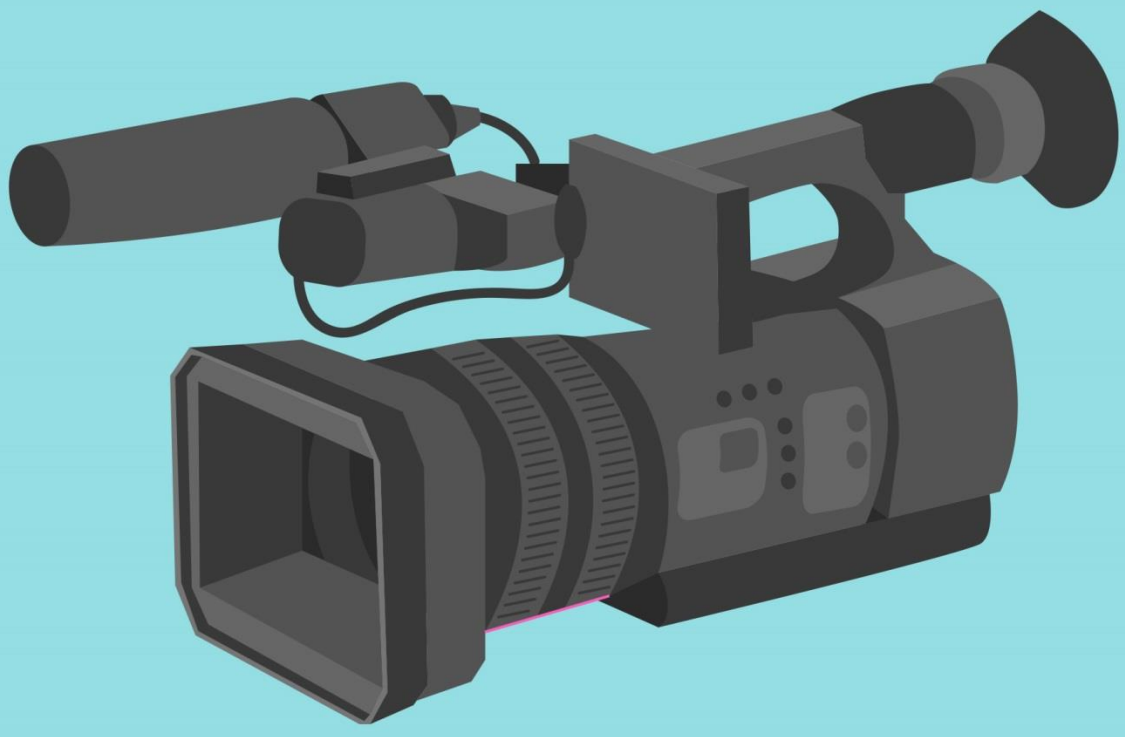
PROCEDURAL RIGHTS OBSERVED BY THE CAMERA – AUDIOVISUAL RECORDING OF INTERROGATIONS IN THE EU (2018-2019)

(PROCAM)

COMPARATIVE REPORT



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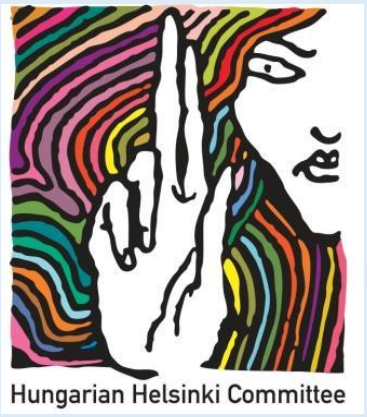

Procedural rights observed by the Camera – Audiovisual recording of interrogations in the EU (2018-2019) (ProCam)

Contributors:

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Contents

I. The project

Procedural rights observed by the camera – Audiovisual recording of interrogations in the EU (ProCam)" is a multijurisdictional research project on the audiovisual recording of police interrogations of suspects, including minors and vulnerable persons funded by the European Union's Justice Programme. It aims at mapping the link between audiovisual recording of interrogations and the enforcement of the rights of defendants, with special regard to the so-called Roadmap directives, along with an EU-wide identification of good practices of recording interrogations of vulnerable persons and understanding concerns about audiovisual recording of interrogations.

The project covers five European Union member states and is coordinated by the Hungarian Helsinki Committee. The national researches in the respective countries were conducted by local project partners:

- Hungarian Helsinki Committee (Hungary)
- Associazione Antigone (Italy),
- Fair Trials (France),
- Human Rights House Zagreb (Croatia),
- Liga Lidských Prav (Czech Republic).

The results of national researches – which included an analysis of the legal framework and the statistical data, as well as an empirical research – were summarized in five individual country reports.

As a first step, researchers analysed the applicable national legal rules – first of all, relevant provisions of the criminal procedure codes – concerning audiovisual recording of interrogations, and submitted freedom of information requests to the competent national authorities to obtain statistical data pertaining audiovisual recording. Results were summarized in desk reviews, with the overall purpose to provide, on the basis of the information available, a critical account of the criminal

procedure with respect to the focus of the research, and to provide a contextual framework for interpreting the data gathered through the empirical research.

In addition to analysing the legal provisions of Member States, we wished to assess compliance with the law on the basis of strong empirical evidence. Because even if the provisions of the Directives are faithfully reflected in national legislation and regulations, effective implementation is reliant on a range of other factors, including financial and other resources, detailed regulation of processes and procedures, and the professional cultures of criminal justice officials and lawyers. Therefore, the best way of obtaining reliable and comparable data on the practical implementation of the Directives, and on the ways in which they are experienced by criminal justice actors, is by fieldwork-based research. Accordingly, as part of the empirical researches local project partners conducted semi-structured interviews with the participants of the criminal procedure: representatives of the law enforcement agencies, prosecutors, judges, defence counsels and defendants. The willingness of authorities and other stakeholders to cooperate with the researchers varied country by country, similarly to the availability of statistics. It should be noted, that a failure by certain government representatives, officials and institutions to facilitate, and to co-operate with researches will mean that the European Commission, and ultimately the EU itself, will not have an adequate basis for assessing either compliance with, or the effectiveness of, its policies and legislation in this field. Moreover, it will mean that Member States will forgo the opportunity to effectively regulate and improve their criminal justice systems and processes, having particular regard to procedural rights and, ultimately fair trial.

As a final output of the project, the present comparative study was complied, which begins with discussing the basic principles and jurisprudence governing the legislation pertaining to audiovisual recording of interrogations. It analyses the jurisprudence of the European Court of Human Rights and highlights findings of international human rights agencies. The report continues with executive summaries of the national jurisdictions compared to allow the reader to look deeper into the relevant legislation of the individual countries.

The national summaries are followed by the actual comparison of the national jurisdictions primarily concentration on the most relevant legal provisions and practical consequences thereof, as well as on the attitudes of the relevant national stakeholders. The study ends with offering recommendations to the counties involved in the research.

Though the aim of the project was to compare five jurisdictions of the European Union – Hungary, France, Italy, Croatia and the Czech Republic, we could not disregard the jurisprudence and practical experiences of the United States of America, as it took a leading role in introducing audiovisual recording of interrogations of defendants.

II. Basic Principles

Confessio est regina probationum - Confession is the Queen of evidence, as the medieval glossators of the Roman-canon law phrased it. Even then, circumstantial evidence in itself was not enough to convict a person: either the accounts of two reliable eyewitnesses were required or the confession of guilt by the suspect.[1] Ever since it has been the most probative form of evidence, central element of the criminal procedure and the most potent weapon of the prosecution.[2]

However, it is a well-known fact that in the medieval ages, investigatory procedures were "notorious for their secrecy, the use of torture to obtain confessions, corporal punishment and public executions."[3] It took long and painful centuries for justice systems around the world to recognize that the confessions obtained through physical coercion are far from being always reliable and the truth may remain uncovered even if someone was convicted for committing the crime and the public outrage was soothed.

For this reason, the Supreme Court of the United States of America – as early as 1884 – while accepting and reiterating the importance of confession, highlighted that statements of defendants are to be taken into account only if given free from coercion. The Supreme Court stated that confession:

> "if freely and voluntarily made, is evidence of the most satisfactory character" explaining that confession deserves "the highest credit, because it is presumed to flow from the strongest sense of guilt."[4]

The underlying principle of course, is that the person who committed the crime would be best equipped to shed light not only on the course of action perceivable for potential witnesses as well, but also on the motives of the crime which are by nature hidden for the outside world and the objective observers.

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[1] Troubling Confessions: Speaking Guilt in Law and Literature, Peter Brooks, University of Chicago Press, London, 2000 p. 93.
[2] Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule, Saul M. Kassin and Holly Sukel, Law and Human Behavior, Vol. 21, No. 1, 1997, p. 27.
[3] Crime, Justice and Society in Medieval and Early Modern Times: Thirty Years of Crime and Criminal Justice History, Xavier Rousseaux, Crime, Histoire & Sociétés / Crime, History & Societies [Online], Vol. 1, n°1 ,1997, p. 100.
[4] Hopt v. Utah, 110 U.S. 574, 584 (1884).

However, the first piece of international legislation recognizing that coercion and duress are not permissible means was adopted only in the middle of the 20th century. The Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 – and generally regarded as the foundation of international human rights law – enshrined fundamental rights related specifically to the criminal justice system (presumption of innocence, *nullum crimen sine lege*, *habeas corpus*), and stipulated in its Article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This prohibition imposed on the state has been ever since reiterated in all major international human right legal instruments relevant for the purpose of the present study: Article 3 of the European Convention on Human Rights (Council Of Europe, 1950) and Article 7 of International Covenant on Civil and Political Rights (UN, 1966) both contain the ban on torture.

Ultimately, a *lex specialis* was designed, adopted and opened for signature on 10 December, the international day of human rights, of 1984: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force on 26 June 1987 and to which all countries of the European Union are State Parties.

Lastly, the prohibition is also entailed in Article 4 of the Charter of Fundamental Rights of the European Union (EU, 2000).

It should be highlighted that the prohibition of torture is formulated in all these legal instruments in absolute terms. As such, it has three paramount characteristics:[5] a) evident from the wording, no qualifications or exceptions are possible to the right and there cannot be competing interests or rights when it comes to the prohibition; b) not even in time of war or other public emergency threatening the life of the nation may any High Contracting Party take measures derogating from its obligations under this prohibition; c) it applies to everyone, regardless of the previous conduct of the victim of Article 3 violations.

[5] Relatively Absolute? The Undermining of Article 3ECHR in Ahmad v UK, Natasa Mavronicola, Modern LawReview, vol 76, no. 3, pp. 589–603.

The prohibition to use violence is thus unequivocally prohibited under any circumstances. However, despite the adopted international legal instruments, the reality even in the modern era of criminal justice has remained that investigating bodies may be too eager to obtain evidence and resolve a case and police brutality would in some cases reach extreme levels, as revealed by the jurisprudence of international and domestic courts.

Jurisprudence on prohibited methods in police custody

In the United States of America, in Miranda v. Arizona,[6] the landmark decision of the Supreme Court, Chief Justice Earl Warren writes in 1966 that

> "[o]nly recently ... the police brutally beat, kicked, and placed lighted cigarette butts on the back of a potential witness under interrogation" to underline his view that the legal check on police interrogation methods is necessary to exclude self-incriminatory statements obtained by violence. The Chief Justice in his reasoning took a step even further, unimaginable before, and stated that "[c]oercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition."

The Supreme Court also recognized that there is an inherent pressure in the interrogation room in the police station which may hinder the voluntariness of the confession.

In Europe, it has been the European Court of Human Rights (hereinafter: ECtHR) that has led the way in interpreting the obligations of the state enshrined in Article 3 of the European Convention on Human Rights. According to the ECtHR's jurisprudence, the framework in which torture, inhuman or degrading treatment or punishment occurs most is detention either in police departments or in penitentiary

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

institutions. Accordingly, in the cases examined by the court, the perpetrators of violations of Article 3 rights are most often police officers or prison guards.[7]

Article 3 violations in detention may be committed for several reasons: reprisal, intimidation, demonstration of force. From the point of view of the present comparative study the most important scenario is when they occur for the purpose of obtaining information and/or confession.

Naturally, the reality has not escaped the attention of the ECtHR and it acknowledges that the absoluteness of the prohibition ties the hands of domestic investigative authorities in cases when efficiency and time are paramount and obtaining information from the suspect or a witness could potentially save lives, especially with regard to organised crime and terrorism. The ECtHR established that in such cases certain limitations to procedural rights may be permissible under Article 6 of the Convention, the right to fair trial, which is relative by nature. However, the ECtHR remains firm is its approach to Article 3.

In the case of Tomasi v. France,[8] the applicant was suspected of taking part in the terrorist attack against the rest centre of the Foreign Legion on 11 February 1982. The following day, the Corsican National Liberation Front movement claimed responsibility for the attack and for twenty-four other bomb attacks which had been perpetrated the same night. The applicant had been arrested on 23 March 1983 and was interrogated for three consecutive days for a total of more than 14 hours. He alleged that during this time in police custody he had been beaten up several times, left naked in front of an open window for two or three hours, had not been allowed any rest and had been left without food.

The ECtHR in its judgment established that "[t]he requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."[9]

[7] The prohibition of torture, A guide to the implementation of Article 3 of the European Convention on Human Rights, Aisling Reidy, Human rights handbooks, No. 6, Council of Europe, 2002, p. 22.
[8] Application no. 12850/87.
[9] Tomasi v. France, para. 115.

In Gafgan v. Germany,[10] the applicant lured an 11-year old boy, the youngest son of a banking family, to his home and then strangled him. Subsequently, the applicant deposited a ransom note at the parents' place stating that the boy had been kidnapped and demanding one million euros. Several days later, he was arrested at Frankfurt am Main airport. He was questioned with a view to finding the boy but to no avail. The next day a police officer leading the interrogation was ordered to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. The officer also hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. For fear of being exposed to the measures he was threatened with, the applicant disclosed the whereabouts of the boy's corpse after approximately ten minutes.

The ECtHR found a violation to Article 3 and stated: "(…) incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to 'afford brutality the cloak of law' (see the judgment in Jalloh, cited above, § 105)."[11]

The reality is that, however consistent the jurisprudence of the ECtHR might be, breaches of Article 3 regularly occur in police detention sites.[12] It can be further concluded from the facts of these cases that ill-treatment with the purpose of obtaining confession or merely information from the suspect is most likely to happen in the initial period of the detention, when interrogations of the arrested person take place, and most likely in a police station as opposed to prisons or other sites of detention. This is statement is also supported by the European Committee for the

[10] Application no. 22978/05.
[11] Gafgen, para. 167.
[12] There are a number of cases where the actions of police officers qualified as torture: the so-called Palestinian hanging, which is suspension by the arms, tied behind the back (Aksoy v. Turkey), severe forms of beating (amongst others Selmouni v. France, Dikme v. Turkey), electric shocks (Akkoç v. Turkey), rape (Aydin v. Turkey), the so-called falaka, which is beating on the soles of the feet (Salman v. Turkey, Greek case). In cases involving milder form of beating, the ECtHR established that the applicant was subjected not to torture but to inhuman treatment. These cases include Tomasi, Ribitsch, and Tekin.

Prevention of Torture (hereafter: CPT) which concluded in its General report: "The CPT wishes to stress that, in its experience, the period immediately following the deprivation of liberty is when the risk of intimidation and physical ill-treatment is at its greatest."[13]

It should be emphasized here that the State not only has a negative obligation to refrain from authorizing ill-treatment by state officials, but a positive obligation as well to protect the individuals from being victims of such acts and the obligation to conduct an effective investigation of complaints of police brutality. The state is responsible for the physical and mental well-being of the detainees from the moment of arrest or apprehension to the point when a person is finally released, as "[t]hose who are deprived of their liberty, and therefore under the full control of the authorities, (…) are most vulnerable to and at risk of abuse of state power against them."[14]

The ECtHR is also aware of the fact that a detainee under the full control of the state, deprived of his/her liberty is in a difficult position when it comes to proving his/her case. That is why it adopted an approach requiring a lower threshold compared to the standards of the criminal justice systems of the Contracting States. To expect the applicant to prove his/her ill-treatment by police while in police custody beyond reasonable doubt and against the presumption of innocence would be unfair and result in illusory and theoretical protection of the most fundamental values of the Convention. For this reason, the generally applicable approach before the ECtHR is that if "an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."[15] It must be added that the ECtHR decides on the responsibility of the State, and not about the criminal liability of individuals, which allows for such a shift in the burden of proof.

[13] 6th General Report of the CPT (1996), para. 15.
[14] The prohibition of torture, A guide to the implementation of Article 3 of the European Convention on Human Rights, Aisling Reidy, Human rights handbooks, No. 6, Council of Europe, 2002, p. 22.
[15] Selmouni, para. 87, citing Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, Article 108-11, and the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, pp. 25-26, Article 34).

An obvious solution: recording

The UN Committee against Torture (CAT) established to monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated in its General Comment No. 2 in 2008: "As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999, or new approaches to public education or the protection of minors) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture."[16]

However, the Committee was not the first to stress the importance of videorecording all interrogations of suspects without exceptions. As early as 2003, the UN Special Rapporteur on Torture in his annual report to the UN General Assembly stated that "all interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings."[17]

As regards the European Council bodies, the CPT also stressed the safeguarding nature of audio and/or video recording of police interrogations against the ill-treatment of detainees. It welcomed that a growing number of countries was considering the introduction of such criminal systems. As noted by the CPT: "Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment."[18]

However, a new, concerning approach seems to emerge under the realm of the right to fair trial: the presence of the legal representative and the recording as interchangeable means to prevent unlawful interrogation techniques, as demonstrated by the *Doyle v. Ireland* case, where the applicant was convicted for

[16] Committee Against Torture, 24 January 2008. General comment no. 2, Section 14..
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhskvE%2bTuw1mw%2fKU18dCyrYrZhDDP8yaSRi%2fv43pYTgmQ5n7dAGFdDalfzYTJnWNYOXxeLRAIVgbwcSm2ZXH%2bcD%2b%2f6IT0pc7BkgqlATQUZPVhi (accessed on 15 April 2019).
[17] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 17 December 2002, E/CN.4/2003/68, para. 26(g).
[18] European Committee for the Prevention of Torture (CPT) Standards, [CPT/Inf/E (2002) 1 – Rev. 2011], Section 36, p9.

murder.[19] When apprehended by the police, he was interrogated 22 times altogether during a period of five consecutive days. All the interrogations were audio visually recorded, however his lawyer was not allowed to be present personally on any of these occasions, although whenever he requested a break during the interrogations and asked for a consultation with his lawyer, he was allowed to speak with him via phone. Before the ECtHR, the applicant alleged that his right to access to a lawyer had been violated. He also alleged that the police had exerted pressure on him by informing him about the detention of his partner. He also believed that their daughter was in a need of a medical treatment and without her parents. According to him, this amounted to psychological intimidation and a threat or inducement on him to admit to the crime with which he was charged. However, the ECtHR found no violation of the minimum right of access to a lawyer as guaranteed by Article 6 of the Convention, and it based its findings partly on the fact that the trial judge of the domestic case reviewed the video recordings of the relevant interviews in their entirety. This seems to be a slippery slope which could easily make the courts hastily jump to concluding not only that where there is recording of the interrogation, the presence of a lawyer is not essential, but also that where a lawyer is present, recording is not necessary. It should therefore be emphasized that audiovisual recording has significant additional benefits above being a mere tool for preventing ill-treatment and other, milder forms of unlawful interrogating techniques.

Additional Benefits

The first arguments propagating audiovisual recording of the interrogations stemmed from the prohibition of torture, and inhumane or degrading treatment for obvious reasons: as discussed above, the absolute nature of this ban left no valid competing right or interest for opposing it on a principal ground. The two compelling arguments of the CPT mentioned above, namely the **completeness** and **authenticity** of the recording of the process in which the queen of evidence was gathered, does not only safeguard the defendant's right, but also protects the law enforcement agencies from false allegations. As the CPT itself emphasizes in this regard:

[19] Application no. 51979/17.

> "This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions."[20]

However, recording has unquestionable additional benefits in the common interest of a just criminal system. As explained by a joint detention monitoring tool by Penal Reform International and the Association for the Prevention of Torture, video recording has three main purposes:

1) to provide protection to defendants or suspects by preventing ill-treatment committed by law enforcement officers during interrogations;
2) to provide protection for law enforcement officers against false allegations of ill-treatment; and
3) to provide evidence for possible legal proceedings and secure accountability.[21]

It is important to draw attention to the latter, namely, the possible benefits of audiovisual recording from the perspective of procedural rights also guaranteed by the relevant international legal instruments. Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention of Human Rights and Article 47 Charter of Fundamental Rights of the European Union all guarantee the right to a fair trial.

Article 6(3) of the European Convention of Human Rights also sets the minimum standards that must be met to declare a criminal procedure fair. Access to lawyer has been briefly mentioned when discussing the Doyle-case, but concentrating on the focal point of the present study, two other may also be raised. These are the defendant's right

[20] European Committee for the Prevention of Torture (CPT) Standards, [CPT/Inf/E (2002) 1 – Rev. 2011], Section 36, p9.
[21] Video recording in police custody. Addressing risk factors to prevent torture and ill-treatment, Penal Reform International and Association for the Prevention of Torture, p.1. "https://www.apt.ch/content/files_res/factsheet-2_using-cctv-en.pdf (accessed on 15 April 2019)".

1) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and
2) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to be informed

The right to be informed of the accusation is a qualified right, several attributes are attached to it: the information should be prompt, it should be in detail and in a language the defendant understands.

As the ECtHR pointed out in Pélissier and Sassi v. France in a Grand Chamber judgment, "special attention" should be paid to the notification of the accusation to the defendant. In the light of the jurisprudence of the ECtHR, Article 6(3) not only affords the defendant the right to be informed of the "cause" of the accusation, that is to say, the acts he/she is alleged to have committed, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts.[22]

It is without doubt the task of the investigating bodies to inform the accused, the duty to inform the accused rests entirely on the prosecution and cannot be complied with passively by making information available without bringing it to the attention of the defendant.[23]

As early as 2001, the ECtHR also recognized that in order to ensure that fair trial rights are not illusorily and empty phrases, special attention should be given to persons with mental difficulties, as the authorities are required to take additional steps to enable such persons to be informed in detail of the nature and cause of the accusation against them.[24]

In the Vaudelle case, the applicant was placed under the guardianship of his son. When Mr. Vaudelle was accused of a crime, his summons to attend the trial was sent only to him. He did not attend and was tried in absentia, as the court deemed him to

[22] Mattoccia v. Italy, Article 59; Penev v. Bulgaria, Article 33 and 42.
[23] Mattoccia v. Italy, Article 65; Chichlian and Ekindjian v. France, Commission report, Article 71.
[24] Vaudelle v. France, 65.

have been lawfully informed of the hearing. He was sentenced to 12 months of imprisonment. The applicant successfully claimed before the ECtHR that as the summons had not been sent to his guardian, he had been prevented from exercising his fair trial rights because he was not mentally competent to exercise his defence rights.

This interpretation certainly points to the need of an **individualized approach** towards defendants, the necessity to take into consideration the special circumstances of the individual, particularly his/her mental capacity and the ability to comprehend at least the core details of the accusation.

Everyone working with defendants knows from first-hand experience how some of the interrogating officers can view the duty to inform the defendant as a routine obligation and either merely read out the information and warnings at the beginning of the interrogation or just summarize them in a few words and ask the person to sign a form certifying that he/she received all necessary information.

Obviously, whether the information for the accused was provided in a manner satisfying the requirement of an individualized approach or it was given in a stereotypical manner can be best assessed if the interrogation is audiovisually recorded.

Interpreter

If the defendant cannot understand or cannot speak the language used during the criminal procedure, he/she has to have access to an interpreter free of charge. Even where the accused is represented by a lawyer, it will generally not be sufficient that the accused's lawyer, but not the accused, knows the language as the right to a fair trial encompasses the right to actively participate in the hearing and requires that the accused be able to understand the proceedings and to inform his/her lawyer of any point that should be made in his/her defence.[25]

[25] Kamasinski v. Austria, Article 74; Cuscani v. the United Kingdom, Article 38.

Without doubt, foreign nationals experience additional hardships during the criminal investigation due to linguistic barriers. The most concerning problem regarding their interrogation is that the quality of translation cannot be assessed during or even after the hearing unless the lawyer present speaks the language of the interpretation – which is clearly an unrealistic hope and cannot be relied upon, especially in cases of rare, uncommon languages.

If the interrogation of foreign nationals was recorded, the quality of translation and the exact statements of the defendants could be easily evaluated in the case of any doubt or contradictions.

Pursuit of the objective truth

Additionally, though the usual approach when examining the possible benefits of audiorecording an interrogation is from the perspective of criminal justice safeguards protecting the defendant, it cannot be overstated how beneficial it can be also to **investigating bodies**. Thomas P. Sullivan, Andrew W. Vail, and Howard W. Anderson III, great protagonists for introducing mandatory recording of police interrogations drew attention to the following positive consequences beside the ones already mentioned:[26]

- Recordings capture reactions and nuances that later a written statement cannot possibly reproduce, such as suspects' facial expressions, remorse, tension.
- Recordings allow officers to focus on the suspect's answers and reactions if they are not required to take notes.
- In the United States of America many police units have recording equipment that permits officers outside the interrogation room to monitor interviews by their colleagues when it is actually happening, and they can express suggestions to the questioners.
- It reduces the number of motions by the defence to suppress custodial statements thus fastening the administration of criminal justice.

[26] The Case for Recording Police Interrogations. Thomas P. Sullivan, Andrew W. Vail, and Howard W. Anderson III. Litigation, Volume 34, Number 3,Spring 2008 by the American Bar Association, pp. 4-5.

- Recordings improve the trust of the general public in police.
- As a record may be viewed multiple times after the interrogation took place, it allows psychologists and psychiatrists, for both the prosecution and the defence, to analyse the interrogation.

The courts would also be better equipped to adjudicate the criminal matter before them if they had the recordings at their disposal. They would not be confined to be able to consult only the written minutes of the interrogations which necessarily lack some of the verbal or non-verbal communication of the interrogation.

Accordingly, as demonstrated, introducing the audiovisual recording of interrogations to the criminal justice systems would provide significant benefits for the defendants, the investigating bodies and the courts as well, and would lead to a more just criminal justice system which is in the interest of all democratic societies.

III. Executive summaries of the countries examined

Hungary

Legal framework

The rules of documentation with regard to the criminal procedure are included in the new Code of Criminal Procedure and its bylaws (hereafter: CCP). In the old CCP, the audio or audiovisual recording of the interrogations was mostly only a possibility.[27] In addition, the old legislative framework failed to prescribe the legal requirements of audiovisual recordings in detail. The legality of the recordings made before 1 July 2018 should be assessed by applying the rules of the old CCP, but otherwise the new CCP is applicable in every ongoing criminal procedure. The new CCP revised and extended the legal rules for audiovisual recordings.

According to the current Hungarian legislative framework, the requirement to audiovisually record the interrogations and hearings of suspects and accused persons is still discretional in most of the cases. In all cases where a procedural act involves a person requiring special treatment, the CCP provides for the possibility to make an audiovisual recording of the procedural acts. The general rule is that the court, the prosecutor and the investigating authority decide on a case-by-case basis whether a victim or a witness requires special treatment, according to a set of criteria on the basis of their personal characteristics or on the basis of the nature and circumstances of the criminal offence.[28] Special categories of persons qualify as persons requiring special treatment automatically: persons with disabilities,[29] persons under 18 and victims of criminal offences of a sexual nature.[30]

The CCP specifies a limited group of persons involved in any of the procedural acts in the case of whom audiovisual (or audio) recording is mandatory. Although mandatory recording due to special treatment mostly concerns victims and witnesses in the criminal procedure, the CCP also sets out that in the case of procedural acts

[27] Old CCP, Article 167.
[28] CCP, Article 85(1)(j).
[29] As defined by Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities, and any person who may qualify as a person with disability.
[30] CCP, Article 82(a)–(c).

involving a minor under 14 years of age (defendants, witnesses, or victims), the court, the prosecutor and the investigating authority are *obliged to audiovisually record* the procedural act.[31] The law prescribes furthermore to record the procedural act if a minor (a person under 18) is a victim of a criminal offence of a sexual nature.[32] The order of the National Police Chief extends the obligation to audiovisually record procedural acts to a further category: to all procedural acts that involve an illiterate person.[33]

Beyond the above-mentioned cases, continuous audio or audiovisual recording may be ordered by the investigating authority, the prosecution or the court also ex officio, based on certain features of the case.[34] Furthermore, audio or audiovisual recording shall be ordered upon the motion of the defendant, the defence counsel, or the victim – provided that they advance the costs of the recording.[35] According to the new CCP, if an audiovisual or audio recording is made, the authorities are not obliged to produce a verbatim transcript, but they have to prepare written summary minutes about the procedural act in parallel to the recording.[36]

Availability of audiovisual recordings

According to the new CCP, in the case of the audio or audiovisual recording of interrogations, the recording is considered part of the case file submitted to the prosecutor.[37] Rules on access by persons subject to the procedure and by defence counsels are also regulated.[38] Although the new CCP sets forth that access to the case materials – including audiovisual recordings – has to be provided only upon a request by the defendant and the defence counsel after the interrogation, it also prescribes that all participants being present at the interrogation recorded have to be informed about when and where they can watch or listen to the recording, within eight days after the completion of the procedural act.[39] The court, the prosecution or

[31] CCP, Article 88(1)(d).
[32] CCP, Articles 87(1), 89(4)(b) and 82(c).
[33] Order no. 41/2018. (VII. 11.) of the National Police Chief on the Rules of the Application of Technical Devices for Audiovisual Recording as Established by the Code of Criminal Procedure, Section 11(c).
[34] CCP, Article 358(3).
[35] CCP, Article 358(4).
[36] CCP, Article 358(2).
[37] CCP, Article 360(5).
[38] CCP, Article 100 and MoJ Decree 12/2018.
[39] CCP, Article 360(7).

the investigating authority have to provide access to the recording by allowing its examination and to copy it.[40]

Establishing the conditions of audiovisual recording

Decrees of the Minister of Justice prescribe the requirements for establishing, operating and monitoring special interrogation rooms on police premises where the interrogation of suspects or witnesses under 14 years of age[41] and of persons who fall under the category of requiring special treatment shall be executed,[42] and for the purposes of remote hearings via a telecommunication device.[43] The conditions and technical requirements (including the number of cameras to be installed, the manner of recording the events, the way of moving the camera, the use of microphones, etc.) pertaining to audio and audiovisual recording of interrogations are also prescribed in details[44].

On 1 September 2017, there were only 25 interrogation rooms in the country where audiovisual recording was possible in accordance with the old CCP, while on 1 September 2018 this number was 202. After the new CCP came into force, 186 *"remote hearing rooms"* were established, which allow presence at procedural acts via a telecommunication device, and at the same time are suitable for the audiovisual recording of interrogations of defendants and witnesses present personally in line with the legal provisions. In September 2018, all counties had at least five interrogation rooms where interrogations could be recorded in accordance with the legal provisions.[45]

As the data provided by the National Police Headquarters showed, the technical conditions of audiovisual recording are established country-wide. But it also reflects that since the new CCP came into force, the proceeding authorities ordered audiovisual recording only in a very low proportion of the interrogations. Between 1

[40] CCP, Article 100(4).
[41] Decree 34/2015. (XI. 10.) of the Minister of Justice on Establishing and Monitoring Rooms in Police Units for Interviewing Defendants and Witnesses under 14 Years of Age and Victims Requiring Special Treatment.
[42] MoJ Decree 13/2018.
[43] MoJ Decree 12/2018., Article 45–54.
[44] MoJ Decree 12/2018.
[45] Response of the National Police Headquarters to the HHC's freedom of information request, 8 February 2019, no. 29000-197/5- 34/2019.

July 2018 and 30 September 2018, the police established only in around 2% of the interrogations that the person interrogated requires special treatment. The law makes audiovisual recording obligatory only with regard to certain groups of persons requiring special treatment,[46] thereby only some of these interrogations were audiovisually recorded - less than 2% of all interrogations.

Legal practice

Empirical data was collected through semi-structured interviews with the participants of the criminal procedure. HHC conducted research interviews with eight defence counsels, two anonymous prosecutors, and a staff member of the National Tax and Custom Administration's Department of Criminal Affairs (Central Department of Investigations), between August and December of 2018.

Research questions pertained to interrogations of suspects and trial hearings conducted in the preceding year, mainly focusing on to what extent the new and more precise rules of the audiovisual recoding of interrogations that came into force in July 2018 changed the practice of the audiovisual recording of interrogations.

Ordering the audiovisual recording of interrogations

Both defence counsels and prosecutors were of the view that the most common way of recording the police interrogations are the written summary minutes, verbatim transcripts are rare.

According to the experiences of practitioners, the quality of minutes varies significantly. Some defence counsels emphasized that they often have to request that the summary minutes are amended because of their low quality. It is a general problem that pertains both the police and the courts. Typically, questions are not included in the minutes, and only the responses given by the subject of the procedural act are recorded, even though recording the questions would be an important precondition for being able to review the lawfulness of the interrogation.

[46] CCP, Articles 87–89.

The deficiencies with regard to the quality of summary minutes are very rarely revealed since in the vast majority of the cases there is no audiovisual recording or verbatim transcript to which the summary minutes could be compared to. The act of the recording would serve as a safeguard in itself: the fact that the written minutes can be checked against something is an incentive for producing more thorough and precise minutes. Furthermore, audiovisual recording may be of assistance in disagreements between the authority and the defence at the trial, when due to the non-satisfying quality of the summary minutes there are debates on what was actually said at an earlier interrogation.

A further area, where the regulatory role of audiovisual recording was emphasized by the interviewees are the interrogations that include an interpreter. Quality problems of interpretations is a significant problem of the present system, especially regarding rare languages. Audiovisual recording would provide the possibility of reviewing and quality control of the translation.

Most defence counsels very rarely requested audiovisual recording of an interrogation. In their views their presence constituted sufficient control over the procedure. Still, five out of eight defence counsels interviewed stated that in at least one of their own cases regretted subsequently that they did not request the audiovisual recording.

Practical experiences represented that the police and the courts order the audiovisual recording of interrogations and hearings of suspects only if that is mandatory under the CCP, i.e. if the procedural act involves a minor less than 14 years old,[47] or if the procedural act is conducted via a telecommunication device.[48]

According to the experiences of defence counsels and prosecutors, in the instances when the law prescribes audiovisual recording only discretionally, i.e. if the need for special treatment is established or the person to be interrogated is less than 18 years

[47] CCP, Article 88(1)d).
[48] CCP, Article 125(2).

old but more than 14, the police and judges order it only scarcely. Decisions establishing that a person requires special treatment are also rare. Defence counsels raised the problem that neither the police, nor the prosecution or the courts consider it their responsibility to establish the need for special treatment. In the view of the defence counsels interviewed, it would be necessary for the prosecution and the courts to exert control and actively intervene in this regard in order to achieve that the need for special treatment is established when necessary.

According to some views, the investigating authority orders audiovisual recording not as much with a view to the special needs of the persons involved, but rather because of the complexity or the severity of the criminal offence investigated.

Defence counsels agreed that audiovisual recording is most crucial for procedural acts where there is no defence counsel present. In these instances, the recording may help in ascertaining the lawfulness of the interrogation. The first confession made by the suspect has a special weight in this regard in investigations: since it is harder for the suspect to prepare for it, authorities accept it as credible more than what is said in later statements. To make audiovisual recording of the first confession mandatory – especially if the defence counsel is not present – is important precisely because the risk of manipulating the confession is highest at that point.

Providing information about the right to motion the audiovisual recording

The information about the rights of the defendant, read out loud by the member of the investigating authority at the beginning of the interrogation, does not contain any information about the possibility of audiovisual recording. According to the experiences of the defence counsels, defendants are typically not informed by the authorities of their right to put forth a motion for audiovisual recording if they bear the costs. In the view of the defence counsels changing this practice would qualify as a procedural safeguard. Furthermore, the audiovisual recording of the interrogation would ensure that even in the absence of an attorney, the general information about procedural rights would be still fully provided.

Access to the audiovisual recording

Prosecutors and judges may consult the audiovisual recordings through an online platform called Central Media Storage which was established in line with the provisions of the CCP. According to their experiences, they receive the recordings together with the case file on time. Prosecutors reported that if there is a recording available, they usually watch it. They emphasized that the questions asked by the police are only included in the audiovisual recording - as we discussed before, the questions usually are not included in the written minutes of the interrogation. Furthermore, audiovisual recordings often reveal important, non-verbal information as well. According to the experiences of the defence counsels, judges watch the recordings only in exceptional cases, when there is a disagreement between the investigating authority and the defence, upon the motion of the defence.

Access for prosecutors and judges is hindered by the fact that watching the recordings is very time-consuming. Reviewing a verbatim transcript of the recording would be faster, but while the old CCP prescribed verbatim transcripts for audiovisual recordings, the new CCP does not provide for preparing a verbatim transcript parallel to the audiovisual recording. Practical experiences confirm that if the interrogation is audiovisually recorded, only a summary minutes is prepared in written format.

Defence counsels reported that the only record they receive automatically are the written, summary minutes. If the recording was made due to the ex officio decision of the proceeding authority, the defence counsels can access the recording for free. However, they have to submit an individual request to access the copies of the audiovisual recordings for each time. Acquiring copies of the recordings is often an onerous process, and copies are produced with delay. Access to audiovisual recordings by detained defendants often poses a problem too.[49] Defence counsels must not bring any device to the consultation room in detention facilities which are capable of displaying the recordings. No such devices are available in the consultation room itself either. Penitentiary institutions are able to handle electronic

[49] This was also pointed out by an earlier research of the HHC. See: András Kristóf Kádár – Nóra Novoszádek: *Article 7 – Access to Case Materials in the Investigation Phase of the Criminal Procedure in Hungary.* Hungarian Helsinki Committee, Budapest, 2017, p. 53. Available at: https://www.helsinki.hu/wp-content/uploads/HHC_Article_7_research_report_2017_EN.pdf.

case files only with great difficulty.

Audiovisual recordings and the admissibility of evidence

Experiences of both the defence counsels and the prosecutors suggest that there are no practical consequences of the lack of audiovisual recording. The information gained at the interrogation are used as evidence even if recording would have been mandatory but the authorities failed to oblige. Only exceptionally take judges into consideration the lack of recording or the record itself, upon a motion by the defence counsel when deciding on the admissibility of evidence. E.g. in one of the cases mentioned the transcript of the interview of a victim of a criminal offence of sexual nature did not match the audiovisual recording. The judge watched the recording – upon the motion of the defence counsel – and concluded that the interview did not comply with the rules of the CCP, and thus excluded it from the procedure due to the discrepancies of the minutes and the records.

Recommendations

Since the police has already established adequate interrogation rooms and secured necessary technical preconditions, the primarily task in order to widen the scope of the audiovisual recording in the investigation phase is the legal obligation to do so. Training the staff to use the devices is not a complex task, and its cost is not significant. In the view of the HHC it would be most beneficial if cameras were used in all cases where the law provides for it in a discretionary manner (in a 'may-clause'). Namely, all the procedural acts involving persons requiring special treatment, with a special regard on minors above 14 and acts involving an interpreter - irrespective of the person's role in the procedure (defendants, witnesses and victims).

The regulation should explicitly set out that if the law prescribes that the interrogation shall be audiovisually recorded, evidence acquired as a result of procedural acts conducted in violation of this obligation shall be inadmissible and shall be excluded as evidence.

The audiovisual, but at least the audio recording of the trial hearings should be prescribed in parallel with producing written summary minutes, with the exception of closed judicial sittings.

In order to ensure compliance with the principle of equal access, authorities should be obliged to provide information about the possibility to motion audiovisual recording at the beginning of procedural acts, as part of providing information about the defendant's procedural rights and obligations.

The very fact that the audiovisual recording made upon the motion of the defendant is not free of charge violates the principle of equality of arms. It puts indigent defendants, who would be eligible for a total exemption from bearing the costs of the criminal procedure,[50] in a particularly discriminative situation, since sometimes indigence is established only after the (first) interrogation. Accordingly, the requirement to advance the costs when putting forth a motion for an audiovisual recording should be abolished.

It should be obligatory to provide defence counsels automatic access to audiovisual recordings in an electronic format or on a storage device.

It should made generally possible in penitentiary institutions for defendants to access audiovisual recordings together with the defence counsel, under appropriate circumstances.

Italy

Legal framework

[50] CCP, Article 75.

In Italy, as confirmed by the research carried out by Antigone, the audio or audiovisual recording of the interrogations is an obligation limited to specific suspects and accused persons.

The ordinary way of documenting the criminal procedural acts is by written minutes, which can be verbatim or summarized. The judge is allowed to choose the most suitable way of documentation. When the documentation is carried out using the summarized minutes, the law prescribes that an audio recording should also be made. However, if the acts have little relevance, the audio recording is not necessary.

Recording is an obligation if the interrogated person is deprived of liberty and if the questioning does not takes place within a hearing[51] carried out by a public prosecutor. Testimonial statements given during an evidentiary hearing also fall under mandatory recording, when the testimonial statements include offences related to family and sexual violence. A further case of mandatory audiovisual recording is the documentation of the statements given by the collaborator of justice, who wants to be awarded special measures of protection: those statements must be documented verbatim.[52]

In the Italian legislation police officers do not have an obligation to record audio or audiovisually any of their procedural acts. The police is not involved in the questioning of those suspects who are deprived of liberty, their hearing has to be carried out by a public prosecutor.

In practice the decision on the way of documentation is mostly taken ex officio, so a high degree of discretion is given to the public official in their choices. The authorities may order audiovisual recording when other ways of documentation (written reports, audio recording) are considered insufficient; for the documentation of the statements of a victim who is particularly vulnerable[53] and upon the request of the parties of a preliminary hearing.

Legal practice

[51] Article 141 bis c.p.p.
[52] Article 141 bis.
[53] This provision has been added with the Legislative Decree n. 212 of 15 December 2015 in order to give execution to the 2012/29/EU Directive on the rights, support and protection of victims of crime.

In order to identify how the different ways of documentation are used in the criminal proceedings, eleven persons have been interviewed: defence lawyers, public prosecutors, investigative and presiding judges and defendants.

Interviews carried out during the project and results of other projects on procedural rights have shown that the first hours after the arrest are the most crucial ones from the point of ensuring the rights of the defendants. Several persons interviewed alleged that arrested people are often subjected to violence while detained in police custody. However, they all agreed that the cameras in police stations actually help protecting the interests of both parties involved: the suspects who have been subjected to ill-treatment by police officers and police officers who are falsely accused of committing physical abuse.
As already mentioned, any questioning of a detained suspect or accused – except court hearings – has to be fully documented by means of audio or audiovisual recording under penalty of exclusion.[54] The authorities have a choice to do audio or audiovisual recording, and they often decided to opt for the former.

If the interrogated person is not deprived of his/her liberty, neither the police forces nor the public prosecutor have the obligation to record audio or audiovisually the interrogation. Statements are generally documented by summary minutes in these cases. The public prosecutor orders the police officers to carry out an audio recording of the statements made during the interrogation only in very complex investigations. Moreover, there seems to be no way for the defendant's lawyer to motion an audio or audiovideo recording of the interrogation.

The law provides that court hearings should be documented through summarized minutes. The choice of the form of the minutes and to additionally order audio or audiovisual recording is mostly at the judge's discretion. Interviews with Italian stakeholders confirmed that the prevalent practice is that hearings are audiorecorded.

[54] Article 141 bis c.p.p.

Defendants of foreign nationality often encounter major difficulties in exercising the right to translation and interpretation. In particular, the right to interpretation has been found to be hindered by the low quality of the service provided by interpreters. At a hearing only the interpreter's voice is recorded, the defendant's statements are omitted, which makes it impossible to check the quality of the interpretation.

Opinions of the practitioners varied regarding the possibility of introducing mandatory obligation of audio and audiovisual recordings of interrogations and hearings. Most attorneys thought that audiovisual recordings would serve as a safeguard to ensure a fair procedure respecting the procedural rights of the defendants by documenting their statements literally.

Regarding the recording of the interrogations in the preliminary investigation phase, the judge for preliminary investigations expressed that the audio- or audiovisual recording is always useful as an instrument to protect the person interrogated (suspect or witness) from possible pressure exerted by the interrogator and, above all, it is an aid to the judge, who can assess the credibility of the person more adequately. According to the opinion of the public prosecutor, a recording may assist the public prosecutor or the judge to evaluate the credibility of the defendant's statement in a later phase of the criminal procedure.

Some attorneys held instead that audio or audio-visual recording may not always be useful for defence purposes, in certain cases it can backfire. Proponents of this view claimed that firstly, the presence of a lawyer is sufficient to protect the rights of the accused, secondly, the audiovisual recording is a too invasive method for the defendants. The public prosecutor and the presiding judge were also of the view that mandatory presence of a defence lawyer and the written minutes of the hearing during trial guarantees the protection of the rights of the defendants and witnesses, therefore audio- or audiovisual recording is not necessary.

Recommendations

Installing permanent cameras in the police stations would mean an effective

protection from possible misconduct of officials and therefore would constitute a real guarantee of procedural rights of the suspect. It controls everything happening inside the police stations not documented otherwise and it would exclude any discretion in the decision on the way of documentation of the investigative acts.

At the moment, a general obligation to record with audio or audiovisual devices is provided only for the interrogations of persons deprived of liberty. [55] In practice, audio recording is preferred by the authorities compared to audiovisual recording. However, considering the particular vulnerability of persons deprived of liberty, to prevent ill-treatment it would be important to establish an absolute mandatory obligation of audiovisual recording of their interrogations.

However, in order to protect the rights of all suspects and accused persons, it would be useful to introduce a general obligation to audiorecord all the interrogations carried out by public prosecutors and police officers that are currently generally documented only by summary minutes. The audiorecording, in these cases, would have a deterring effect regarding the possible violations of the moral integrity of the interrogated person.

However, in order to prevent that the recording of the statements would facilitate the entry in the court hearing of those statements that were given during the investigations, it would be necessary to provide a prohibition of the transcription. In this way, the recordings would have the only aim of providing to the defence the evidence of possible compressions of the suspect's will.

The law provides a list of derogations to the obligation of audiorecording during hearings. These derogations are so wide that it frustrates the essence of the act. Considering the greater benefits of the audiorecording of hearings, the introduction of an absolute obligation with no possibility of derogations would be highly desirable.

[55] Article 141 CPP

In order to make the audiorecording an effective protection of the foreign accused person's rights, it is necessary to provide an absolute obligation to record both the non-national's statements in his/her mother language and the interpreter's voice in interrogations involving an interpreter. Only in this way is it practically possible to check the conformity between the accused person's statements and the words of the interpreter at a later stage of the procedure.

France

Legal framework

The obligation to record interrogations audiovisually by police and investigative judges was progressively introduced in France since 2000 and is well-regarded amongst criminal justice stakeholders as a key safeguard in criminal investigations. The courts have interpreted the scope of the exceptions to this obligation very strictly, and sanctioned severely any unjustified failure to record by law enforcement officials, recognising that the failure to record necessarily harms the interests of the suspect or accused person.

The specified objective of the requirement to record interrogations audiovisually is to secure an accurate and complete account of the interrogation, if the suspect subsequently contests the statements that have been attributed to him/her in the written transcript of the interview.

However, the extent of the obligation remains limited in scope. In terms of persons covered, the obligation covers minors who are interviewed as victims, witnesses and suspects in criminal investigations; but only adults who are suspected or accused of serious crimes. *Crimes* are defined as the most serious offences for which penalties range from 10 years to life imprisonment[56].

This raises important concerns about the equality of treatment of all persons involved in criminal proceedings. The obligation is further limited by the location of

[56] CC, Article 131(1).

the interview, given that recording only takes place in respect of interviews conducted in police custody[57], and in the offices of investigative judges[58]. As such, there are "blind spots" where questioning (informal or formal) may take place without any audiovisual recording.

There are also a number of important gaps in the legal framework, which leave room for differing practices. In particular, the French law does not specify when the recording should begin and end, neither for interrogations in police custody, nor for interrogations before an investigating judge. Furthermore, the recording of the notification of rights to the suspect or accused person, including any waiver to the right to access a lawyer, is not required by the law and not carried out systematically.

In any event, there are written transcript of the interrogations in all cases, whether interrogations were audiovidually recorded or not. These minutes must include all the questions asked, and the answers are summarised.

Further, audiovisual recordings are not included in the case file, and are not automatically made available to the parties or their counsel in the proceedings. Instead, recordings are sealed to prevent the parties from leaking them to the public. Even though the police may access a working copy of the recording, an application must be presented by the requesting party. The conditions and procedure for defence lawyers to access the recordings are restrictive. This can prove to be a risky defence strategy, and one that broadly appears to discourage lawyers from seeking access to the recordings. This also raises questions regarding the principle of equality of arms in criminal proceedings.

In respect of interrogations by an investigative judge, the party has to make a request of a copy of the recording by way of an application to the investigating judge.[59] In respect of interrogations held in police custody, a recording may be consulted during the investigation or before the trial, but only based upon a dispute over the contents in the written transcript of the interrogation.[60] The suspect (or his counsel) or the prosecutor may apply to view the recording. The application must be

[57] CPC, Article 64(1).
[58] CPC, Article 116(1).
[59] CPC, Article 116 (1) Article (2).
[60] CPC, Article 64 (1) Article (2).

presented to the examining magistrate or the trial court. A request to access recordings may also be made during the trial itself, in which case it must be presented to the trial judge.[61]

The same principles apply to requests to consult audiovisual recordings of interrogations of minors: recordings may be consulted only in the event of a dispute over the contents of the transcript of the interrogation and upon application by the person concerned, the prosecutor or one of the parties. As the case may be, the investigating judge, the youth court or the trial court will decide whether to grant access to the recording.[62]

The police in charge of the proceedings may consult the recordings if deemed necessary for the purposes of the investigation.[63] The recording may be used by the police to check the statements of the interviewee, given that his/her answers are not transcribed verbatim in the police report but summarised, and to check the attitude of the interviewee during the questioning.

Legal practice

As part of the research, a series of interviews were conducted with criminal justice practitioners. 3 judges, 1 press spokesperson from the public prosecutor offices, 1 official from the Ministry of Justice, 13 police officers, 3 defence attorneys and 2 representatives of the French National Preventive Mechanism were interviewed.

According to the experiences of the interviewees the written transcript prepared by the police remains the form of record of the interrogation that is most used by all parties, whether a recording is available or not. Even when an audiovisual recording is made, it is rarely consulted by judges or defence lawyers. Criminal justice stakeholders (police, judges and defence lawyers) continue to rely almost exclusively on the written transcript of the interview, even though written transcripts provide only a partial record of the interrogation.

Audiovisual recording makes it possible to check the written report against the recording of the interview. Thereby audiovisual recording was identified as a useful safeguard to inform the next steps of the investigation and criminal proceedings, if

[61] CPC, Article 116 (1)Article(2).
[62] Article (4) VI of the Ordonnance n°45-174 on minors in criminal proceedings.
[63] CPC, Article D. (15-6).

the suspect or accused person later contests his/her statements as reported in the written minutes of the interrogation.

The police consider that such a requirement is crucial to the investigation, as it helps establish the facts, especially in ensuring the availability of an accurate record of the attitude and body language of the interviewee during the interrogation.

Judges consider the audiovisual recording as completing the written transcript of the interrogation and recognise that viewing the recording may be very useful during the hearings before the trial court.

According to the judges that were interviewed, there are few requests made by defence lawyers to consult audiovisual recordings - in less than 1% of cases. The low number of requests might derive from the strict requirements that need to be met in order to apply for access to the recording.

The police officers that we interviewed reported that recording the interview without having to make simultaneous written records is very beneficial for the minors, and encourages the interviewee to feel safe during the interview. Moreover, the recording means that the victim is not required to repeat his/her statements several times during the proceedings. The audiovisual recording is also key in respect of minors, because young victims may express themselves non-verbally during the interview (e.g. drawings).

The police officers that we met expressed mixed views about the usefulness of an extension of the audiovisual recording obligation to intermediate offences. On the one hand, such an extension may benefit investigations, as the audiovisual recording provides an accurate record for the written transcript. On the other hand, some police officers expressed the view that a general obligation could be quite burdensome, particularly in the context of proceedings relating to minor offences. In this respect, the police officers considered the presence of a lawyer to be a more useful safeguard.

Nevertheless, the research highlights the overall positive impact of audiovisual recording in criminal investigations. The stakeholders that we met indicated that the simple fact of audiovisually recording the interrogation has brought a positive

change in the attitude of the different parties involved in an interrogation. On the one hand, police are dissuaded from using undue compulsion or other coercive interrogation techniques, both the police officers and judges are encouraged to adopt a more respectful attitude towards the suspect or accused person – as it was indicated by an attorney. On the other hand, suspects and accused persons are less likely to make false allegations of police misconduct. In this respect, audiovisual recordings may help to prevent cases of miscarriage of justice.

Recommendations

Given the importance audiovisual recording as a procedural safeguard in criminal proceedings, we suggest the following five recommendations:

Report on the feasibility and benefits of an extension of the requirement, including a cost assessment: domestic policy makers should request a report on the feasibility and benefits of an extension of the obligation to record interrogations audiovisually, as envisaged by Article 16 of the Law of 5 March 2007, to safeguard the principle of equality of treatment of citizens involved in criminal proceedings. Equally, a cost assessment of the equipment and maintenance as well as the potential cost benefits (e.g. reducing court time in litigation over disputes relating to the statements made by accused persons during police interviews, reducing complaints against the police) should be produced to take into account the technological developments since the last assessment, which was made before the introduction of the obligation.

Review conditions of access to audiovisual recordings for defence lawyers: it is necessary to consider simplifying the conditions for access to audiovisual recordings for defence lawyers, and enabling the suspect and his or her counsel to consult the recording as part of the case file in advance of the trial, in order to decide whether or not it is useful for the defence, subject to a strict confidentiality obligation not to share the recording with any others. In this respect, the risk of audiovisual recordings being leaked to the public should be weighed against the need to ensure equality of arms in criminal proceedings.

Ministry of justice should issue internal guidelines on audiovisual recording: the Ministry of Justice should produce clear and detailed internal guidelines on the practical implementation of the audiovisual recording obligation, in order to unify

differing practices amongst judges, and to reflect technological progress since the requirement was originally introduced. The guidelines should cover: (i) when the recordings should begin and end, (ii) when interruptions can take place (and the recording of such interruptions), (iii) how the camera and the room are set up during the interview, to ensure the quality of the recording, and a broad field of view of the camera.

Review investigative techniques by the police and the use of written transcripts: recognising that audiovisual recording has the potential to positively impact on interviewing practices, a review of police interviewing practices, including those relating to the necessity and usefulness of producing written records, should be conducted in parallel with an assessment of the extension of the scope of the audiovisual recording requirement. The review should consider how to incorporate audiovisual recording into practice, and enable investigative officials and judges to rely less on written transcripts.

Continued monitoring: the *Contrôleur général des lieux de privation de liberté (CGLPL)* has an important role to play in inspecting the proper implementation of the audiovisual recording requirement in places of detention and making recommendations to ensure that audiovisual recording duly acts as a safeguard against any form of ill-treatment during detention.

Croatia

Legal framework

The new Criminal Procedure Act[64] was adopted in 2008 and constitutes the main source of law regulating prosecution and criminal procedural rules and has been amended several times. The latest changes are the result of aligning domestic criminal legislation with the *acquis communautaire*, including Directive 2013/48/EU

[64] Croatia, Criminal Procedure Act (OG 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17);

of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

By transposing Directive 2013/48/EU into Croatian criminal law, a series of changes has been implemented primarily dealing with the role of the police in the pre-trial procedure and strengthening the suspect's procedural rights. The latter is reflected, for example, in introducing the mandatory audiovisual recording of the interrogation of suspects at police stations. On one hand, mandatory recording prevents potential accusations by defendants of ill-treatment in obtaining a confession or other violations of certain procedural rights - which had happened prior the amendments. On the other hand, recording ensures that the police informs the defendants about his/her rights in a proper way at the beginning of the interrogations, which was also not the case in the earlier practice of police.

Prior to amendments to the CPA (OG 70/17), Croatia was one of the few countries in the European Union where police investigation of a suspect only represented an "official note" and did not have any probative value. Amendments to CPA (OG70/17) resulted in the abandonment of the traditional informal questioning of the suspect and prescribed the formal police interrogation of suspects with the obligation of the police to inform suspects of their defence rights before carrying out a formal interrogation. Moreover, the definition of a suspect was altered so that it now fully complies with the definition of a suspect in the Directive.
The obligation to record interrogation using audiovisual devices (which de facto relate only to pre-trial proceedings) applies in cases when a suspect is interrogated by the police and the accused person is interrogated by the state attorney.

To better understand differences between the suspect and accused it is to be noted that the pre-trial procedure in Croatia consists of two sub-phases: the inquiries and the investigation. Inquiries are considered to be an informal stage of pre-trial

proceedings and the investigation as a formal stage. Inquiries are led by the state attorney or the police under the supervision of the state attorney.
During police inquiries the defendant is known as a suspect – a concrete person in relation to whom there are grounds for suspecting commitment of a criminal offense and against whom the police or the public prosecutor take actions to investigate this suspicion. If it is concluded that a prosecutable criminal offence has been committed, police officers are obliged to inform the state attorney about the investigations undertaken.

The investigation is led then by the state attorney in order to collect evidence and information necessary for a decision on whether to file an indictment or to discontinue the criminal procedure. The defendant must be questioned before discontinuing the investigation or filing an indictment. Questioning may be conducted only by the state attorney or the police investigator if ordered to do so by the state attorney.

Obligation of audiovisual recording exists in several other case: (i) interrogation of minors under 18 years, (ii) interrogation of minor witnesses under 14 years of age at a probationary hearing, (iii) also in the investigation phase when a defendant confronts another defendant, or a (iv) witness if the witness's statement is not consistent with important facts (except when the witness is a child), and (v) confrontation between a witness and another witness or (vi) a witness and a defendant if their statements are not consistent with important facts.

In addition to that, the CPA gives discretional powers to authorities conducting other investigatory activities to decide at any time to record any action using an audio or audiovisual device.[65] Furthermore, there is an option for authorities to carry out an audiovisual recording of an investigatory action upon the motion of individuals. This possibility is explicitly provided for victims of a crime against sexual freedom or the

[65] CPA, Article 87(2).

crime of human trafficking, domestic violence victims and victims with special needs.[66] However, the CPA does not prescribe the manner, form and to whom such request is to be submitted. If the aforementioned person submits a request for an audiovisual recording, the authorities (judge or investigative judge) does not have to adopt a decision on the motion. The person will be informed in a summons for trial sent by an investigating judge or the proceeding judge depending on which authority is conducting the examination.

Discretional audiovisual recording also pertains interrogation of a witnesses through a court interpreter, interrogation of minor witnesses above 14 years of age, the elderly, the sick, persons with disabilities who are not able to attend a court hearing, victims of domestic and sexual violence, human trafficking victims, victims for which special protection measures have been ordered, witnesses in imminent danger and by performing a recognition actions.

Based on the above-mentioned cases, it becomes obvious that the discretional possibility of conducting interrogations using an audiovisual device generally involves vulnerable groups of witnesses or victims of certain categories of criminal offenses.

The recording starts at the order of the police officer conducting the interrogation. The recording device is handled by a trained person. The recording must contain a read notice of the suspect's rights (reasons for suspicion, right to having a defence attorney, right to a court interpreter, right to refuse to provide any statements or answer questions and the right to leave the police premises at any time, except in the case of detention), the suspect’s statement as to understanding their rights and the suspect’s statement as to exercising the right to a defence attorney, including a caution that the interrogation is being recorded and that the recorded testimony can be used as evidence in ongoing proceedings.

If the police made any omissions when warning the suspect about the rights of the

[66] CPA, Article 292(4).

defence or during the formal interrogation, the evidence so obtained will be regarded as illegal and any other evidence that derives from the illegally obtained statements of the suspect during the police interrogation would be illegal too, and neither could be used at court.

Written summary minutes are taken during the audiovisual recording and together with the record can be used as evidence in court proceedings. The judge or the state attorney may order a partial or full transcription of the audiovisual recording.

Given that state bodies conducting an investigative action of interrogation use an audiovisual device, they are obliged to provide parties with a copy of the record immediately after the interrogation is completed.[67] Three (sometimes four) record of interrogations of the suspect are to be made, one of which is sealed and submitted to the investigating judge as a safeguard. The second record is immediately handed over to the suspect, whereas the third record is handed over to the state attorney's office via the police officer who conducted the interrogation.[68] If police conducted the interrogation, they can keep one copy for themselves. The parties are not obliged to pay for a copy of the recording. However, if the case file, for some reason is consulted subsequently, the costs of a recording of the file are charged on the person upon whose request the consulting is made, except when it is carried out upon the request of the appointed defence attorney, in which case the expenses are covered by the body conducting the proceedings.[69] The recording is kept for as long as the criminal file is kept.[70]

Since the Juvenile Court Act does not determine the manner of interrogation of juvenile suspects and defendants using an audiovisual device, the subordinate provisions of the CPA on this matter are applied. Defence for a juvenile is mandatory. If the juvenile does not have a defence attorney and/or if the questioning of the juvenile is not recorded with an audiovisual device, written

[67] Article 410(5) of CPA.
[68] Article 275(6), in conjunction with Article 14(1) and (2), of Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings.
[69] Article 145(5) of the CPA.
[70] Article 87(7) of the CPA.

minutes of the course of interrogation may not be used as evidence in criminal proceedings.

The CPA does not define the term "vulnerable persons", but the term does refer to a vulnerable group of witnesses (minors, the elderly, the sick, persons with disabilities, victims of domestic and sexual violence, human trafficking victims, victims for which special protection measures have been determined) and for whom the CPA provides for a special treatment when interrogated.

Regarding the interrogation of vulnerable witnesses, examination of minors under 14 years of age are conducted by the investigating judge without the presence of an actual judge and parties in the room where the minor is located, using an audiovisual device operated by a trained assistant in the room. The interrogation is carried out with the assistance of a psychologist, a pedagogue or other trained expert, and a parent or guardian is present unless it is against the interests of the child. The parties may pose questions to the minor with approval of the judge and solely through a trained assistant. The interrogation will be recorded with an audiovisual recording device, and the recording will be sealed and attached to the file. The minor may only be re-examined in the same way and in exceptional circumstances.

Witnesses who are unable to obey a court summons due to medical condition or disability, victims of domestic and sexual violence, human trafficking victims, victims for which special protection measures have been ordered may be examined using audiovisual devices operated by a trained assistant. If this person is a witness, the examination will be conducted so that the parties (defendant, defence attorney, state attorney) may ask questions without being present in the room with the witness. The interrogation will be recorded using an audiovisual device and if necessary, the recording will be sealed and attached to the file.

Legal practice

As part of the empirical research, in Croatia, 13 interviews were conducted with the

following criminal justice stakeholders: 2 police officers, 1 judge, 3 prosecutors and 4 defence counsels. Permission to conduct interviews with defendants was not provided due to their unwillingness to share their experiences.

It is to be concluded that Croatia with last Amendments to CPA/17 made a significant step towards the further Europeanization of Croatian criminal procedural law. All interrogators emphasized that by transposing the Directive Croatia greatly improved the procedural position of the suspects. The obligation to record a suspect's interrogation in the pre-trial proceedings is a particularly positive change, as it prevents false accusations that certain procedural rights have been violated.

All practitioners said that the quality of the recordings are generally good and that there were only few situations exposed to technical problems. According to the data provided by the State Attorney's Office and the Ministry of Justice, it became clear that not all courts, police stations and branches of the State Attorney's Office have equipment for audiovisual recordings. Additionally, the State Attorney's Report found existing equipment to be insufficient. Namely, the report points out that during 2017, there were several technical problems with equipment used to record evidence. Repairs in these cases lasted a long at a significant cost. The State Attorney's Office believes that the recording equipment will need to be soon replaced with new devices.

On the territory of the Republic of Croatia, there are a total of 110 police station rooms suitable for conducting audiovisual recordings which are equipped with a total of 226 audiovisual devices. The Criminalist Union argues that police stations lack police officers, typists and audio-video devices. On the other hand, the Minister of Interior Affairs asserts that the police possesses sufficient number of audio-video sets and that the police officers are currently being trained for using the devices.

Regarding audio recording of hearings in court or other investigatory actions, almost all interviewees said that they have no experience in audio recordings using audio devices even though the devices are at their disposal. Only one state attorney stated

that audio devices are used in some pre-trial proceedings to record the testimonies of witnesses. According to an academic study on the issue, "despite relatively good regulation of the audio recordings of hearings, the vast majority of judges express their discontent in dictating in minutes. However, they do not use the given option despite technical possibilities of making recordings."[71]

The purpose of written minutes is to record important statements provided by persons involved in the case. However, practice has shown that minutes often do not contain some parts of statements or they contain mis-paraphrased statements resulting in frequent objections to written minutes. This certainly places more emphasis on audio recordings, which has also been pointed out by some of our respondents.

All interrogators emphasized that Croatia possesses a good legal framework that respects the procedural rights of suspects and defendants now from the earliest stages of criminal proceedings. The practice of audiovisual recording of interrogations before the police and state attorney seems to be a standard practice fully respected, given that the form and manner of examination is regulated in detail by law. However, practice shows different interpretation of preconditions necessary to file the indictment. Several courts have not accepted the indictments filed without prior interrogation conducted by the state attorney.

Recommendations

The conclusion is that the jurisprudence of different courts in Croatia results in legal uncertainties. Keeping in mind that the Croatian criminal justice system is still adjusting to the requirements of the EU criminal law system, unifying practice on the probative value of evidence resulting from the interrogation of the suspect in police station should be adopted in the future. Possible solutions may be in the new amendments to the CPA or in a final interpretation of current provisions of the CPA by the Supreme Court.

[71] Supreme Court of Republic of Croatia, The Judicial Academy of Croatia, Digest- Novelties in criminal proceedings- 2017, Opatija, pp. 11-12. May 2017.g., p. 82, Available at: http://pak.hr/cke/ostalo%206/Opatija%202017.pdf

Taking into account the requirements of the Access to a Lawyer Directive and what we described in the preceding chapters, we put forth the following recommendations:

(1) To provide for audiovisual recordings in misdemeanour cases.

(2) To include misdemeanour victims in individual assessments, i.e., increasing the capacity and quality of support services provided by national practitioners, improvement the understanding of victim rights for misdemeanours.

(3) To make transcripts of recorded interrogations obligatory.

(4) To ensure appropriate technical devices as well as regular tuning of existing equipment, to avoid unlawful practices due to the lack of proper equipment.

(5) To provide for mandatory audiorecordings at court hearings.

Czech Republic

Legislation
The legal system of Czech Republic does not provide for mandatory audiovisual recording of interrogations, which remains optional. The recording of interrogation remains a discretionary decision of each police officer individually. However, not all police stations are equipped with the necessary technology.

The criminal proceedings under Czech law are governed by an adversarial system, meaning that the role of the court is primarily that of an impartial referee between the prosecution and the defence. The court is therefore not actively involved in the investigation of the case, leaving this part of criminal proceedings to the police and public prosecutors.

The ordinary way of documenting the criminal procedural acts is producing minutes, which can be either verbatim or summarized. Although the legal provisions presume presence of a typist, due to financial reasons, this duty often remains of the police officer conducting the interview.

The Criminal Proceedings Code (CPC) does, however, set a rule that minors under 18 years old should be interrogated so that it would not be necessary to repeat the

questioning, especially in cases where the interrogation could affect their intellectual and moral development. Although audiovisual recording is not mentioned by law as a means to ensure this aim, the practice showed that it is often the case. Usually these interrogations take place in special interrogation rooms set up with toys and one sided mirror glass and an equipment suitable for audiovisual recording, in which case the recording would always be produced.

Practice of audiovisual recordings as viewed by stakeholders
In the Czech Republic, interviews were conducted with the following criminal justice stakeholders: 3 police officers, 1 prosecutor, as well as 3 defence counsels and 3 defendants. The information these stakeholders shared has been supported by statements by the Police Presidium and the Ministry of Interior obtained through freedom of information requests.

The experiences of practitioners varied on a wide scale. A high ranking police officer interviewed disclosed that the decision on the audio- or audiovisual recording was, indeed, under the discretion of the individual police officer. Another officer described instances from their practice where recordings were being used mostly in case of serious crimes for the purposes of proper identification of the suspect as well as for non-verbal analysis and an evidence for further proceedings.

However, the attorneys, an NGO representative and all of the interrogated persons agreed that none of them has been involved in a case where an interrogation had been recorded in their entire career, with merely two exceptions: one of the situations concerned organized crime (the recording was supposed to be made solely because of the complexity of the case, so that the police would be able to review the interrogation later in the investigation) and the in the other case the interrogation of a victim of a violent crime was recorded.

According to a police officer, approximately 100 police investigators share one special interrogation room with an audiovisual recording device, and the police officer stated that the equipment was available at request and it suited the needs of their department. It is, however, important to mention that this experience came from one of the major police stations; for smaller stations further from big cities, the availability of equipment was significantly worse, often requiring the officers to submit a request to another police department for a device.

Interviewing a police officer and a prosecutor with a wide experience in interviewing minors allowed provides a better insight. According to these experts, the common practice is that children are usually being recorded during interrogations, often in the special interrogation rooms customized for the needs and comfort of children. The officer described they would try to record the interrogation each time they would find it beneficial either for the case or the parties involved.

Trends in introducing audiovisual recording of interrogations
Although the possibilities of introducing an increased audiovisual recording of interrogations seem, as for now, quite limited, there is a positive trend: the special interrogation rooms are being spread through the whole state. The Czech country

report stated that they have encountered positive attitudes from several of the stakeholders including the authorities producing audio- and audiovisual recordings during the latter stages of criminal proceedings, such as court hearings.

Challenges in audiovisual recording of interrogations
While being asked on the possible obstacles of the introduction of increased audiovisual recording of interrogations, every stakeholder listed financial reasons as the first and main obstacle against recording. The individual problems seemed to be:

1) Lack of interrogation rooms
Currently, there are around 66 special interrogation rooms in the Czech Republic, while some others are under construction. This would most definitely become a problem if the number of interrogations to be recorded were to increase significantly.

2) Lack of personnel
During our research, each of the persons interviewed confirmed that the most common way of recording the interrogation was the written minutes. What seemed to be even more problematic, however, was the fact that the minutes are being produced by the interrogators themselves, a separate position of a typist became uncommon in police headquarters due to financial reasons. A medium-ranking policeman we interviewed disclosed that this was not the case earlier in his carrier. Without a typist, they pointed out, the interrogations became difficult: the police officers themselves have to produce a transcript of the interrogation. Writing the minutes divides their attention, and reduces the quality of the interrogation. Because of that the simplest and least time-consuming methods are being used. If the police officer was to record every single interrogation, they would also need to take the time to process them and make a transcript, which would take an enormous amount of their time. This was a common issue mentioned by the stakeholders. Technician personnel would be also needed: there is usually up to three different people present with the recording devices, supervising the technical aspect of the recording.

3) Lack of equipment
Equipment would need to be purchased: although there were no problems identified regarding the visual part of the recordings, due to the wrong quality of the audio recorders, they often impose difficulties to the authorities. Many times the recordings are inaudible, which undermine the benefits of the recordings later in the course of the criminal proceedings.

4) Willingness of the police personnel
While all of the previous points are merely a matter of finances, another topic came up in majority of cases: the willingness of the police personnel to record their interrogations, for several reasons. Mainly, the interviewees agreed that a camera present in the room would make every party nervous. If the camera was visible, one of the stakeholders pointed out, the nervousness would affect not only the interrogator but also the person interrogated, which could diminish the value of the whole testimony as they would watch their verbal and non-verbal reactions much

more closely.

Recommendations

(1) Specification of rules for recording of interrogations
Despite audiovisual interrogations being possible and sometimes in use, we found there are no internal rules concerning the situation in which the recordings are recommended. Special provisions on the scope – groups covered in terms of age range, vulnerability, and types of offences – would prove helpful in establishing good practice throughout the Czech Republic.

(2) Broadening the scope of legislation on vulnerable persons
During the course of our research, we found that little legislation concerning vulnerable persons had been implemented in the Czech Republic. Neither the practice nor the law recognizes the concept of a vulnerable defendant. Introducing these concepts would be crucial to ensure a fair procedure for such persons, and could be possibly helpful in establishing broader legislation on audiovisual recording of interrogations.

(3) Establishing more special interrogation rooms
A positive trend could be seen both from the interviews with stakeholders and official information conveyed by the authorities: the special interrogation rooms are becoming more available to the police officers who would decide to record their interrogations. We believe that the availability of the equipment is the essential premise of moving towards good practice and create a base for the legislative framework.

(4) Education of police officers
Until there is no binding legislation, the recording remains an individual decision of each officer, thereby motivating the members of police personnel to use the recording seems crucial. High ranking police officers could take a lead in promoting this practice among their colleagues. We also believe the motivation could come from outside the police in the form of educating the officers, promoting the benefits of such practice regarding their own work. We believe that non-profit as well as government organizations should promote the good practice and helpfulness of the recordings of interrogations to both parties concerned.

(5) Reintroducing the positions of assisting staff
While the vision of increasing the number of interrogations recorded would be desirable, we would also point out that a complex solution to the problem must be sought. Without assisting stuff such as technicians and typists taking part in the recordings and interrogations themselves, we believe the obligation to produce a recording of each interrogation would be met with understandable reluctance. We would strongly argue that a complex and financially demanding solution must be sought in order to establish an example of good practice rather than a non-functional system that would look good on paper but would prove counterproductive in practice.

IV. Introduction of Audiovisual Recording – the US example

Introducing mandatory audiovisual recording of interrogations may happen in three ways: (1) the police voluntarily adopts internal rules upon their own initiative; (2) the supreme court/constitutional court of a given state rules on the question and triggers an amendment of either legislative acts or police practice; (3) the state uses its regulatory powers and adopts legislation.

These are the three key actors, as also recognized by the American Bar Association of the **United States of America** – the states of which are leading actors in introducing the tool of audiovisual recording – which adopted two resolutions regarding the audiovisual recording of interrogations in 2004:

(1) It resolved that the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at all state premises if suspects are held there for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial investigations.

(2) It further resolved that the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at all state premises if suspects are held there for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations. It also urged, that necessary funding should be provided, and that appropriate remedies should be applied for non-compliance.[72]

In the same year, Illinois became the first state of the United States of America that passed legislation making unrecorded police interrogations presumptively inadmissible in homicide prosecutions. However, it is noteworthy that Illinois was not the first state to render recording of the interrogations in the most serious criminal cases mandatory.

As early as 1985, the Supreme Court of Alaska decided in Stephan v. State that the state constitution's due process clause required the police to record suspect

[72] 8A (NY County Lawyers' Association; Criminal Justice Section) Midyear 2004. Available at: https://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting/

interviews in felony investigations conducted in police stations.[73] The two petitioners were arrested on unrelated criminal charges, taken to police stations and questioned by police officers. Both men confessed to committing a crime. It is important to stress that in both cases, a working audio or video recorder was in the interrogation room and was used to tape a certain part of the interrogation, but not all of it. The officers, in each case, offered no explanation for their clear disregard of the Mallott rule.[74] The Court in its judgment held:

> "The concept of due process is not static; among other things, it must change to keep pace with new technological developments. For example, the gathering and preservation of breath samples was previously impractical. Now that this procedure is technologically feasible, many states require it, either as a matter of due process or by resort to reasoning akin to a due process analysis. The use of audio and video tapes is even more commonplace in today's society. The police already make use of recording devices in circumstances when it is to their advantage to do so. Examples would be the routine video recording of suspect behaviour in drunk driving cases and, as was done in these cases, the recording of formal confessions. Furthermore, media reports indicate that many Alaska police officers have purchased their own recorders, carry them while on duty and regularly record conversations with suspects or witnesses, in order to protect themselves against false accusations."

The court also pointed out in its judgment that audiovisual recording is not only beneficial to the defendant:

> "The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many

[73] 711 P.2d 1156, 1162 (Ala. 1985).
[74] Five years earlier, in Mallott v. State 608 P.2d 737 (Alaska 1980) the Supreme Court of Alaska held pertaining to law enforcement officials that "it is incumbent upon them to tape record, where feasible, any questioning [of criminal suspects,] and particularly that which occurs in a place of detention".

cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth."

Subsequently, in 1994, the Minnesota Supreme Court also ordered the police to record all police station questioning of felony suspects.[75] More similar decisions followed year by year and the unequivocal trend in the United States of America has been to oblige police officers either by supreme court judgments or state legislation to record interrogations.[76]

V. Introduction of Audiovisual Recording in the European Union

As for the **European Union**, being primarily an economic and political union, the core of it is the internal single market developed through a standardised system of laws applicable in all member states, in particular in matters aiming to ensure the free movement of people, goods, services and capital; legislation at EU level in criminal matters can be still regarded therefore as a new area that the founder states had not have in mind as a common issue. However – as the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (hereinafter: the Roadmap) – admitted, the removal of internal borders and the right to free movement led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence.[77]

As the European Union had not had an extended common criminal law heritage on the one hand, but all its members were member states to the Council of Europe as well, the Roadmap opted for the obvious choice and declared that in the European Union the European Convention of Human Rights (Convention) "constitutes the

[75] State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994)
[76] National Association of Criminal Defense Lawyers keeps track of the actual situation in each state. Available at: https://www.nacdl.org/usmap/crim/30262/48121/d.
[77] Article 3 of the Preamble of the Roadmap

common basis for the protection of the rights of suspected or accused persons in criminal proceedings"[78] and also recognized the primary importance of the ECtHR as the authentic interpreter of the Convention to ensure that Member States have trust in each other's criminal justice systems.[79]

Referring to the delicate balance that has to be struck between the need of high level of safety of the citizens and the equal need to address specific problems that can arise when a person is suspected or accused in criminal proceedings, the Roadmap calls for "specific action on procedural rights, in order to ensure the fairness of the criminal proceedings"[80] with the aim of enhancing citizens' confidence that the European Union and its Member States will protect and guarantee their rights. However, it also emphasized that a step-by-step approach should be taken "bearing in mind the importance and complexity of these issues."[81]

In its Annex, the Roadmap sets out an action plan as the basis for future action, on the basis of which the following, vital pieces of legislation have been adopted since 2009:

- Interpretation and Translation Directive[82]
- Right to Information Directive[83]
- Access to a Lawyer Directive[84]
- Children Directive[85]
- Legal Aid Directive[86]
- Commission Recommendation for vulnerable suspects and accused[87]

[78] Article 1 of the Preamble of the Roadmap.
[79] Article 1 of the Preamble of the Roadmap.
[80] Article 5 of the Preamble of the Roadmap.
[81] Article 11 of the Preamble of the Roadmap
[82] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.
[83] Directive 2012/13/EU on the right to information in criminal proceedings.
[84] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
[85] Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings.
[86] Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings
[87] Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings 2013/C 378/02.

The directives and the recommendations all aim at enhancing the procedural fairness of criminal procedures in the European Union and their cumulative effect does and will have major impact on the domestic legislation and the practice of the domestic authorities involved. However, for the purpose of the present comparative report, we would like to highlight only the key features that are relevant with regard to the audiovisual recording of the interrogations or other procedural actions.

The first Roadmap directive, the **Interpretation and Translation Directive** stipulates that Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.[88]

As highlighted above when discussing possible benefits of audiovisual recording of interrogations, foreign nationals are always under the greater risk of not being able to fully exercise and benefit from their fundamental procedural rights in a criminal procedure. The quality of interpretation may be questionable, especially in the case of not that commonly spoken languages of the European Union or rare languages of third country nationals, particularly during police interrogations that usually follow quickly after the apprehension or arrest.

Unfortunately, however, the Translation Directive lacks provisions on audiovisual recording, although the directive refers to the advantages of information technology when it declares that communication technology such as videoconferencing, telephone or the Internet may be used for interpreting.[89] On such occasions it would be possible to record the procedural act without considerable financial investment.

The **Right to Information Directive** contains a specific provision on access to case materials if a person is arrested and detained at any stage of the criminal proceedings, prescribing that in such situations Member States shall ensure that documents in the possession of domestic authorities which are essential to

[88] Interpretation and Translation Directive, Article 2(1).
[89] Interpretation and Translation Directive, Article 2(6).

challenging effectively the lawfulness of the arrest or detention are made available to arrested persons or to their lawyers.[90]

It should be highlighted for the purpose of the present study that the European Parliament and the Council also acknowledge in this directive the technological possibilities available to the domestic courts and investigating authorities. The directive implicitly stipulates that audio and video recordings are part of the case file that should be made accessible to the defendant in order to defend himself/herself, when it declares that not only the documents, but also the photographs, audio and video recordings should be made available in due time to defendants or to their lawyers, at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention.[91]

Similar to the Interpretation and Translation Directive, the **Access to a Lawyer Directive** also provides that to ensure the practical exercise of the right of access to a lawyer in criminal proceedings,[92] advantages secured by technological developments can be relied on. It stipulates that the right to communicate with the lawyer representing the defendant may be practiced at any stage, including even before meeting that lawyer, and Member States may make practical arrangements concerning the duration, frequency and means of such communication, including the use of videoconferencing and other communication technology in order to allow such forms of communication to take place.[93] Referring back to the 2nd General Report on the CPT's activities that mentions the presence of the lawyer as a key element in preventing ill-treatment by the police during interrogations, it is to be welcomed that the Access to Lawyer Directive prescribes that Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned, and where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned.[94] However, the Doyle-case and its possible adverse consequences to the right to

[90] Right to Information Directive, Article 7(1).
[91] Right to Information Directive, Article (30) of Preamble.
[92] Access to a Lawyer Directive, Article 3.
[93] Access to a Lawyer Directive, Article (23) of Preamble.
[94] Access to a Lawyer Directive, Article 3 (b).

access to a lawyer must also be borne in mind and it must be emphasised that the Access to a Lawyer Directive unequivocally sees technical developments as a means to support the right to legal assistance, and not to substitute it.

Though all three directives entail provisions strengthening the exercise of procedural rights of defendants in the criminal procedure, and the access to lawyer in particular reduces the risk of ill-treatment, **none of the directives contain a "shall" provision concerning the audiovisual recording on interrogations.**

Commission Recommendation 2013/C378/02 (hereafter Commission Recommendation) – although obviously has no binding effect – was adopted with a view to encourage Member States to strengthen the procedural rights of all vulnerable suspects or accused persons who are defined as persons "not being able to understand and to effectively participate in proceedings due to age, their mental or physical condition or disabilities."[95]

The recommendation's structure follows a logic commonly used in international legislation: it establishes minimum rules, which are without prejudice to stricter rules that may be adopted by individual member states.

The Commission Recommendation expressly defines as a right of a vulnerable person that: "Any questioning of vulnerable persons during the pre-trial investigation phase should be audiovisually recorded."[96]

It should be highlighted that the recommendation pertains to the first, investigative stage of the criminal procedure – but not to judicial proceedings – which is crucial in determining the course of a given criminal procedure and where ill-treatment is most likely to occur, as established by the CPT in its 6th General report.

The Commission Recommendation even offers an explanation as to why the recording is necessary in the cases of particularly vulnerable persons: they are "not always able to understand the content of police interviews to which they are subject.

[95] Commission Recommendation, Article (1) of Preamble.
[96] Commission Recommendation, recommendation no. 13.

In order to avoid any contestation of the content of an interview and thereby undue repetition of questioning, these interviews should be audiovisually recorded."[97]

One other key safeguard of the recommendation should be mentioned here: if a vulnerable person is unable to understand and follow the proceedings, he or she should not be able to waive their right to lawyer.[98] Once again, the recommendation also regards the right to access to a lawyer and the means of audiovisual recording to be strengthening each other, with the aim of securing the fairness of the criminal procedure.

The **Children Directive**, which was adopted in May 2016 and the deadline for the Member States to transpose it was 11 June 2019, is therefore the first piece of EU legislation in the field of criminal justice that contains a clear, unequivocal obligation to audiovisually record an interrogation. As evident from the title of the directive, this obligation applies to a special group of defendants: children. By child the directive means everyone below the age of 18, but the directive is also applicable to persons who were children when they became subject to the proceedings but have subsequently reached the age of 18.[99] Similar to the other Roadmap directives, it establishes minimum standards with a view to ensure the respect of procedural rights of the defendant in criminal procedures.

As a key safeguard, the directive provides that all Member States shall ensure that the questioning of children by police or other law enforcement authorities during the criminal proceedings is audiovisually recorded where this is proportionate to the circumstances of the case.[100] It should be noted that the obligation does not apply to hearings before judicial bodies. As evident from the wording of the provision, the obligation is not absolute even during police interrogation. When deciding on what is proportionate to the circumstances of the case, relevant factors are primarily whether a lawyer is present or not and whether the child is deprived of liberty or not, however, the child's best interest is always a primary consideration.[101] In the event that the interrogation is not audiovisually recorded, the directive provides that duly

[97] Commission Recommendation, Article 13 of Preamble.
[98] Commission Recommendation, recommendation no. 11.
[99] Children Directive, Article 2.
[100] Children Directive, Article 9(1).
[101] Children Directive, Article 9(1).

verified written minutes are to be made.[102] As a guiding principle, questioning should in any event be carried out in a manner that takes into account the age and maturity of the children concerned.[103]

As for the reasons of introducing such procedural safeguards in the case of minors, the preamble serves as a good guiding point. It provides that children who are suspects or accused persons in criminal proceedings are not always able to understand the content of questioning to which they are subject, and audiovisual recording serves to ensure sufficient protection to such children.[104]

If a recording should be made, but an insurmountable technical problem renders it impossible to make such a recording, the police is allowed to question the child without it being audiovisually recorded, provided that three criteria are met:

(a) reasonable efforts have been made to overcome the technical problem,

(b) it is not appropriate to postpone the questioning, and

(c) it is compatible with the child's best interests.[105]

A significant novelty of the directive should be highlighted: it also recognizes the importance of collecting and analysing data. It establishes that both data gathered by the judiciary and the law enforcement authorities should be collected "in particular in relation to the number of children given access to a lawyer, the number of individual assessments carried out, the number of audiovisual recordings of questioning and the number of children deprived of liberty."[106]

The importance of collecting accurate, up-to date and relevant data cannot be overestimated. Lack of reliable data is an obstacle to monitoring the effectiveness of certain legal provisions and drawing accurate conclusions.

[102] Children Directive, Article 9(2).
[103] Children Directive, Article (44) of Preamble.
[104] Children Directive, Article (42) of Preamble.
[105] Children Directive, Article (43) of Preamble.
[106] Children Directive, Article (64) of Preamble.

VI. Legal frameworks – criminal justice systems

The five criminal justice systems compared (Hungary, France, Croatia, Czech Republic and Italy) are all continental systems and the countries are all members of the Council of Europe and the European Union and consequently all are signatories of the major relevant international legal instruments in the UN and Council of Europe framework. As EU members, all of them also have the duty of transposing the above listed Directives of the European Union. However, their legal traditions are not identical and are characterized by significant differences. These peculiarities of the national criminal justice systems are highlighted in the national executive summaries as they might shed a light on why these jurisdictions are in significantly different stages of introducing the general safeguard of recording interrogations, despite the clear intention defined in the directives, and also bearing in mind that the Roadmap Directives all set minimum standards. Therefore, in this section, we only briefly describe the criminal justice systems and their basic lines of procedure.

In **Hungary,** a criminal procedure may be launched against a person if there is substantiated suspicion that they have committed a criminal offence. The criminal procedure comprises of two phases: (1) investigation and (2) the court phase. It may be preceded by a preparatory procedure which has the aim of establishing whether there is a suspicion of a criminal offence.[107] The investigation is carried out by the investigating authority: in the vast majority of the cases by the police[108] and in some instances, exceptionally by the prosecutor (the most important exception being the ill-treatment cases committed by or against members of law enforcement agencies).[109] During the investigation the defendant is interrogated,[110] who is identified as suspect in this phase of the proceedings. At the beginning of the first interrogation, suspects are informed about the charges against them (i.e. the criminal offence they are suspected of committing). This is the so-called

[107] CCP, Article 340(1).
[108] CCP, Article 34(1).
[109] CCP, Article 25(2).
[110] CCP, Article 385 (1).

communication of the suspicion, [111] when the concerned person formally becomes a suspect.

Upon the completion of the investigation, the prosecutor presses charges by submitting the bill of indictment to the court.[112] The court phase starts with the preliminary hearing aimed at the preparation of the substantive trial.[113] If the defendant does not confess to committing the criminal offence, the preliminary hearing provides an opportunity for the defendant and the defence counsel to present their arguments about the indictment before the trial begins and to submit their motions aimed at having any evidence excluded or any evidentiary action concluded by the court.[114] Thereafter, the court holds a hearing to which the person subject to the procedure (now identified as the accused person) is summoned – however, according to the rules currently in force, their presence is not inevitable any more.[115] The evidentiary procedure at the trial starts with the hearing of the accused person,[116] other evidentiary actions and their order are determined by the court.[117]

The judgment can be appealed against in all cases but the second instance decisions may be subject to further appeal only in certain cases identified by the criminal procedure code.[118] Under special circumstances, with limitations, the final judgment may be subject to extraordinary remedy procedures.[119]

The **French** criminal justice system is based on an inquisitorial model. Criminal proceedings can be initiated by the public prosecutor or the victim. A preliminary phase precedes a judicial phase with the aim to assess the necessity of a judicial phase. The preliminary investigation is led by a state official – either the prosecutor or the investigating judge – who collects both incriminatory and exculpatory

[111] CCP, Article 388(1).
[112] CCP, Articles 25(1) and 421(1).
[113] CCP, Article 499(1).
[114] CCP, Article 506(4).
[115] CCP, Articles 136, 428-431, and 510(1).
[116] CCP, Article 522(1).
[117] CCP, Article 519(2).
[118] CCP, Article 615.
[119] CCP, Part 19. For example, there is possibility for a retrial if new evidence emerges, and there is also a possibility to request a judicial review from the highest Hungarian judicial forum, the Curia.

evidence. The vast majority of the criminal cases are investigated by the police under the supervision of the prosecutor, and an investigating judge will lead the preliminary investigative phase only in procedures of the most serious crimes.[120] The police collects information to enable the prosecutor to decide whether or not to prosecute. If the prosecutor decides to prosecute, he/she refers the case to a tribunal (*jurisdiction de judgement*) or to an investigating judge (*judge d'instruction*).

For serious criminal cases, the prosecutor refers the case to an investigating judge. This leads to a second investigative phase (*instruction*), after the inquiry by the police, but it is already part of the judicial phase of the proceedings, as the investigations are led by an investigating judge.

At the end of this phase, the investigating judge may decide to put an end to the case (*ordonnance de non-lieu*) or to refer the case to a tribunal (*ordonnance de renvoi*). The tribunal will subsequently rule on the merit of the case with a sentence, and will also consider whether to award a compensation to the victim(s).

Italy is unique because there is no separation of powers between the judiciary and the public prosecution as both functions are exercised by members of the Judiciary who are completely independent and autonomous *vis-à-vis* the executive power.[121] Since 1988, the Italian criminal system has been mixed, presenting both elements of the inquisitorial tradition and elements of the adversarial one.

Just like in the case of Hungary and France, the criminal procedure is divided into two phases: the investigative phase (*indagini preliminari*) and the trial phase. Preliminary investigations start when a crime is reported to the public prosecutor or when the public prosecutor/member of the law enforcement agencies suspects that a crime has been committed. However, unlike in the case of Hungary and France, it is the prosecutor that collects evidence and interrogates the suspect in order to find elements showing whether the investigation must be pursued. Nonetheless, once before the judge, the matter is entirely re-examined.

The investigation is conducted under the supervision of the judge for preliminary investigations (*giudice delle indagini preliminary - G.I.P.*), whose task is to monitor

[120] Article 79 of the Criminal Procedure Code.
[121] Article 104 of the Constitution.

the work of the public prosecutor and guarantee the rights of the person under investigation.

Italy has various law enforcement agencies, each with a different status and structure: State Police (*Polizia di Stato*), the *Arma dei Carabinieri* and the Customs and Excise Police (*Guardia di finanza*), etc. Any member of any law enforcement agency can be ordered to carry out actions of investigations by the public prosecutor and in this case, they come under the term of the *polizia giudiziaria* (judicial police), a term used to indicate this specific function.

Interestingly, in the **Czech Republic** the criminal proceedings under Czech law are governed by an adversarial system, meaning that the role of the court is primarily that of an impartial referee between the prosecution and the defence. The court is therefore not actively involved in the investigation of the facts of the case, making the proceedings less prone to the bias of the court.

The judicial stage is preceded by the submission of an indictment by a public prosecutor, which is a prerequisite of a trial. The criminal procedure can be divided thus into two major stages: preliminary proceedings and judicial procedure. The main part of preliminary proceedings is the investigation carried out by the police. The public prosecutor supervises the proceedings.

Preliminary proceedings serve for the verification of facts, investigation, and also shortened preliminary procedure. Investigation is led by the Service of the Criminal Police. Criminal prosecution of the accused starts by the written charge. The written charge has to be delivered to the accused in person. It contains the description of the criminal act, its legal qualification and instructions on the remedy against being charged. The shortened preliminary procedure concerns less serious offences with a simplified evidence procedure.

The judicial stage starts with the presentation of the indictment and follows with the examination of an accused and the witnesses.

In the **Republic of Croatia** criminal proceedings are initiated by the state attorney as the authorized prosecutor for criminal offences subject to public prosecution, or exceptionally by private plaintiffs. Criminal procedure in Croatia – just as all the other

countries examined in the present report – can be divided into pre-trial and trial phases.

However the pre-trial phase consists of two very distinctly regulated sub-phases: pre-investigatory proceedings and the investigation itself. In order to initiate criminal proceedings, the pre-investigation of criminal offenses is led by the state attorney or by the police under his/her supervision. At this stage of the proceedings, police can conduct informational conversations with citizens, but as a safeguard, citizens cannot be questioned as witnesses or expert witnesses. The information collected in the pre-investigation is represented in an "official note" and does not have probative value.

By contrast, the investigation shall be instituted against a concrete, specific person when reasonable suspicion exists that he/she has committed a criminal offence.[122] The purpose of the investigation is to collect evidence and information necessary for a decision on whether to file an indictment or there is a danger that it may not be possible to present sufficient evidence at the trial. The investigation is led by a state attorney. The police investigator may be ordered by the state attorney to conduct evidentiary actions.

The defendant must be questioned before the ending of the investigation and prior to filing the indictment. Questioning can be conducted only by the state attorney or by a police investigator by an order and under the supervision of a prosecutor. For serious criminal offences the interrogation of a defendant may not be entrusted to a police investigator.[123] The defendant's interrogation must be recorded with an audiovisual device and only evidence recorded this way has probative value in the further course of the proceedings.

[122] Article 219 par. 3 of the CPA.
[123] The European Institute for Crime Prevention and Control, affiliated with the United Nations. Criminal Justice Systems in Europe and North America - Croatia, p. 25. Available at: https://www.heuni.fi/material/attachments/heuni/profiles/6KtzTUP9j/Croatia.pdf.

VII. Special Legal Provisions on Audiovisual Recording

The primary question is how broad the scope of the obligation to record interrogations during the investigative part of the criminal procedure is in certain jurisdictions.

The **Czech Republic** is the only state examined where the law does not provide for mandatory audiovisual recording of the hearing of the defendant or any other person affected by the criminal procedure under any circumstances. The upcoming transposition of the Children Directive will necessarily change this situation. As of today, the dominant practice remains the production of a transcript of the interrogation. Moreover, the Czech report even states that the topic of recordings is absent from legal and societal discourse in the country. By no surprise, the police has no internal rules concerning the production of audio/audiovisual recording of interrogations, as confirmed by a freedom of information request. Accordingly, the production of an audiovisual record of the interrogation and the specific circumstances remain within the sole discretion of the police officer conducting the interrogation.

As opposed to this, the obligation to audiovisually record interrogations is the broadest in **Croatia**. A comprehensive modification of the Criminal Procedure Act, which entered into force on 1 December 2017, made a significant step towards the strengthening of defendants' procedural rights in the criminal procedure, in line with the Roadmap directives. The amendment provides the obligation to audio-video record all first interrogations by the police in each criminal procedure.

Apart from the interrogation of the defendant, a further obligation to perform audiovisual recording is stipulated if a child under 14 is heard as a witness. The interrogation is conducted by the investigating judge, but the child and the judge are in separate rooms. The interrogation is carried out with the assistance of a psychologist, a pedagogue or another expert person, and a parent or guardian who is present, unless it is against the interests of the child. The parties may ask questions only if the judge approves. The interrogation is recorded with an audio-

video recording device, and the recording is sealed and attached to the record. The child can be re-examined only exceptionally. [124]

In **France**, initially the law only provided that all interviews with children victims of sexual offences must be audiovisually recorded.[125] Subsequently, the obligation was extended to all minor victims in 2007. Meanwhile, the obligation to record interrogations of minor defendants was also introduced in 2000 and the Court of Cassation ruled that the obligation to audiovisually record interrogations of minors is a right of the defence and thus the defendant may not waive this right.[126]

Interestingly, France is a perfect country to demonstrate how a single case can have a major impact on an entire criminal justice system, and the rights of the defendants in particular. The safeguard of mandatory audiovisually recorded interviews was introduced regarding all suspects as from 1 June 2008 for the most serious categories of offences that are punishable with at least 10 years of imprisonment (*crimes*)[127] if held in police premises or if interviewed by an investigating judge.[128] This amendment was a response to the Outreau case.[129]

Accordingly, the audiovisual recording of the interviews is mandatory in criminal proceedings (major crimes) at two crucial moments of the procedure: (1) interview in police custody,[130] and (2) interview by the investigating judge at the first appearance of the suspect.[131]

There is no possibility, however, to request audiovisual recording in cases where the law does not specifically provide for mandatory AV recording.

There are written minutes of the interrogations in all criminal cases, whether interrogations were audiovisually recorded or not. These minutes must include all the

[124] Croatia, Article 291, Section 2 of CPA.
[125] Introduced by Article 28 of the Law n°98-468 17 June 1998 (*relative à la prévention et à la répression des infractions sexuelles ainsi qu'à la protection des mineurs*) for minors victims of sexual offences and extended to all minors by Article 27 of the Law n°2007-291 of 5 March 2007 (as mentioned above).
[126] *Cour de cassation, Chambre criminelle*, 12 June 2007, case n°07-80194.
[127] Article 64-1 of the Criminal procedure code.
[128] Article 116-1 of the Criminal procedure code.
[129] The Outreau case refers to a 2004 criminal trial relating to the alleged sexual abuse of a group of 17 children. The trial and the appeal trial revealed that the main witness for the prosecution had in fact lied about the involvement of some of the suspects. As a result, several innocent suspects had spent years in pre-trial detention. The trial resulted in a national outrage in France and a parliamentary inquiry, which led to major reforms of French criminal procedure.
[130] Article 64-1 Criminal procedure code.
[131] Article 116-1 Criminal procedure code.

questions asked, and the answers are summarised. According to the French research conducted for the ProCam project, the written minutes of the interrogations are considered sufficiently detailed by legal practitioners.

With the emerging legislative trend to restrict fair trial rights for the sake of public safety, it should be also highlighted, that in 2012, the *Conseil constitutionnel* ruled that the obligation to audiovisually record interrogations must apply to all criminal cases and stated that an exception to the obligation to audiovisually record interrogations are cases concerning organised crime and crimes constituting a violation of the "fundamental interests of the Nation."[132]

In **Italy** as well, the general rule remains that the documentation of a criminal procedure is done through producing written minutes, either in a comprehensive form or a summary. However, in the latter case, an audio recording should also be prepared. Unfortunately, this obligation is not absolute, and in any case, it remains a *lex imperfecta*: there is no sanction provided if the authorities fail to record the interrogation,[133] this does not affect the validity of the procedural action and the results of the hearing are not excluded as an evidence.

However, if the defendant is detained for any reason, the interrogation has to be – under penalty of exclusion – recorded audiovisually and summary-type minutes are also to be made. The transcription of the recording shall be ordered only upon request of the parties. The State bears the costs. The Court of Cassation[134] specified that the term "deprivation of liberty" means the restriction of personal liberty that takes place upon execution of a custodial sentence, application of a pre-trial detention order or any temporary order of deprivation of liberty in any kind of institution. House arrest does not fall under these cases.

Apart from this situation, an audiovisual recording can be ordered additionally to the written minutes, if the judicial authority deems it to be absolutely indispensable.[135] Accordingly, in such cases audiovisual recording is exceptional and depends on the sole discretion of the judge.

[132] Decision n° 2012-228/229 QPC du 6 avril 2012, M. Kiril Z., Article 9.
[133] Court of Cassation (judgement 13610/2010).
[134] Judgement n. 31415/16.
[135] CCP, Article 134(4).

However, the audio or audiovisual recording of the testimonies given during evidentiary hearings is mandatory, if the investigated crime is of sexual nature and minors are affected.[136] If the person concerned is a vulnerable adult, the audio or audiovisual recording of the hearing may be requested by the parties.

In **Hungary**, the requirement to audiovisually record interviews of suspects and accused persons is still discretional in the vast majority of the cases. There is a very limited obligation to audiovisually (or audio) record interrogations. In the case of procedural acts involving minors under 14 years of age (either as suspects, witnesses or victims), the court, the prosecutor and the investigating authority are obliged to audiovisually record the interrogation.[137] Also, if the procedural act is conducted via a telecommunication device, recording is mandatory.[138]

The law prescribes to audiovisually record the procedural act *if possible* in case there is a minor (a person under 18)[139] involved in the procedural act (as a victim, witness or suspect), except where the minor is a victim of a criminal offence of a sexual nature, in which case the audiovisual recording is mandatory.[140]

In all other cases, continuous audio- or audiovisual recording may be ordered by the investigating authority, the prosecution or the court ex officio, based on certain features of the case. The defendant or his/her counsel may request the audiovisual recording but in that case the defence also bears the duty of advancing the costs of the recording. According a Decree 12/2018 of the Minister of Justice on Certain Criminal Procedural Acts and the Persons Participating in the Criminal Procedure (hereafter: MoJ Decree 12/2018.),[141] authorities have to grant requests to audiovisually record interrogations, if the costs of the recording are paid at least five days in advance of the procedural action by the defendant or the defence counsel; or if the costs are paid less than five days before the procedural action, and the technical conditions for an audiovisual recording are met. The costs are 5000 HUF

[136] CCP Article 398(5).
[137] CCP, Article 88(1)(d).
[138] CCP, Article 125(2).
[139] According to Act C of 2012 on the Criminal Code, the minimum age of criminal responsibility is 14, but in the case of certain criminal offences (homicide, voluntary manslaughter, battery, robbery and plundering) minors have criminal responsibility if they were over the age of 12 at the time the criminal offense was committed, and if they had the capacity to understand the nature and consequences of their acts.
[140] CCP, Articles 87(1) and 89(4)(b).
[141] Article 62 of Decree 12/2018.(VI. 12.).

(approx. 15 EUR) per every started hour, but at least 10 000 HUF. The cost of an audio recording is 2000 HUF (approx. 6 EUR), regardless of the length of the procedural act.[142]

If audiovisual recording is requested and made, the authority is not obliged to produce written minutes in parallel, only a written extract of the recording.

Consequently, all legislations apart from the Czech Republic provide for mandatory audiovisual recording at least in certain cases. The national legislators emphasize either the safeguard perspective, that is protecting the victim of a crime from multiple re-traumatization and/or view it as a guarantee for the fullest possible enjoyment of procedural rights of the defendant, as opposed to emphasizing the other possible benefits, for example evidence against false allegations by defendants against police officers or preventive measure regarding ill-treatment of the defendant.

The three most relevant factors when providing for mandatory recording are accordingly

(1) the vulnerability of the defendant or the victim due to special individual circumstances, first and foremost being underage,

(2) the gravity of the crime, more precisely, the maximum sentence imposable, and

(3) if the defendant is held captive during the time of the interrogation, typically in police custody.

It is to be welcomed that in the majority of the countries examined, if the audiovisual recording is not mandatory, it can at least be requested as expressly provided for by the criminal procedure codes. However, it is a concerning practice if the costs of these recordings should be paid in advance by the defendant.

Also, it is interesting to see how the opinion of the general public affects the legislation and even the basic characteristics of a criminal justice system. In the Czech Republic – where the national report stated that the notion of audiovisual recording is not even part of the public discourse – there is no obligation to

[142] Article 62(3).

audiovisually record the interrogation in any of the cases. By contrast, in France the expansion of the obligation to record interrogations by law enforcement agencies was the consequence of the public outrage caused by the miscarriage of justice in the Outreau case.

Mandatory recording: the process and technicalities

In **Croatia**, it is prescribed by law that the audiovisual recording of the accused persons and witnesses in the pre-trial proceedings (in the police and state attorney office) is performed through two cameras and a microphone that are part of the recording system. The cameras and the microphone are positioned in the interrogation room in a way that one camera widely records the whole room while the other captures the close-up of the person being examined. The microphone is positioned in a way that allows recording of the voice of all the participants involved in the interrogation of the defendant.[143]

Due to the very extensive obligation to record and the evident commitment of the legislation we describe the **Croatian** model in detail, as regulated by law, referring to it as a **good practice.**

- Before the commencement of the interrogation, police will ask the suspect whether he or she has received a written instruction on the pertaining procedural rights.
- If the answer is negative, it will be handed over and asked whether he/she understands the instruction.
- If the answer is negative, the police officer will explain the suspect his/her rights in a way that he/she can understand, in plain words, if necessary.
- Before the police starts to interrogate the suspect, he/she needs to be warned that the interrogation is recorded and that the record may be used as evidence in the proceedings.

[143] Croatia, Article 6 of the Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings
At the first interrogation of the defendant or other investigatory actions carried out in the State Attorney's Office, at least one audio-video recording device is provided in each State Attorney's Office consisting of a device (central device with monitor), at least three DVD recorders, two cameras and one external microphone (Article 313 of the Rules of Procedure of the State Attorney's Office).

- If the suspect refuses to make a statement, he/she is to be released immediately, unless placed under a coercive measure.[144]
- If the suspect wishes to make a statement, he/she will first have the opportunity to do so without being interrupted.
- Subsequently, questions may be asked by the interrogating officer. During this part of the questioning, the suspect cannot consult with his/her defence attorney, but the attorney may suggest him/her not to answer particular questions. Subsequently, the attorney may also ask questions.[145]
- The interrogation of the defendant may be interrupted (1) for allowing the suspect to consult with the attorney; or (2) if the interrogation is postponed; or (3) there is a malfunctioning of the audio-video recording system; and (4) in the case of force majeure.[146] Any interruption of the interrogation of the defendant is noted on the recording and in the written record of the interrogation with stating the exact time (date, hour, minute) and the reason for the interruption as well as the time when the recording was resumed.[147]
- The police officer then gives an order to end the recording and announces that the recording is completed.[148]
- Three copies of the interrogation records are made.[149] One is sealed and submitted to the investigating judge. The second copy is immediately handed over to the suspect free of charge,[150] while the third copy is forwarded to the prosecutor by the police officer who has conducted the examination.[151]
- The audio-video recording is transcribed either partially or fully, as ordered by judge or the prosecutor. The transcript will be attached to the case file but does not serve as evidence in the course of the proceeding.[152]

[144] Croatia, Article 208a paragraph 1 and 8 of CPA.
[145] Croatia, Article 276 paragraph 4 of CPA.
[146] Croatia, Article 9 paragraph 2 of 1 of the Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings.
[147] Croatia, Article 12 paragraph 1 of 1 of the Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings.
[148] Croatia, Article 14 paragraph 1 of the Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings.
[149] Croatia, Article 275 paragraph 6 of CPA.
[150] Croatia, Article 410 paragraph 5 of the CPA.
[151] Croatia, Article 275 paragraph 6 in conjunction with Article 14 Section 1 and 2 of Ordinance on Recording of Investigatory or Other Actions in Pre-Trial and Criminal Proceedings.
[152] Croatia, Article 87 paragraph 6 of the CPA.

In **France,** the obligation of audiovisual recording concerns interrogations which take place in police stations[153] and in the office of the investigating judge. In practice, interrogations typically take place in the actual office of the investigative judge. In police custody, the interrogation may take place either in the office of the police officer, or in dedicated rooms at police premises.

In May 2008, the French Ministry of Justice issued an instruction giving guidance on the implementation of audiovisual recording in practice.[154] This instruction is partially out-dated but practitioners confirmed that the instruction is still useful.

Section 3 of the *Circulaire* 2008–12E6 of 26 May 2008 emphasises the importance of the quality of the recorded images and sound and specifies that: "the individuals filmed must be perfectly identifiable and audible and the entirety of their statements must be understandable".

Moreover, in so far as possible, the room where the interrogation takes place must be specially set up for audiovisual recordings. The *Circulaire* indicates that the room must have sufficient lighting and not suffer from background noise.

The *Circulaire* also specifies that "it may be opportune" to orientate the camera so as to capture "the face and bust in order to catch facial expressions" rather than a larger angle. There is no requirement to film the interrogated person. In practice, only the suspect and his/her counsel are filmed.

In **Hungary**, MoJ Decree 12/2018. specifies the rules and technical requirements pertaining to audio and audiovisual recording of interrogations.[155] Another decree of the Minister of Justice on establishing, operating and monitoring the use of special interrogation rooms prescribes the requirements for special interrogation rooms at police premises where audiovisually recorded interrogations of defendants who fall under the category of persons requiring special treatment shall be executed.[156]

[153] More precisely, according to the wording of article 64-1, the Court gave an interpretation of what is meant by premises of a police unit or department or of gendarmerie in charge of a mission of judicial police.
[154] Instruction of the French Ministry of Justice (Department for criminal affairs) concerning the implementation of the legal provisions on audiovisual recording of interviews of persons in police custody or appearing before an investigating judge in criminal matters.
[155] Decree no. 12/2018. (VI.12.) of the Minister of Justice on the Rules on Certain Criminal Procedure Acts and Persons Participating in the Criminal Procedure.
[156] Decree 13/2018. (VI. 12.) of the Minister of Justice on Establishing, Operating and Monitoring the Use of Special Interrogation Rooms in Police Units for Conducting Procedural Acts that Involve a Person Requiring Special Treatment.

Those rooms have to meet certain other requirements, related to the physical and emotional needs of the interrogated persons, to reinforce their procedural rights. The camera has to be installed in a way that all the events, circumstances and statements that are relevant from the point of the procedural act are perceivable, and the person concerned with the procedural act is recognizable.[157] The camera might be moved exclusively upon the order of the person who leads the procedural act. There is a recommendation for a second camera, which provides the view on a specific person being present in the procedural act, or part of the interview space or an object, or the case files. The exact time of the recording has to be indicated on the record continuously. The importance of the sound quality is also emphasized: 'a proper amount of microphones have to be installed, to make it sure that the sounds of all participants are continuously recorded. As far as possible, an individual microphone has to be provided for the leader of the procedural act, and the person who is present on the location of the procedural act, making a confession or a statement.'[158]

The audio- or audiovisual recording is continuous during the procedural act, unless the procedural act is interrupted for a particular reason.[159] The MoJ Decree 13/2018. foresees the case of "technical malfunction", when the audiovisual-recording is technically disabled. "In case of any technical problems, necessary measures shall forthwith be taken to prevent the obstacle."[160] The procedural act cannot be started before the problem is solved. If the technical problem occurs during the procedural act, the act must be interrupted and cannot be continued until the technical problem is solved. There is no space for requesting the interruption of the audiovisual recording by the affected person. In those cases where the recording is mandatory but the procedural act could not be recorded due to technical problems, or the recording does not meet the requirements, the non-recorded parts of the procedural act have to be repeated to the extent necessary.[161]

[157] Decree no. 12/2018. (VI.12.) of the Minister of Justice on the Rules on Certain Criminal Procedure Acts and Persons Participating in the Criminal Procedure; Article 55(1).
[158] Decree no. 12/2018. (VI.12.) of the Minister of Justice on the Rules on Certain Criminal Procedure Acts and Persons Participating in the Criminal Procedure; Article 56(6).
[159] Article 358(2).
[160] Article 57(2).
[161] Article 57 (5).

Consequences of the lack of an audiovisual record

The failure to make an audiovisual recording of the interrogation where such obligation is imposed on the authorities necessarily harms the interest of the interrogated person and more abstractly, the fairness of the criminal procedure.

In **France**, the only valid excuse for the failure to make a record in the cases where it is mandatory is a "technical impossibility" which is interpreted by the Court of Cassation as an "insurmountable obstacle". If the responsible authority cannot justify the failure to record, it might result in an annulment of the interrogation and even of the whole procedure by the court, if the absence of the recording in not mentioned in the transcript of the interrogation, if the "technical impossibility" is not described or the police fails to inform the prosecutor of the technical impossibility. The Court is particularly strict in its interpretation. For instance, one judge underlined during the interview that the fact that a device is out of order does not qualify as a sufficient "technical obstacle" according to the Court of Cassation. There should be a case of force majeure.

In **Italy**, the Criminal Procedure Code expressly provides for the nullity of the given procedural act if it has not been recorded despite being mandatory.[162] Such hearing cannot be admitted as evidence.

In **Hungary**, both the defence lawyers and the prosecutors alleged that there is no consequence of the absence of audiovisual recording from the point of the admissibility of evidence, even if recording would have been mandatory. The absence of a record in such a case would only affect the criminal procedure if the defence submits a motion for excluding such evidence. However, even if such motion is submitted, the exclusion of the statements made at the interrogation as evidence is questionable according to a defence lawyer interviewed.

In **Croatia**, all interviewed stakeholders mentioned the same consequences of a failure to record interrogation as prescribed by law. Such footage or the lack of footage would represent unlawful evidence. Although, according to the information

[162] CPP, Article 177.

provided by the report by the State Attorney's Office in 2017, due to the insufficient number of recording rooms and devices, there might be cases, where interrogations are not audio-video recorded, thereby unlawful evidence is produced.

VIII. Statistical data

Though one of the specific aims of the present report was the comparison of statistics pertaining to audiovisual recording in the five jurisdictions examined, this goal proved to be unrealistic.

The data this report sought to compare were not publicly available in any of the countries. All of the local project partners thus submitted freedom of information requests but even if the authorities answered, the quality and quantity of the statistics provided remained problematic. As the **Italian** report stated, "the received data were not comparable nor complete." However, it was interesting to find out that the Ministry of Justice has an agreement with an external contractor that manages audio and audiovisual recording services in all Italian tribunals.

The other deterring factor was a lack of data. The **Czech** national report stated that "the police itself conducts a very limited range of statistical data gathering, resulting in the information being practically non-existent." The only data shared with the local project partner was that as of the end of 2017 there were a total of 66 rooms fully equipped for audiovisual recordings countywide.

As a comparison: the **Hungarian** national report states that of the 4184 rooms at least occasionally used for interrogations in police units there were only 25 where audiovisual recording was possible in accordance with the CCP on 1 September 2017. However, the number significantly increased in a year and on 1 September 2018, this number was 202.

On the territory of the **Republic of Croatia**, there is a total of 110 rooms suitable for audiovisual recording that have been equipped with a total of 226 audio-video devices.

The **French** national report, similarly to the Czech one, stated that "data are not systematically collected on the recording of interrogations, either in custody or before investigating judges."

As for the number of interrogations conducted, three project partners were able to obtain statistical data.

In the **Czech Republic** a total of 1921 audiovisually recorded interrogations were performed, the subject of which mainly being a minor. In **Croatia** – were all first interrogations by law enforcement agencies are recorded – in the year of 2017, a total of 21 079 first interrogations of suspects were recorded either by the police or the state attorneys (and even more, 24 600 interrogations of witnesses were recorded despite the fact that there is no legal obligation to do so).

In Hungary, in the period between 1 July 2018 and 30 September 2018, the police conducted 100 417 interrogations nationally, out of which 1776 (2%) were regarded as interrogations involving a person requiring special treatment. As discussed above, it is not mandatory in Hungary to record such interrogations audiovisually, the interrogating officer only "may" record these interrogations. However, we may assume that a considerable portion of these 1776 interrogations were recorded.

Regarding the costs of the recording, the **Hungarian** local research succeeded in obtaining the most inclusive data. Accordingly, the average architectural cost of newly establishing a remote hearing room was approximately 3100 EUR, while the technical installation costs amounted to approximately 2670 EUR. Purchasing one camera set for an already existing interrogation room cost approximately 515 EUR. Accordingly, the National Police Headquarters spent a considerable sum, nearly 5 624 000 EUR on establishing rooms and purchasing equipment allowing for the audiovisual recording of interrogations on a larger scale.

IX. Attitude of stakeholders

In **France**, practitioners, including defence counsels, judges and police officers underlined that the audiovisual recording of interrogations is a very well-accepted requirement. The police considered that such a requirement is crucial to the investigation as it helps to establish the facts, especially in keeping a record of the exact attitude of the interviewee during the interrogation. They highlighted two benefits of recording interrogations: first, it is a safeguard against the ill-treatment of detainees, as the recording facilitates the investigation of any allegations of ill-treatment aimed at obtaining confessions during the interviews. Secondly, in the event that the offender contests his/her statements as reported in the minutes of the interrogation, recording are of crucial importance. The audiovisual recording makes it possible to check the written report against the audiovisual recording of the interview; the requirement to record reduces the opportunity for defendants to later falsely deny their statements.

A judge commented that the obligation to audiovisually record the interrogations had a "pacifying" effect: it puts an end to disputes in relation to statements made to the police and the investigating judge. This "pacifying" effect was confirmed by the police as well. One of the attorneys indicated that audiovisual recording influences the attitude of the parties, in particular the police officers and judges who adopt a "more respectful attitude" as they know that the transcript may be checked against the recording.

Interestingly, though, requests to consult audiovisual recordings are very limited in number, in less than 1% of cases before the investigating judge did the parties put forth such a request.

The interrogators interviewed in the **Czech Republic** stated unanimously that none of them had witnessed an interrogation recorded, with only two exceptions (one of the situations concerned organized crime and the case was very complex, and the other case concerned the interrogation of a victim to violence).

A high-ranking police officer stated that the decision whether to make an audio- or audiovisual recording was, indeed, under the discretion of individual police officers. Another officer described instances where recordings were being used from their practice as follows: first, the case of serious crimes for the purposes of the proper identification of the suspect as well as a nonverbal analysis of his/her behaviour, and a proof for further proceedings. Second, the case of online transitions between regions, including a transcript from that transmission.

In **Hungary**, opinions of defence attorneys on audiovisual recording differed significantly. At the end of the day, they see more benefits to it than disadvantages. They all agreed, however, that recording would be of key importance, when there is no attorney present at the interrogation – echoing the CPT's opinion that the presence of a defence attorney per se is a safeguard against illegal interrogation techniques or ill-treatment. However, half of the attorneys also claimed that audiovisual recording makes the preparation of defence strategies harder. The defendant might be in a stressful status at the beginning of the investigation which is visible on a record and may result in an unfavourable first impression on the defendant. If only written minutes are prepared on the interrogation, these factors may be offset by the wording of the minutes. Defence attorneys stated that it was an imminent part and art of defence work to help the interrogator formulate the sentences of the minutes, carefully choosing words and emphases. However, at the same time, more than half of the lawyers stated that they could recall at least one case from their practice when at a later stage of the criminal procedure they regretted not requesting audiovisual recording of the interrogation.

In **Croatia**, all interrogators emphasized that Croatia has a good legal framework that is conducive to compliance with the procedural rights of suspects and defendants. Obligation to record the defendant's interrogation in the pre-trial and investigative proceedings is particularly positive as it prevents false accusations against the police that certain procedural rights have been violated (e.g. any allegations of ill-treatment in order to obtain confession).

A further positive aspect of audiovisual recording stated by the interviewees is transparency, since the entire testimony has been recorded, the way of questioning

is visible, and it can also be controlled properly if the suspects were informed about their procedural rights.

It should be noted that the recording of police questioning was not introduced due to a mistrust of the lawful work of the police but to secure the evidence and also to check allegations that the police did not give the necessary warnings or did not carry out the interview of the suspect in a lawful manner.[163]

In **Italy**, the lawyers interviewed have expressed two diametrically opposed opinions: some deemed that the currently applied method of preparing only summarized minutes of an interrogation does not reflect the interrogation authentically, thus audiovisual recording would be useful. Others believed that audio or audiovisual recording cannot always be considered useful for defence purposes, since they might be harmful to the defendant. The public prosecutor believed that the audio or audiovisual recording of the suspect's statements is not decisive for the effective protection of his/her rights because the suspect is assisted by a lawyer and rarely decides to make statements, being able to exercise his/her right to silence; the audio or audiovisual recording is, instead, very useful for all the statements made by witnesses. The judge for preliminary investigations had a different opinion. He said that the audio/audiovisual recording is always useful as an instrument to protect the testifying person (suspect or witness) from possible pressures exerted by the interrogator and, above all, as an aid to the judge, who, thanks to the recording, can more adequately assess the credibility of the person who has made a statement.

There is a convergence of opinions regarding the usefulness of the audio recordings of the statements made by foreigners at all stages of the procedure, since these would provide a stronger safeguard concerning the right to good quality interpretation.

X. Challenges

[163] Vrhovni sud Republike Hrvatske, Pravosudna akademija, Zbornik radova - Novine u kaznenom zakonodavstvu - 2017, Opatija, 11-12. Svibnja 2017.g. str. 78. Available at: http://pak.hr/cke/ostalo%206/Opatija%202017.pdf

Though the usefulness of videotaping all interrogations at police stations cannot be denied in the light of the above-mentioned persuasive reasons and arguments, one should be careful not to set unrealistic expectations and always remember that the devil is in the details.

As a comparative study highlights: "All too often, electronic recording is put forward as a panacea. There is little consideration of how or why it will deal with the problem: it is taken for granted that it will."[164]

Even if the criminal procedural code of a given state provides for recording all interrogations in criminal procedures, it is crucial that there are no blind spots. It is equally obvious that the quality of the image and voice must be good enough to ensure that the persons on the record can be identified and their statements can be extracted. Ideally, there would be more than one camera in the interrogation room or if there is only one, it should be possible to rotate it and to zoom with it. As observed by the CPT, there is a risk that threatening gestures towards the defendant go unnoticed if the camera is fixed and its viewing angle does not cover the entire room.[165]

It increases the risk of coerced confessions and ill-treatment by police officers if it is permitted to stop recording randomly during questioning, or some parts of the interrogation can be omitted from the recording. The practice of not filming the initial stages of the interrogation or recording only the final statement of the accused is also very problematic.[166]

Audiovisual evidence may also increase the risk of bias: images may divert the viewer's focus away from other essential types of information, such as the substance of the story being told and "[u]nlikeable suspects are found guilty more easily than likeable suspects are, while the subjects are generally unaware of this effect."[167]

However, even if the criminal legislation provides for video recording all interrogations at police stations, the risk of ill-treatment by police cannot be fully

[164] Videotaping Police Interrogation. David Dixon. p. 2-3. Available at: http://ssrn.com/abstract=1392592.
[165] European Committee for the Prevention of Torture (CPT) report on its visit to Turkey in 2009, CPT/Inf (2011) 13, Article. 33, p. 22.
[166] CPT's report on its visit to Slovenia in 2006, [CPT/Inf (2008) 7], Article. 24.
[167] Reporting on Police Interrogations: Selection effects and bias related to the use of text, video and audiotape. Marijke Malsch, P. Robin Kranendonk, Jan W. De Keijser, Martha L. Komter, Meike De Boer, and Henk Elffers. Investigative Interviewing: Research and Practice (II-RP). p. 63. Available at: http://www.iiirg.org/journal.

eliminated. As revealed by the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT): "most of the alleged acts of police brutality reported to the delegation during its visit to the State party appear to have occurred in the street or in police vans during transportation of detainees to police facilities."[168]

Implementing audiovisual recording of interrogations can be only effective alongside the implementation of other measures outside the interview rooms. Suspects are especially vulnerable in custody. In order to address the problem and reduce the risk of ill-treatment, the obvious, practical solution is to equip police vans for apprehended persons or detainees with video-recording devices, as well as placing cameras in custody premises.

Lastly, it should be emphasized that equipping the interrogation rooms and police vehicles with recording devices is not per se a sufficient measure against police brutality. It is most effective in preventing ill-treatment "if it is applied together with other preventive measures, including independent complaint mechanisms and adequate training for law enforcement officials."[169]

[168] Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) to Mexico, CAT/OP/ MEX/1, 31 May 2010, Article 141.
[169] Video recording in police custody. Addressing risk factors to prevent torture and ill-treatment, Penal Reform International and Association for the Prevention of Torture, p.1. Available at: https://www.apt.ch/content/files_res/factsheet-2_using-cctv-en.pdf (15.04.2019.)

XI. Recommendations

The recommendations proposed in the country reports reflect the current status of the respective countries' criminal justice system, and particularly the extensiveness of audiovisual recording in criminal procedures. Accordingly, the recommendations vary greatly: while the Croatian country report suggests that the obligation of audiovisual recording should be extended to even misdemeanours, the Czech country report tentatively suggests that at least the interrogations of vulnerable persons should be recorded as a starting point.

For this reason, it would be hard to adduce suggestions that are all relevant and applicable to all countries. Therefore, the present comparative report seeks to establish minimum rules regarding audiovisual recording:

Audiovisual recording should be mandatory

- If the case involves a person under 18, irrespective of the person's role in the procedure (i.e. including both defendants and witnesses). This would be in line with the international obligation stemming from the principle of the best interest of the child.

- At least in the cases of the gravest crimes, punishable with more than 5 or 8 years of imprisonment.

- Audiovisual recording (or at least audio recording) should be mandatory for procedural acts involving an interpreter, in order to ensure that if doubts arise as to the quality of interpretation, proceeding authorities are able to review it later on.

- If the defendant is held in detention on any legal ground, bearing in mind that these suspects have a restricted opportunity to contact and consult a lawyer and that the majority of ill-treatment cases occur in detention facilities, as discussed in the present report.

- If the case involves a person with vulnerability. Who qualifies as such person should be regulated in clear terms, in compliance with the Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (Recommendation 2013/C 378/2).

As a safeguard, in cases where audiovisual recording is mandatory, the law should explicitly set forth that evidence acquired from procedural acts conducted in violation of this obligation shall be inadmissible.

As an interim solution, until the national infrastructures for audiovisual recording are fully established, it should be considered to allow both for defence lawyers and officials to use mobile phones capable of audiovisual recording in an adequate quality.

Defence should be free to request the audiovisual recording even in cases where the recording is not mandatory. If such a request is granted, the costs of it should be born, or at least advanced by the state.

Authorities should be obliged to provide at the very beginning of procedural acts information about the possibility to request audiovisual recording, as part of providing information about the defendant's most important procedural rights and obligations.

In case of audiovisual recordings, it should be obligatory and automatic to provide defence counsels access to these in an electronic format or on a storage device, if possible, immediately after the interrogation took place.