Harmonisation in Forensic Expertise

An inquiry into the desirability of and opportunities for international standards

Edited by

J.F. Nijboer and W.J.J.M. Sprangers
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THELA THESIS
Prinseneiland 305, 1013 LP Amsterdam, The Netherlands
Tel. +31 (0) 20 625 54 29 – Fax +31 (0) 20 620 33 95
E-mail: office@thelathesis.nl
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AA Ars Aequi
AEPC Association of European Police Colleges
AFIS Automated Fingerprint Identification System
AFR Automatic Fingerprint Recognition
AIDP Association Internationale de Droit Pénal
APR Act on the Police Registers
Art. Article
ASCLD American Society of Crime Laboratory Directors
ASTM American Society for Testing and Materials
BBS Bulletin Board Systems
BKA BundesKriminalAmbt
BRA Base Rate Availability
BRU Base Rate Use
BtMG Betäubungsmittelgesetz
C & V Consumer Goods & Veterinary Affairs
CAFE Community of Active Forensic Experts
CAPE Central Analysis Programme Ecstasy
CBCA Criteria-Based Content Analysis
CCP Code of Criminal Procedure
CCU Computer Crime Units
CEN Commune Européenne de Normalisation
Cf. Compare
CID Criminal Intelligence Division
COM Common Object Model
COM Communication of the European Commission
CPP Code de Procédure Pénal
CPT Committee for the Prevention of Torture
Cr. App Court of Appeal
CRI Criminele Recherche Informatiedienst [Dutch Criminal Intelligence Division]
CSAAS Child Sexual Abuse Accommodation Syndrome
CTS Collaborative Testing Service
DD Delikt & Delinkwent
DNA Deoxyribo Nucleic Acid
DSM-IV Diagnostic and Statistical Manual of Mental Disorders, 4th edition
DVI Disaster Victim Identification
EAEC European Atomic Energy Community
EAFS European Academy of Forensic Sciences
EC Europol Convention
EC European Community
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<th>Abbreviation</th>
<th>Description</th>
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<td>ECHR</td>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
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<td>ECHR</td>
<td>European Court on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EDU</td>
<td>Europol Drug Unit</td>
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<td>EFQM</td>
<td>European Foundation for Quality Management</td>
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<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
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<tr>
<td>ENFSI</td>
<td>European Network of Forensic Science Institutes</td>
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<td>ESS</td>
<td>European Standard Set (of loci)</td>
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<td>et al.</td>
<td>et alii (and others)</td>
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<td>etc.</td>
<td>etcetera</td>
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<td>EU</td>
<td>European Union</td>
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<td>f. i.</td>
<td>for instance</td>
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<tr>
<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>FBI</td>
<td>Federal Bureau of Investigation</td>
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<td>FFCI</td>
<td>Federal Food Control Institute</td>
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<td>FRE</td>
<td>Federal Rules of Evidence</td>
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<td>FRI</td>
<td>Food Research Institute</td>
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<td>FSL</td>
<td>Forensic Science Laboratory</td>
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<td>FSS</td>
<td>Forensic Science Services</td>
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<td>GALA</td>
<td>General Administrative Law Act</td>
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<td>GLP</td>
<td>Good Laboratory Practice</td>
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<td>HACCP</td>
<td>Hazard Analysis of Critical Control Points</td>
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<td>HAVANK</td>
<td>Het Automatisch Vinger Afdrukkensysteem Nederlandse Kollectie [The Dutch Automatic Fingerprint Collection]</td>
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<tr>
<td>HR</td>
<td>Hoge Raad der Nederlanden [Dutch Court of Cassation]</td>
</tr>
<tr>
<td>Ibid.</td>
<td>Ibidem (in the same place)</td>
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<tr>
<td>IBIS</td>
<td>Integrated Ballistic Identification Systems</td>
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<td>ICPO</td>
<td>International Criminal Police Organisation</td>
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<td>ICS</td>
<td>Integrated Circuits</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>i.e.</td>
<td>id est (that is)</td>
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<tr>
<td>IKV</td>
<td>Internationale Kriminalistische Verein [International Criminal Association]</td>
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<td>ILAC</td>
<td>International Laboratory Accreditation Conference</td>
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<td>INREP</td>
<td>International Research for the Law of the Evidence and Procedure</td>
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<td>IOCE</td>
<td>International Organisation on Computer Evidence</td>
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<td>IOFOS</td>
<td>International Organization for Forensic Odonto-Stomatologysity</td>
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<td>ISO</td>
<td>International Organization for Standardization</td>
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<td>IT</td>
<td>Information Technology</td>
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<td>JZ</td>
<td>Juristen Zeitung</td>
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<td>MHEA</td>
<td>Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>NAMAS</td>
<td>National Measurement Accreditation Service</td>
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<td>NCID</td>
<td>National Criminal Intelligence Division</td>
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<td>NFI</td>
<td>Netherlands Forensic Institute</td>
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<td>NIST</td>
<td>US National Institute of Standards and Technology</td>
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<td>NJ</td>
<td>Nederlandse Jurisprudentie [Dutch Law Reports]</td>
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<td>NJB</td>
<td>Nederlands Juristenblad</td>
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<td>NJCM</td>
<td>Nederlands Juristen Comité voor de Mensenrechten</td>
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<td>No.</td>
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<td>NRC</td>
<td>National Research Council</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>OIG</td>
<td>Office of the Inspector-General</td>
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<tr>
<td>O.J.</td>
<td>Official Journal (of the Council of the European Union)</td>
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<td>OSI</td>
<td>Office of Special Investigations</td>
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<td>P</td>
<td>Probability</td>
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<tr>
<td>PC</td>
<td>Personal Computer</td>
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<td>PCR</td>
<td>Polymerase Chain Reaction</td>
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<td>PCWG</td>
<td>Police Cooperation Working Group</td>
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<td>Pr</td>
<td>Probability</td>
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<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
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<td>R &amp; D</td>
<td>Research &amp; Development</td>
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<td>RICO</td>
<td>Raqueteer Influenced and Corrupt Organizations Act</td>
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<tr>
<td>SD</td>
<td>Standard Deviation</td>
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<td>SHA-1</td>
<td>The Secure Hash Algorithm</td>
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<td>SIC</td>
<td>Schengen Implementation Convention</td>
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<td>SIS</td>
<td>Schengen Information System</td>
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<tr>
<td>SKL</td>
<td>Swedish National Laboratory of Forensic Science</td>
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<tr>
<td>SMANZFL</td>
<td>Senior Managers of Australian and New Zealand Forensic Laboratories</td>
</tr>
<tr>
<td>STOP</td>
<td>Sexual Trafficking Of Paedophiles</td>
</tr>
<tr>
<td>STRs</td>
<td>Short Tandem Repeats</td>
</tr>
<tr>
<td>Sv</td>
<td>Wetboek van Strafverordening [Dutch Code of Criminal Procedure]</td>
</tr>
<tr>
<td>SVA</td>
<td>Statement Validity Analysis</td>
</tr>
<tr>
<td>SWG</td>
<td>Scientific Working Group</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty Establishing the European Community</td>
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<td>TECS</td>
<td>Treasury Enforcement Communications System</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TQM</td>
<td>Total Quality Management</td>
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<td>TTP</td>
<td>Trusted Third Party</td>
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<td>TWG</td>
<td>Technical Working Group</td>
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<td>UKAS</td>
<td>United Kingdom Accreditation Service</td>
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<tr>
<td>VAS</td>
<td>Visual Analogue Scale</td>
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<tr>
<td>VCL</td>
<td>Validity Checklist</td>
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<tr>
<td>VNTRs</td>
<td>Variable Number of Tandem Repeats</td>
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<tr>
<td>WBP</td>
<td>Wet Bescherming Persoonsgegevens</td>
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<th>Full Form</th>
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<td>WFOC</td>
<td>Worldwide Forensic Odontology Contacts</td>
</tr>
<tr>
<td>WG</td>
<td>Working Group</td>
</tr>
<tr>
<td>WPR</td>
<td>Wet Persoonsregistraties</td>
</tr>
<tr>
<td>WvSy</td>
<td>Wetboek van Strafvordering [Dutch Code of Criminal Procedure]</td>
</tr>
<tr>
<td>WWW</td>
<td>World Wide Web</td>
</tr>
<tr>
<td>ZFIT</td>
<td>Zurich Federal Institute of Technology</td>
</tr>
<tr>
<td>ZStW</td>
<td>Zeitschrift für die gesammten Strafrechtswissenschaften</td>
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Preface

This volume is the result of an extensive study carried out jointly by researchers from the Study Centre on Evidence (Seminarium voor Bewijsrecht) of the Universiteit Leiden and the Netherlands Forensic Institute (of the Ministry of Justice, the former Gerechtelijk Laboratorium). Both institutes used their international networks to gather information about forensic expertise and to invite people to contribute to the project. The actual research started in 1997. The research group invited a number of authors, all experienced in their respective domains, to contribute in the form of articles containing descriptions of actual situations and analyses of opportunities and impediments. Without these contributions the theoretic part of our project would not be as comprehensive as it is. The second part of the project consists of an inventory of the practices and legal regulations of fifteen disciplines in forensic expertise, carried out in fifteen countries of the Council of Europe. This part of the research is still in progress, but this volume reports on several important parts of the inventory.

The research is financed by the Dutch Ministry of Justice, Wetenschappelijk Onderzoek- en Documentatie Centrum (WODC). The Netherlands Institute for the Study of Criminality and Law Enforcement (Niscale/NSCR) at Leiden offered facilities for the frequent team meetings.

We would like to thank the authors and all the forensic experts, lawyers and police officers who completed questionnaires. We also wish to thank the researchers and students who assisted in this project; Fransje Hartog, Jasper de Jong, Joy de Winter, Robert Malewitz and Dan Pipe.

Special thanks for the assistance of Reino Rustige, Karla van Leeuwen, Atie Pols, Janneke Metz, Amina Marix Evans, Leny van der Zeeuw and Rieny Albers.

The research group:

Marjan de Boer, Joan Holthuis, Livia Jakobs, Iris de Kwant, Hans Nijboer, Leo Toornvliet, Wim Sprangers, Lia van der Westen and Sijtze Wiersma.
The Focus of this Book
1 Introduction

1 A simple case with complications

Following a burglary in Leiden, Holland, the police investigated the crime scene. Shoeprints were taken and some fingerprints lifted from a window glass. The quality of the fingerprints was not good enough for identification according to the Dutch standards, and therefore a comparison with the Dutch database was not made.

Suppose that — unless the poor quality — the dactyloscopic traces were sent by the local police to other countries within the Schengen area, in order to compare them to fingerprints in their databases. Moreover, suppose that the police in Germany found a match of eight similar points with a fingerprint in their database and that along the usual way in international co-operation the alleged perpetrator was found. Finally, suppose that the identification of the fingerprint was the crucial piece of evidence, beside some similarity in the general shoeprints. Could a conviction have followed in the Netherlands? The criteria for identification by fingerprints differ between the two countries. The defence would bring in an expert contending that the German identification standard does not meet the Dutch convention of ‘12 points of reference’ for identity. Such a claim might very well block a conviction by the Court. It is not difficult to think of more complications with respect to standards that differ greatly across the borders, even when looking at neighbour states in Europe. This example points to a difficult area of criminal law.

2 Internationality (transnationality)

International social mobility, communication opportunities, trade and traffic have contributed greatly to the globalisation of many sectors of society. This also applies to criminality and law enforcement. During the last two decades, the volume of transborder crimes and transborder criminal investigations has grown dramatically. International police, prosecutorial, and judicial co-operation has increased, as has the work of the bar and forensic experts. In all these professional sectors of the criminal justice system(s) not only has the number of international aspects in concrete cases grown, but so has the degree to which their core work has become subject to insights, norms, and standards that are no longer purely national. This applies even to the work of the courts, where international bodies review national procedures from the human rights perspective, for instance the European Court of Human Rights in Strasbourg. These factors are the background against which the idea of harmonisation becomes relevant.
The Focus of this Book

3 Desirability and possibilities

This brings us to the theme of this volume. A couple of years ago the editors of this book discussed the idea of harmonisation in the different fields of forensic expertise. The underlying notion was that forensic expertise is embodied only partly in the legal norms and practices in national systems. In most areas there seem to be plenty of professional norms (standards) and practices that are suitable for international harmonisation, although — other than in most fields of criminal law — the national elements do not necessarily seem to impede such a development.

A research plan was prepared on the question: is (European) harmonisation of forensic expertise desirable, and — assuming that the answer is not categorically no in all respects — what are the possibilities and opportunities for achieving this? This appears to be an extremely complex question, which needs careful discussion and an enormous inventory on the actual situation in dozens of forensic disciplines and in many countries.

This volume is the first result of this research. This book contains contributions from international authors. The central issue, to which the various authors contribute, is the question whether, and if so, in what respects and to what degree international harmonisation of technical norms and standards in the forensic practice can be considered as possible — at least in Europe. Attention is given to harmonisation (or compatibilisation) of laws in general, with an accent on criminal law and procedure. The authors discuss the pros and cons, as well as the conditions for harmonisation. Aspects of standardisation and quality assurance are covered in relation to forensic and legal practice, together with the complex subject of the use of probability theory in forensic science. The subject matter of the book lies at the intersection of interdisciplinary, interprofessional and international aspects of today's criminal law 'in action'.

4 Interdisciplinarity

In many fields forensic specialities have emerged all over the western world. Often institutionalisation of a specific field, as has recently happened in forensic accountancy, is a product of interaction between the needs of the legal profession and the legal institutions, with respect to non-legal or semi-legal expertise, and creativity on the supply-side (often applied science, sometimes experience from practice without academic basis). Many authors have observed the increasing impact of forensic expertise on the law, especially with regard to 'fact-finding' (investigation and evidence). It does not take a vivid imagination to see that this tendency emphasises the importance of interdisciplinary understanding. As we will see, the relevant universe of 'norms' and 'standards' is not limited to legal 'norms' and 'standards'. Disciplinary — and professional — 'norms' and 'standards' play a role that is at least as important in this field.
5 Interprofessionality

Immediately connected to the interdisciplinary aspects of the involvement of forensic expertise in the legal province is the interprofessionality. Not only do typical legal professionals (advocates, prosecutors, judges) have to collaborate with experts from other disciplines, the experts themselves have to collaborate with each other under certain circumstances, although they come from very different backgrounds and 'schools'. The same goes for the police. This means that in the area of forensic expertise, aspects of interprofessionality are always present.

6 European integration

In Europe, a conscious process of economic and political integration supplements globalisation and internationalisation as societal developments. More and more issues of criminal law and security are addressed by European supranational bodies (European Union and Council of Europe) in order to reach greater unity amongst the various European countries. The efforts by the Council of Europe to draft multilateral treaties on subjects such as extradition and mutual co-operation are still important, as are its Recommendations on several areas of criminal policy. More recently, however, the EU has become more active in this area as well. Frauds against the EU budget, corruption, and international organised crime have triggered a good deal of activity in Brussels, not to mention the extra investments in the context of the Schengen-group and Europol.

This book is not limited to the EU or the Schengen-group. With regard to the inventories that lie at the basis of some parts of the book, a selection out of the 41 Member states of the Council of Europe is taken into consideration. For the more general subjects, such as the process of institutionalisation of a field to a recognised form of forensic expertise, the writings are not limited to the European context only.

The fields covered by the term 'forensic expertise' are not too narrowly determined in this volume: they include all kinds of non-legal expertise which is or can be involved in the process of investigation and proof at all stages of a (criminal) case. Attention is therefore given not to only classical areas like forensic science and forensic psychiatry, but also to newly emerging fields like forensic psychology or forensic cryptology. Also non-academic fields are included.

7 Aim of the project

With respect to harmonisation in criminal law and criminal procedure in Europe, as in other domains, Euro-enthousiasts and Euro-sceptics may be found. This volume attempts to rationalise the debate. It is devoted mainly to opinions and general descriptions of situations, impediments and in-
The Focus of this Book

Instruments with regard to harmonisation. The book also sheds light on the very different nature of various forensic fields. Finally, it begins taking stock of current legal and forensic practices. The editors hope that their ongoing research will, in due time, lead to a second book on the subject in which the emphasis will lie on concrete empirical findings with respect to legal and forensic practices throughout Europe.

8 Spin-off

Disregarding the speed of real ‘harmonisation’ or ‘compatibilisation’ in the field known as forensic expertise, a likely effect of this study will be a growing awareness of the importance of standards, specification, certification, and monitoring processes for the quality of the work of both legal and non-legal professionals in the criminal justice systems of Europe (and elsewhere).

9 Finally

This book reflects the current international (European) situation in criminal procedure and forensic expertise.

The authors represent a variety of nationalities and the book is partially based on the answers to questionnaires from many countries. Nevertheless, the editorial board is composed of Dutch nationals. As a consequence, the editors often use examples from Dutch practice, contexts, and cases, because they are most familiar with their own experience. In order to avoid a too heavily national focus and bias, much effort was invested in describing ‘local’ phenomena in a way which is universally understandable.

Johannes F. Nijboer
Wim f.j.M. Sprangers
2 Development of the Systems of the Law of Evidence in Europe; Diverging and Converging Tendencies

Johannes F. Nijboer

Uniformity in the law across borders reminds us of earlier days. Leaving aside the scholarly law before 1800, we may think of the relatively common background of the various laws in the nineteenth century – at least at its beginning – when an important part of mainland Europe was influenced by the (French) post-revolutionary codification movement. The organization of the legal system in terms of substantive and procedural law and the administration of justice was heavily influenced by the Napoleonic era. In the rest of the world the ‘continental-Napoleonic’ model for the administration of justice was spread along colonial lines. In Latin America the legal systems took over the ‘model’ from the Spanish and Portuguese, the French left their heritage in large parts of Africa, Polynesia, Asia and the Caribbean area, the Dutch did the same in what is now Indonesia et cetera. In Europe, the important exception to this pattern in terms of classification was the UK.

‘Common Law’ spread, as did ‘Continental’, along colonial lines. Already by the time of Napoleon the USA was independent from the British Crown but they also retained a ‘Common Law’ system, like Canada, large parts of Africa, Australia and New Zealand. The difference between the two traditions can still be observed today – although some convergency certainly exists.

1 The nation states

As will be discussed in greater detail later, in the second half of the nineteenth century nationalism became a major factor in Europe – and in much of the rest of the world. For many reasons the strengthening of national institutions, languages et cetera can be considered a blessing. There are, however, also reasons to regret some of the ‘products’ of that period. Positive ‘competition’ led to world expositions where many new findings were shown. Negative ‘competition’ finally led to disasters such as the World Wars of 1914–1918 and 1939–1945.
The field of criminal law was not immune to the general tendency of drifting apart. Practice, probably already traditionally very local, was stimulated to stay 'insular' and legislation, scholarly law, and the case law of high courts became domestic rather than universal or at least transnational. The comparatist Albin Eser labeled the often still present 'insular' approach of national law within the national legal language by the national incrowd of nationally oriented lawyers the autist approach. The resulting immense variety in the law — together with the old differences between continental and common law systems — offered opportunities for the comparison of laws. It is not just by accident that the first successful attempts to create an independent academic discipline in comparative legal studies date back to about a century ago.

The twentieth century was a century of major political events and disasters (as mentioned before), but also of increasing wealth and technical progress. Politically, there were other priorities than unification or harmonisation and Europeanisation — and after the fall of the Iron Curtain in Europe, the time appears to have come to take this issue more seriously than before. General issues in the developments of the period include increasing international cooperation in criminal matters, not only with regard to criminal policy, but also, and maybe even more, in factual mutual assistance between countries in concrete cases. There is a large number of bi- or multilateral treaties with respect to international cooperation. Here the transnational and supra-national efforts in the domain of the protection of human rights should also be mentioned. Here the Council of Europe with its organs (European Court of Human Rights, Commission for the Prevention of Torture and Inhuman or Degrading Treatment et cetera) serves as a major vehicle in the convergency of minimum standards. Finally, international criminal law strictu sensu has become important (war crimes, crimes against humanity, criminalization of genocide, and also the EU 'corpus iuris' on fraud against the community budget and the open single market) as well as the work of international courts.

1 Eser, A., 'The importance of comparative legal research for the development of criminal sciences in Comparative Criminal Justice Systems', in M. Cherif Bassouni (ed), Comparative Criminal Justice systems: From Diversity to Rapprochement, Toulouse: Erès 1998, pp. 77-108. In this piece Eser criticises the traditional pride of German dogmatic specialists with regard to their 'system'. He uses the word 'over-breeding' in relation to their writings.


2 Fact-finding as a primary function of the criminal justice system

One aspect of criminal law and criminal procedure which is often overlooked at the national level, seems to be overlooked internationally as well – but perhaps to a lesser degree. This is the primary process of ‘fact-finding’ (investigation and evidence) within the criminal process. Nevertheless, one can easily mention examples of cases (national, transnational, supra-national) in which matters of sound ‘fact-finding’ are obvious. Forms of forensic expertise are increasingly involved in complex – as well as less complex cases. This quantitative and qualitative increase of weight of forensic expertise provokes the process participants and the various disciplines of expertise to pay more attention to norms and standards in that area. Taken in combination with the internationalization of the law (not only ‘in the books’ but also ‘in action’) the question of transferability of forensic investigation results shows that it is important to compare national situations and to raise the issue of harmonisation, not only of legal aspects but also of forensic accounts.

3 Scepticism about legal harmonisation

Until recently the idea of harmonisation in criminal law and criminal procedure in the EU or the Council of Europe, met a lot of scepticism, even in the founding states of the European Communities. For instance, according to some writers, the differences in statutory law and practice in relation to a major subject in criminal procedure, namely the examination of witnesses (and the function of the trial), are so great that harmonisation should be considered a pipe-dream. Even the pilot project for a European legal space in criminal matters concerning the EU budget and the single free market, as proposed by M. Delmas-Marty and others – the ‘corpus iuris’ mentioned above – has become subject of many critical comments – even by strong proponents of Europe.

4 Small steps

This being the case, there are nevertheless growing signs that small steps are being made towards greater unity. The creation of a European prosecution service in relation to Euro-corruption (as introduced in September 1999) may be considered such a step. Another area is the prosecution of alleged war criminals before international courts as well before (foreign) national courts. With regard to the investigation of killing and rape in wartime, it is important that internationally accepted standards for investigation are developed. Here it can be considered an important (small) step that the Committee of Ministers of the Council of Europe recently adopted a Recommendation No R (99) 3 on uniform rules on medico-legal autopsies.
The 'uniform' European train cabin dashboard as an example

The complexity of our subject can be demonstrated by a non-forensic example of a successful project with, in our estimation, a complexity comparable to, let us say, the harmonisation of dactyloscopic procedures, standards and devices (tools). Some years ago the European Rail Research Institute hired a team of experts (ergonomists, psychologists, computer graphics experts) to develop a uniform European Train Control System (a high tech 'dashboard') to be used 'on trains throughout Europe'. It took them five years, but they succeeded. First they travelled throughout Europe. In ten countries they asked engine drivers to demonstrate their professional work in a simulation cabin. It was amazing how much difference they found, from the various signs and track-gauges outside the cabin to small details like brakes on left or right inside. Subsequently they made an inventory of complaints and wishes of the drivers in the different countries. On the basis of the data obtained, they developed the dashboard. For us it is important to know that many of the differences and problems they found were induced by cultural differences. One other relevant aspect: due to the different circumstances the 'European' dashboard has optional facilities which are left to be filled in by the (national) users for the final (national) version.

The dynamics of the law; misrepresentations

Scholars and practitioners in non-legal fields who apply their specialties to legal problems, often misrepresent the law. Such misrepresentations can be clear: the economist considering the law as a constant 'ceteris paribus'-factor and not as a variable is often surprised by the comments of legal scholars or practitioners who consider law as something 'fluid' that changes over time (sometimes quickly, sometimes slowly, but never exactly the same today as it was yesterday). Often such misrepresentations are latent; they are not immediately recognised, but can influence the results of their work offered to the legal participants in a procedure. An example from psychiatry: in the USA the 'ultimate issue-rule' (that means that an expert witness is not allowed to give his/her opinion in terms of 'guilty' or 'not-guilty') is taken very seriously. This created a motive for the psychiatrists involved in forensic psychiatry to develop other terminological concepts that can be communicated as more 'scientific', such as the 'battered woman syndrome'. The courts seem not to block statements about the existence of such a syndrome – which may induce a verdict of 'not-guilty' – on the basis of the 'ultimate issue-rule'. In other countries, e.g. the Netherlands and other continental countries, there is no direct reason to avoid statements that are related to 'guilty' or 'not guilty', although in these jurisdictions such a decision is ultimately a decision within the province of the courts as well. Law may still be very much national, but in
many respects forensic expertise is not. And the ‘poor’ continental forensic psychiatrists do not know the exact differences in approach in the various legal systems. Nevertheless, they use American manuals and other literature as basis materials for their practice, including concepts developed for a particular American situation. Thus it happens that they unnecessarily invoke a complex ‘technical’ concept like the syndrome mentioned above before continental courts. Personally, I am pretty sure that similar examples can be found in many areas of forensic expertise. Our project is aimed at contributing to a growing awareness of these kinds of misrepresentations and helping to overcome problems which may arise therefrom.
3 Harmonisation in the Forensic Sciences

Wim J.J.M. Sprangers

Harmonisation is a relatively new idea for those working in the forensic sciences. In the last forty years industry and industrial laboratories have agreed on standard specifications for consumer products, and methods and techniques of measurement and analysis. Basic standardisation is a familiar concept in industry and it has not at all resulted in a diminishing variety of products. Quite to the contrary in fact. Manufacturers are increasingly able to produce customised products (according to fixed standards) at the same cost and of the same quality as mass-produced consumer products. In the forensic sciences, the first attempts to reach agreement about certain standards are of very recent date. This introductory chapter sketches the background of the recent interest in harmonisation and looks at some of the opportunities for further harmonisation in the forensic sciences.

1 From loose sand to cohesion

The history of the forensic sciences is a long one and it has already been described from various viewpoints. In this volume we define the forensic sciences as the sciences that contribute to the collection and examination of evidence in (criminal) cases. This refers to all natural sciences as practised in national forensic laboratories today, including forensic pathology, but also to sciences like odontology, psychiatry, psychology, historiography and accountancy.

Forensic sciences can be distinguished from the fundamental sciences (physics, chemistry, etc.) by the fact that they deal with the search for traces at the scene of the crime and the examination of the items of evidence. In many cases the samples to be analysed are not uniform and frequently contaminated with other materials. Sometimes it is possible to analyse the sample only once because of the very minute amount of mate-

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rial available. Often, when dealing with complicated or complex cases, co-
operation between experts from a variety of areas of expertise is necessary
to make it possible to draw conclusions from the evidence examined
(traces, real evidence). Most of the forensic sciences (or combinations of
these) aim at individualisation and identification of persons and/or objects.

Up until the beginning of the 1990s structural co-operation between fo-
rensic scientists or forensic science institutes was non-existent. They did of
course co-operate occasionally. Generally, there was a helpful/brotherly
attitude, especially among the scientists from the various institutes who
were involved in the same area of expertise. Loose networks existed among
scientists within the different areas of expertise.

This situation changed at the beginning of the nineties. Most countries in
Europe have only one national forensic institute. Consequently, the di-
rectors of these institutes do not have national peers (with the exception of
a few large countries). For this reason, some directors showed a growing
interest in meeting together to discuss the managerial problems they have
in common. In March 1993 ten directors of laboratories from countries in
north-western Europe gathered for the first time to talk about their com-
mon concerns (quality assurance and accreditation, laboratory automa-
tion, new developments, and education and training). The meetings that
followed attracted a growing number of participants representing an in-
creasing number of countries. The participants in these meetings discov-
ered that there were several areas in which their experts could work to-
gethertothebenefitofall. Thefocusslowlychangedfromapurelyna-
tional orientation to a more international one. Scientific and managerial
problems are generally international rather than national, unlike legislative
problems, which are not so commonly shared because most law is laid
down nationally. In October 1995, at the sixth meeting of the European
Network of Forensic Science Institutes (ENFSI), the directors signed a
Memorandum of Understanding, giving their informal network ‘official’
status. At that time ENFSI had thirty members, representing nineteen
European countries. Meanwhile ENFSI has grown to 41 members from 26
countries including representatives from Middle and Eastern Europe; ENFSI now covers most of Europe.

The first ENFSI Working Group was established by the membership early
in 1995. This was the ENFSI Working Group on Firearms and Gunshot
Residues. More working groups followed so that most areas of expertise in

2 For more about quality assurance, see Lydia Bestebreur, Evert Korthagen and Wim
Neuteboom, in this volume.

3 ENFSI is not an organisation according to any national legislation; as a consequence
ENFSI lacks a legal basis. Until now this has not been a problem, but if the organisation
continues to grow it could become one.
the forensic science laboratories now have their own working group. The working groups aim to promote co-operation between the experts of the member laboratories within their respective areas of expertise. They are meant to focus on developing methods and standards to improve the quality of the results of the investigations.

In the preceding years each laboratory developed its own methods, techniques and standards. One effect of these isolated developments was the existence of at least five different methods of shoeprint comparison, for example, with nobody willing to give up 'his baby' and work with a colleague to further develop his method. Please don’t interpret this remark as a plea for the development of a single method or system, for this is not my intention at all. In my opinion, variation and competition in the development of methods and techniques are desirable and stimulating. Although five or more competing systems in Europe alone might be overdoing things. Differences in methods make it difficult and sometimes even impossible for laboratories to exchange information. Some common basis needs to be found to make it possible to exchange data obtained with different methods and techniques.

Because the market for specific forensic applications of scientific methods or techniques is relatively small and institutes have only limited room in their budgets for investment, forensic institutions are forced to develop these applications themselves. As a consequence, the forensic sciences generally follow scientific developments slowly. Co-operation between forensic institutes is the best option to accelerate the needed scientific developments.

By the end of 1995 the first and so far only ENFSI research project group was off to a cautious start. Because of the limited number of laboratories working together on the project Three Dimensional Forensic Imaging, this group is referred to as an ENFSI Committee⁴ rather than a Working Group. In a few years’ time ENFSI has become an organisation of directors of forensic science institutes (laboratories). Most of ENFSI’s work is done in the Working Groups and Committees. At their annual meetings directors cre-

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⁴ This is an exceptional example of a committee. Normally ENFSI committees have a limited fixed number of participants working on a well-defined (organisational) task or objective. The life span of a committee is limited. The Three Dimensional Forensic Imaging Committee however is busy with a technical task and is therefore similar to a working group (technical task but a limited number of participants). The other ENFSI Committees are: Drafting Committee (drafting rules with respect to the Statute and Frameworks), Training and Education Committee, Benchmarking on Drugs Committee, and the European Academy of Forensic Sciences (EAFS is a Standing Committee which organises the EAFS meeting held every three years. This meeting is intended for forensic scientists and people interested in forensic science and is organised under the auspices of ENFSI. The ENFSI working groups are strongly involved in the organisation of the EAFS meeting. Cross-fertilisation between the various forensic expertise areas is a major aim of the meeting.)
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ate the best possible conditions for members of the Working Groups because the major aims of ENFSI can be achieved only through the work done by the Working Groups. Decisions and conclusions within ENFSI and its Working Groups are generally based on consensus.

Today ENFSI has built up contacts with sister organisations like the American Society of Crime Laboratory Directors (ASCLD) and the Senior Managers of Australian and New Zealand Forensic Laboratories (SMANZFL).

2 Driving forces

Standardisation and/or harmonisation of methods and techniques is one of the major aims of ENFSI and its Working Groups. But what are the driving forces behind ENFSI's choice of projects and what criteria are to apply where choices have to be made between projects? National domestic priorities may play a role, but there are also external forces. Cross-border and international crime are increasingly attracting the interest of nongovernmental as well as governmental organisations. The Treaty on European Union (also called the Maastricht Treaty, 1992) committed the EU nations to the 'third pillar' (co-operation in the fields of Justice and Home Affairs in the European Union). Crime became a major political issue not only nationally. The Amsterdam Treaty (1997) included amendments to the Maastricht Treaty designed to further reinforce co-operation in Justice and Home Affairs ('third pillar').

Also noteworthy are the proposals made by the group that worked on the European Legal Area Project. The results of this project are described in Corpus juris. This project was concerned with 'the search for a fairer, simpler and more effective system of criminal justice' within the area of the European Union. The underlying idea of this project was to develop standard procedures for investigating situations in which the financial interests of the Community are endangered by fraud. In the European Union criminal justice is up against obstacles caused by lack of continuity/cohesion in criminal procedure and disparity between legal systems. So far three possible means of remedying this situation have been explored: assimilation, co-operation and harmonisation. All three options also have their limitations. For this reason, closer integration of national practices was examined as a possible means of alleviating the problems. This study group proposes a set of penal rules limited to the penal protection of the financial interests of the European Union, designed to ensure in a largely unified European legal area, a fairer, simpler and more efficient system of

6 The Member States of the European Union are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
repression. Remarkable in this study was the diagnosis that the largest differences in the whole judicial procedure between the countries of the European Union are found at the preparatory stage (before trial).

2.1 Cross-border and international criminality
Mobility, traffic and trade have grown tremendously in Europe since World War II. Two events have accelerated these developments. The first important factor was removal of the major part of the internal borders in the EU to facilitate internal trade and traffic (Convention Applying the Schengen Agreement) in 1990. This had an unfortunate unintentional effect: offenders took advantage of the new opportunities as well. The second important factor was the disappearance of the iron curtain in 1989. This allowed criminals and criminal organisations in Eastern Europe to flourish. Initially lack of police control made it possible for them to increase their power locally; later they expanded their influence mainly to the 'rich' neighbouring countries in the West.

2.2 Police influence
Police forces have already worked together worldwide via Interpol for a long period of time. This nongovernmental organisation helps police forces combat international criminals and criminal organisations mainly by serving as an intermediary in the exchange of information between national police organisations. This can be achieved only if the information is standardised to a certain extent.

Because of the tasks Interpol fulfils world-wide, its major interest is information (data) that can identify persons (e.g. pictures, fingerprints). Interpol also keeps abreast of recent developments in the forensic sciences, DNA technology and intelligence databases in particular because these new developments can be very helpful in the identification of criminals.

In 1996 the Interpol European Regional Conference established the Interpol European Regional Working Party on DNA Profiling. The Working Party had two assignments: have a method developed that will enable international exchange of DNA profiles and promote the use of the DNA profiling technique in criminal investigation in Europe. The Working Party co-operated closely with three ENFSI working groups (DNA, Scene of Crime and Quality Assurance) and reported in May 1998 at the Interpol Regional Conference. The Working Party's final report was also brought to the attention of the Interpol General Assembly (October 1998, Cairo, ...
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Egypt) which recommended expanding the efforts of the Working Party to all Interpol member countries.

The exchange of DNA profiles is only possible when countries use the same or compatible DNA technological applications (with a minimum number of the same markers). Interpol's activity provided extra stimulation to forensic scientists in the various countries to work toward harmonisation of the DNA profiling technique.

Interpol has also been active in bringing laboratory and police experts together to exchange information in other areas of expertise. For example: forensic accountancy, fraud (currency, credit cards), environment and wildlife. Every three years Interpol organises the Interpol Forensic Science Symposium where overviews of progress made in the various areas of forensic scientific expertise during the three previous years are communicated.

Since 1998 Europol has been able to expand its activities. Until then only the Europol Drug Unit was operational. Europol's task is to promote co-operation in internal security within the European Union. This means that the major objectives of Europol are transborder crimes not limited to drugs but including terrorism and counterfeiting. As the work of Europol, like that of other police organisations, depends on information (data), the information available at the various national forensic institutes can also be of importance. Co-operation between Europol and the forensic institutes will therefore evolve in time, just as it has already been achieved in drug enforcement.

2.3 Political influence

Prior to the Convention Applying the Schengen Agreement there was very little pressure from the European Union on the forensic science community in Europe to establish structural co-operation or to develop harmonised or standardised methods of investigation.

In addition, the EU Police Co-operation Working Group (PCWG) initially showed no real interest in the forensic sciences. However, by the end of 1996, under Ireland's EU Presidency, this changed and early in 1997 ENFSI was officially recognised by the PCWG as an advisory body on forensic scientific matters. ENFSI recommendations are not binding to the PCWG. The PCWG decides what action to take in light of the ENFSI recommendations.

Mid-1997 the Council of Ministers of the European Union adopted a resolution on DNA. This was the first sign of high-level interest in forensic science as a tool for criminal investigation.

10 See also Edwin Kube and Rainer Dahlenburg in this volume.
The major driving force behind this interest is the fear that countries will be unable to exchange important information about suspected persons or criminals because their different methods of analysis would be likely to lead to incompatible or incomparable investigation results.

The PCWG can ask ENFSI for advice regarding a specific forensic science question. In this way there is political influence on harmonisation in the forensic sciences, even though the only basis for this political interest is the exchangeability of information about criminals. Recently the PCWG asked ENFSI for advice about DNA profiling and drugs profiling.

It should be possible to obtain a subsidy from one of the EU funding programs to strengthen harmonisation. If the PCWG accepts the recommendations made by ENFSI, it should be easier to obtain a subsidy from an EU funding program for further development of a project proposal (based on the accepted recommendations). The PCWG do not decide on funding. A nice example is the EU STOP\textsuperscript{11} program that supports the ENFSI DNA Working Group.

2.4 Economic influence

In the last ten years the management of forensic science institutes became increasingly interested in the effectivity and efficiency\textsuperscript{12} of work carried out in connection with criminal cases. The budgets of the forensic science institutes are determined in almost all countries\textsuperscript{13} (with the exception of England and Wales)\textsuperscript{14} by the Ministry under whose jurisdiction the institute falls.\textsuperscript{15} This means that no direct costs are involved for the party requesting forensic scientific expertise. The advantage of this situation is that the forensic scientist feels almost no pressure on his work so that the impartiality of investigation is almost ensured. But there are also disadvantages to this way of working. The forensic scientist may feel so involved with the case he is working on that he will attempt at all costs to draw as much information as possible from the evidence (exhibits). He will then try everything possible and in this way slow down the investigation or neglect other casework awaiting attention.

Traditionally, the objective is to perform the investigation in such a way that a report can be made for the Court (\textit{pro justitia}). However, in the police investigation phase, the forensic scientific part of the investigation of a crime need not produce absolute certainty. Indicative results suffice to help the police decide which avenue of investigation is most promising to

\textsuperscript{11} Sexual Trafficking Of Paedophiles (STOP).
\textsuperscript{12} Effectivity is a measure if whether a certain activity has achieved the desired goal. Efficiency refers to the effective operation as measured by a comparison of outcome with cost (in money) as low as possible.
\textsuperscript{13} With respect to Germany the federal situation (Bundes Republik Deutschland) but also the individual states (Bundesländer) are meant.
\textsuperscript{14} The Forensic Science Service (FSS) is an agency of the Home Office. The customers pay for the services requested.
\textsuperscript{15} Usually the Ministry of the Interior (Internal Affairs) or the Ministry of Justice.
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pursue. A greater balance must be found between absolute proof and the degree of certainty needed by the customer of forensic sciences in order to do his job. In police investigations speed can be very important. Rapid methods of investigation have to be developed for the forensic scientist to improve the efficiency of investigations and the effectiveness of the entire chain of investigation (from the scene of crime officer to the judge in court).

Automated and computerised methods are very helpful in speeding up the 'total investigation' process. However, these developments entail considerable expense. In addition to the need to do things faster, there is the need to increase exchangeability of investigation results between countries. This will bring scientists and forensic institutes together in joint development projects and thus keep the costs at an acceptable level for all participants.

2.5 Scientific motives

One of the basic activities in forensic scientific investigation is making comparisons between the exhibit under investigation and other samples. Traditionally, the scientist who interprets and draws conclusions from the findings of an investigation also performs the comparison. This is the approach in the more 'classical' areas of expertise in the forensic sciences, handwriting, firearms, marks, etc. The results of these types of investigation are subjective. By having a colleague ('shadow') perform the same investigation some degree of objectivity can be achieved. However, this way of working is very labour-intensive and thus also expensive. The use of computerised comparison systems greatly enhances the objectivity of the investigation results. At the same time speed and accuracy of the investigation increases while labour costs decreases.

In this manner the need for objectivity in methods of investigation required by the courts also supports the drive toward harmonisation. The ENFSI Working Groups must seize the opportunity to play a leading role in this process. Forensic scientists from outside Europe participate in only a few of the ENFSI Working Groups.

In the United States there are also working groups active under the auspices of the FBI laboratory. These Scientific Working Groups (SWGs, formerly Technical Working Groups, TWGs), too, aim to develop more objective methods and harmonise the techniques used. A limited number

16 Speeding up the investigations at the beginning of a criminal case can reduce the total cost and time spent on the case.
17 The 'total investigation' process includes the investigation by forensic experts and the prosecution as well as the police investigation.
18 Saks, M.J., Hastings Law Journal, 49:1069 (1998). The more subjective (or 'classical') expert areas are amply discussed by Saks in terms of 'skilled expertise' versus 'scientific expertise' (the objective expert areas).
of forensic scientists from outside the USA are invited to participate in the SWGs leading to some intercontinental cross-fertilisation.

Some criminal cases attract international attention. Especially cases in which the quality of the evidence was dubious bring discredit not only to forensic science at home, but internationally. These occurrences will stimulate the forensic institutes and their scientists to co-operate in developing scientific methods, scientific techniques and quality assurance. In this way the forensic experts and their institutes will stimulate each other to strive for a high and undisputed level of quality in investigation and expert testimony. This includes finding objective methods of investigation to replace the current subjective methods.

3 Conclusions

Thanks to increasing international contacts and networking in the forensic scientific field since 1990 a sound basis now exists for co-operation in forensic scientific methods and techniques. The organisations at the managerial level like ASCLD (American Society of Crime Laboratory Directors), SMANZFL (Senior Managers of Australian and New Zealand Forensic Laboratories) and ENFSI (European Network of Forensic Science Institutes) form stimulating platforms which give directors an opportunity to discuss their concerns and the need for objective and harmonised methods and techniques in forensic investigation. It is then up to the directors to create conditions in their institutes conducive to working out more objective methods and greater harmonisation of methods and techniques.

This will place a heavy burden on the budgets of forensic institutes. Manpower will be needed in order to perform all this work in addition to the normal casework, quality assurance, etc. and investment in new or improved equipment will often be necessary. At the same time, we must keep in mind that more objective and harmonised methods can reduce the operational costs of a forensic institute. The benefits can be even greater if we take into account the fact that automated and computerised investigation techniques can accelerate investigation and help guide the police in the direction of the most promising avenues of investigation. In principle, there are no fundamental restrictions any more from a scientific viewpoint to harmonisation in forensic expertise. The political changes in the world

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19 Reference to the O.J. Simpson case (1995) The Los Angeles Police Department Laboratory, a major site of forensic testing in the Simpson murder trial, came under scrutiny from Simpson’s defence attorneys for negligence in evidence handling and investigation. The prosecution stated that the blood evidence (DNA profile) proved that Simpson was the perpetrator, while the defence contended that the crime scene samples had been contaminated and/or planted. See: W.C. Thompson, DNA Evidence in the O.J. Simpson Trial, University of Colorado Law Review, 1996, 67(4), pp. 827–857. G.F. Uelmen, The O.J. Files: Evidentiary Issues in a Tactical Context, St.Paul: West Group 1998.
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during the last ten years and the existing networks of forensic science institutes have given an enormous impetus to thinking about harmonisation of methods and technologies used in forensic investigation.
4 Methodology of the research

Leo G. Toornvliet

1 Introduction

This chapter introduces the empirical part of the research project ‘Harmonisation in Forensic Expertise’ carried out by the Study Centre on Evidence (Seminarium voor Bewijsrecht) of the University of Leiden and the Netherlands Forensic Institute. This extensive study addresses two questions:

What similarities and differences exist in the methods of investigation practised within the various fields of forensic disciplines, and in the evidentiary and procedural rules concerned with forensic investigations? Is it possible to minimise the differences found by normalising and harmonising both the methodology and the legislation of the countries within the Council of Europe?

From the beginning of the project in 1997, the research group decided to obtain the answers to the first question by means of a survey consisting of separate questionnaires for a selection of forensic disciplines. Choosing the survey technique seems obvious, but this method has advantages and limitations which are especially important for the interpretation of the results. I will discuss some of the relevant methodological issues in more detail.

2 Survey research

Today, surveys are an important and a common tool not only for the scientist but also for practical use. With this method one can study both large and small populations by selecting samples of those populations, in order to discover the relative incidence, distribution, and possible interrelations of (sociological and psychological) variables by means of a carefully chosen technique. A second characteristic concerns conducting the survey at a single point in time, i.e. in as short a time possible. In practice the data collection of a survey study may take several weeks or even months.

1 From the original research design; also part of the cover letter accompanying all the mailed questionnaires.
2 The answer to the second question depends almost entirely on the possibility of performing a careful analysis of the results of the survey research.
If a survey is designed, improved and standardised, it can be carried out more frequently in order to measure changes of the important variables over time. A well known example of a periodically used instrument is the Eurobarometer, designed to measure (the changes in) public awareness of, and attitudes towards European Union related topics, such as the desired future role of the European Parliament, and the European Market. In the field of criminology researchers and policy makers are currently using the results of the International Crime Victim Survey, the development of which started in 1989. Since then this survey has been carried out in more than 50 countries, providing comparable information on crime levels, people at risk and opinions about police, fear of crime and the use of crime prevention measures. In the field of comparative legal studies and forensic expertise the survey technique has not been used frequently up to now.

The most important advantage of the survey technique in general is related to the fact that one tries to obtain information from a sample instead of from the total population, which, in most situations, would not be possible. This method also leads to savings of both time and money. These advantages are inevitably accompanied by some disadvantages. The sampling technique (random or not) and the sample size, chosen by the researcher, can influence the validity of the results.

3 The actual research design

In the harmonisation project the survey method is used in its most basic form. There is not enough substantial knowledge available about the differences and similarities of existing methods of investigation within the forensic fields, otherwise the researchers would have formulated a theory, or at least postulated a set of hypotheses to test empirically. Because of this lack of elaborate knowledge the survey itself is purely descriptive, a collection and arrangement of facts, often called fact-finding, combined with some relatively superficial analyses.

3.1 Selection of forensic disciplines

A hundred or more disciplines can be distinguished in the field of forensic expertise. These forensic disciplines differ from one another in numerous aspects. We have limited this study to those areas of expertise that are frequently involved in criminal cases. For instance, it seems obvious to characterise the disciplines with respect to the division into subjective and objective methods used. It can be stated that when we deal with objective measurement methods which need little further interpretation by the investigator, the whole discipline can be seen as objective. This category includes drugs, DNA, paint, fingerprints and odontology (excluding bite marks). Toxicology is objective with respect to blood-alcohol analysis; for

other toxicological investigations subjective contexts are always needed for the interpretation of the objective analysis results. All the other disciplines are considered as subjective.

A few of the forensic science disciplines use more than one basic (natural) science. In most of the disciplines two (or sometimes to a smaller degree three) basic disciplines are involved. The disciplines of paint and gunpowder residue analysis are based simply on chemistry as the basic natural science. Toxicology and drugs have their analysis basis in chemistry but the effects are studied in biology/medicine. A combination of chemical analysis and physical investigations is found in fingerprints. DNA investigations are founded in biology/biochemistry.

Physics is the basic natural science for the reconstruction of traffic accidents, toolmark investigations and computer crime (if electronics is part of physics). Forensic speech investigations are based on phonetics and physics.

The disciplines with a major medical background are pathology, odontology and psychiatry. Forensic psychology and accountancy are disciplines in their own right.

Most forensic disciplines have existed for a long time. More recently developed are DNA investigations (now replacing the classical blood-typing in most countries), speech investigations, computer crime and forensic accountancy.

Most areas of forensic expertise are organised within a forensic science institute but the following are not: odontology, psychiatry, psychology and accountancy (in specialised institutes or not organised at all). Forensic pathology is just in a few situations applied in a forensic science laboratory (e.g. France and the Netherlands), but this discipline is in most other countries a part of a medico-legal institute (often also present toxicology and sometimes also DNA and Drugs).

The above mentioned differences between forensic disciplines made it possible to classify the disciplines so that the research team could make a considered selection for the survey. In short, the dimensions of this classification are:

‘Objective’ or ‘subjective’ disciplines.

Variation based on the chemical, biological, medical and physical components of the discipline.

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6 This sharp dichotomy is of course a scientific construct; actually ‘objective’ and ‘subjective’ are the ends of a continuum: the forensic specialities differ in the degree of objectivity of their methods and procedures.
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Both older, frequently used techniques and new sophisticated techniques, which are probably not yet widely accepted in all the chosen countries.

Some techniques which are not applied in the forensic science laboratories, but elsewhere.

The aim of the choice of the various disciplines was to obtain a mixture based on the two binary classification criteria (new vs. old, objective vs. subjective) and the other criteria. For instance: new + objective + organised + physics (computer and cryptology investigation), old + subjective + organised + physics (toolmarks) and old + subjective + not organised + medical (forensic odontology). Based on these criteria 15 disciplines were selected. The lower half of table 2 shows the selection of the forensic disciplines (specific questionnaires); this table also presents the distribution of the ‘general’ questionnaires among experts (discussed in 3.4).

3.2 Sample of countries

It goes without saying that the research team was unable to study all the countries in Europe, therefore the study was restricted to the members of the Council of Europe (41 countries).

Table 1 Selection of countries

<table>
<thead>
<tr>
<th>Common law</th>
<th>Selected</th>
<th>Possible substitute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Pure</td>
<td>England &amp; Wales Malta</td>
<td>Ireland Cyprus</td>
</tr>
<tr>
<td>2. With historical continental influences</td>
<td>Sweden Germany Austria</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Continental law</th>
<th>Selected</th>
<th>Possible substitute</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Northern European (Nordic countries)</td>
<td>France Netherlands Spain Portugal</td>
<td>Belgium</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Inquisitorial</th>
<th>Selected</th>
<th>Possible substitute</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Countries in transition (former Central and Eastern Europe) a. Fast development</td>
<td>Latvia, Poland Slovakia, Russia</td>
<td>Czech Republic Ukraine</td>
</tr>
<tr>
<td>b. Slower development</td>
<td>Italy Turkey</td>
<td></td>
</tr>
</tbody>
</table>

We decided not to draw a random sample from this smaller set of countries, but a purposive sample in which the researcher uses his or her own judgement about the countries to choose, and picks only those who best meet the purposes of the study. For our research we drew a sample based

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7 In random sampling each element (country) has an equal probability of being chosen for the sample.
on two dimensions: (1) type of legal system, and (2) the frequency and intensity of scientific contact with a country. The classification of the countries on the type of legal system is based on the fundamental distinction between common law and continental law and subdivisions within both systems. Italy has been added to the selection because of the recent adoption of a different trial mode, with an adversarial character, and Turkey because this country cannot be clearly fitted in the classification of the continental law system.

The first dimension causes an independent variable with the possibility of making a distinct comparison in analysing the results of the research, the latter has been introduced in order to improve the response rate of the survey.

The final sample is shown in table 1. In addition to the list of the selected countries, this table presents possible substitutes for some of the categories in case one of the selected countries should be eliminated.

3.3 Sample of forensic experts
Considering the purpose of the study, and the sampling of countries and disciplines, the research design provided for sending questionnaires to forensic laboratories, police, public prosecutors, judges, barristers, university professors, forensic accountants, forensic psychiatrists, forensic psychologists and odontologists in all the 15 selected countries. It should be clear that a laboratory with a variety of disciplines received most of the questionnaires and an individual expert, such as a forensic psychologist, only one. The distribution of the questionnaires among (groups of) experts is shown in table 2.

Although random selection methodology is the most proper sampling procedure, it seemed hardly possible in the present survey. There is no comprehensive list of all the experts concerned with forensic expertise in the 15 countries available. Therefore the investigators were compelled to use a form of non-probability sampling. Both the Netherlands Forensic Institute and the Study Centre on Evidence (Seminarium voor Bewijsrecht) of Leiden University have at their disposal names and addresses of forensic laboratories in other European countries, police organisations and forensic experts. We sometimes approached these agencies and individuals for snowball sampling: they were used as informants to identify others who qualify for inclusion in the sample.

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8 See Johannes F. Nijboer, *The significance of comparative legal studies* (in this volume).
### Table 2 Distribution of questionnaires among (groups of) experts

<table>
<thead>
<tr>
<th>General questionnaires</th>
<th>Laboratories or independent forensic experts</th>
<th>Police</th>
<th>Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime scene investigation</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Seizure and exhibits</td>
<td>partially</td>
<td>partially</td>
<td>partially</td>
</tr>
<tr>
<td>Investigation of clothing and body</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Police administration</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Administration within the laboratory</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Quality of forensic investigation</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Police training</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Training expert</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Regulation of expert evidence</td>
<td>+</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Database</td>
<td>+</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>Countercheck</td>
<td>+</td>
<td>+</td>
<td>partially</td>
</tr>
<tr>
<td>Questions for judges, public prosecutors and universities</td>
<td>+</td>
<td></td>
<td>+</td>
</tr>
<tr>
<td>Organisation of police forces and forensic laboratories</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Specific questionnaires</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toxicology</td>
</tr>
<tr>
<td>Drugs</td>
</tr>
<tr>
<td>DNA</td>
</tr>
<tr>
<td>Forensic examination of paint</td>
</tr>
<tr>
<td>Investigation of fingerprints</td>
</tr>
<tr>
<td>Toolmarks</td>
</tr>
<tr>
<td>Forensic traffic accident reconstruction</td>
</tr>
<tr>
<td>Computer and cryptology investigation</td>
</tr>
<tr>
<td>Speech</td>
</tr>
<tr>
<td>Gunpowder residue-investigation</td>
</tr>
<tr>
<td>Forensic pathology</td>
</tr>
<tr>
<td>Forensic odontology</td>
</tr>
<tr>
<td>Forensic psychiatry</td>
</tr>
<tr>
<td>Forensic psychology</td>
</tr>
<tr>
<td>Forensic psychology</td>
</tr>
<tr>
<td>Forensic accountancy</td>
</tr>
</tbody>
</table>

### 4 The questionnaires

Surveys are usually classified by the method of obtaining the desired information. In the harmonisation project some of these potential methods were clearly undesirable. The personal interview, for instance, seemed too costly. The telephone survey – less costly and a rather fast and frequently used method – is a limited data gathering method if one needs answers to a lot of complex questions. So the team preferred the mailed questionnaire despite the fact that the response rate is generally poor.9

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9 See for instance K.D. Bailey, op.cit. p. 149.
After detailed analysis of the literature, for each of the 15 forensic disciplines a specific questionnaire was constructed by the research team in close co-operation with experts in the field involved. However, in the course of the project the researchers realised that several groups of questions, such as training of experts, the organisation of police forces and forensic laboratories and the administration on various levels, were relevant for (almost) all the disciplines. Hence additional 'general' questionnaires (see table 1) were developed as well as a questionnaire with questions for judges, public prosecutors and universities. The latter is rather comprehensive because it is a condensed compilation of four other general questionnaires: Police administration, administration within the laboratory, quality of forensic investigation and police training.

All the questionnaires contain a mixture of both closed-end and open-end questions. The latter are used because not all the possible answer categories for a question were known to the investigators in advance, but also to allow the respondent to answer a complex question in more detail and to formulate specific definitions, in reaction to essential concepts defined at the beginning of some questionnaires. The first question of the questionnaire for judges, public prosecutors and universities, is a good example:

"In your opinion, do you think that forensic investigative institutions (police and laboratories) should have a (recognised/certified) quality system at their disposal? If so, how valuable do you think/estimate this system is? If not, why not?"

There have been circumstantial scientific disputes about the use of open-end questions in which response categories are not specified, and closed-end questions in which the respondent selects one or more fixed alternatives or answer categories. Since the middle of the 1980s, open-ended questions have become rather unpopular. However, recent research has shown that closed-end questions do not have more fundamental advantages than open-ended questions. Krosnick argues that "a closed-end question can only be used effectively if its answer choices are comprehensive, and this is difficult to assure." He also discusses some rediscovered studies with the conclusion that the reliability and validity of open-end questions even exceed that of closed-end questions. This last type of question is, according to him, perhaps a more viable research tool than had seemed to be the case. Inevitable as they may be, the frequent use of open-end questions in all the questionnaires of this project provide the researchers with an enormous amount of qualitative information, which is very difficult to code and to analyse with traditional methods.

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5 Response rates

One of the well-known problems of mailing questionnaires is the sometimes extremely low response rate. In our survey we utilised all common procedures to improve the response rate in advance. First of all, every package of questionnaires was accompanied by a covering letter explaining the aim of the investigation and the importance of the recipient's participation. After some weeks the group of non-respondents received a reminder, if necessary a second or even a third one. Finally we tried to approach the non-respondent by means of telephone calls, fax messages and e-mails.

Table 3 Theoretical number of questionnaires mailed and the actual response

<table>
<thead>
<tr>
<th>General questionnaires</th>
<th>Number of questionnaires mailed</th>
<th>Number of questionnaires returned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime scene investigation</td>
<td>67</td>
<td>20</td>
</tr>
<tr>
<td>Seizure and exhibits</td>
<td>154</td>
<td>28</td>
</tr>
<tr>
<td>Investigation of clothing and body</td>
<td>125</td>
<td>15</td>
</tr>
<tr>
<td>Police administration</td>
<td>47</td>
<td>15</td>
</tr>
<tr>
<td>Administration within the laboratory</td>
<td>43</td>
<td>18</td>
</tr>
<tr>
<td>Quality of forensic investigation</td>
<td>67</td>
<td>17</td>
</tr>
<tr>
<td>Police training</td>
<td>24</td>
<td>16</td>
</tr>
<tr>
<td>Training expert</td>
<td>42</td>
<td>16</td>
</tr>
<tr>
<td>Regulation of expert evidence</td>
<td>146</td>
<td>31</td>
</tr>
<tr>
<td>Database</td>
<td>47</td>
<td>15</td>
</tr>
<tr>
<td>Countercheck</td>
<td>168</td>
<td>27</td>
</tr>
<tr>
<td>Questions for judges, public prosecutors and universities</td>
<td>104</td>
<td>11</td>
</tr>
<tr>
<td>Organisation of police forces and forensic laboratories</td>
<td>170</td>
<td>27</td>
</tr>
</tbody>
</table>

Subtotal                              | 1204                            | 256                              |

<table>
<thead>
<tr>
<th>Specific questionnaires</th>
<th>Number of questionnaires mailed</th>
<th>Number of questionnaires returned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toxicology</td>
<td>28</td>
<td>9</td>
</tr>
<tr>
<td>Drugs</td>
<td>48</td>
<td>20</td>
</tr>
<tr>
<td>DNA</td>
<td>27</td>
<td>17</td>
</tr>
<tr>
<td>Forensic examination of paint</td>
<td>23</td>
<td>16</td>
</tr>
<tr>
<td>Investigation of fingerprints</td>
<td>43</td>
<td>21</td>
</tr>
<tr>
<td>Toolmarks</td>
<td>43</td>
<td>19</td>
</tr>
<tr>
<td>Forensic traffic accident reconstruction</td>
<td>43</td>
<td>10</td>
</tr>
<tr>
<td>Computer and cryptology investigation</td>
<td>44</td>
<td>11</td>
</tr>
<tr>
<td>Speech</td>
<td>43</td>
<td>13</td>
</tr>
<tr>
<td>Gunpowder residue-investigation</td>
<td>43</td>
<td>19</td>
</tr>
<tr>
<td>Forensic pathology</td>
<td>27</td>
<td>9</td>
</tr>
<tr>
<td>Forensic odontology</td>
<td>28</td>
<td>18</td>
</tr>
<tr>
<td>Forensic psychiatry</td>
<td>26</td>
<td>13</td>
</tr>
<tr>
<td>Forensic psychology</td>
<td>25</td>
<td>8</td>
</tr>
<tr>
<td>Forensic accountancy</td>
<td>30</td>
<td>7</td>
</tr>
</tbody>
</table>

Subtotal                              | 521                             | 210                              |

Total                                 | 1725                            | 466                              |
Despite all these efforts the response rates in the harmonisation study were variable, and in some cases extremely low. The total number of questionnaires mailed was 1725. At the time of writing this, we have received 466 completed questionnaires, an average response rate of 27%. Table 3 shows the distribution of the mailed questionnaires on the general and specific topics and the number of questionnaires returned.

The response rates seemed rather good for the questionnaires on police training (66.7%) and forensic odontology (64.3%), but very low on seizure and exhibits (12%) and the general questionnaire for judges, public prosecutors and universities (10.6%). It is difficult to give an elaborate explanation for these large discrepancies, but some general factors have influenced the rates beyond any doubt.

- Some of the questionnaires (forensic pathology, for instance) were mailed later, weeks or even months, than others.
- Several questionnaires appeared to be very lengthy and may have required too much of the respondent's time to complete.
- We noticed this particularly in the case of lawyers, many of whom were sent a package of questionnaires.
- To a certain extent the snowball sampling technique failed: key persons did not always distribute questionnaires to colleagues as we requested.
- In general the co-operation of the laboratories and the police was good, especially in comparison with the judges; however in some countries the response rate appeared to be poor.
- This last factor is also important in explaining why response rates vary as they do across countries, apart from the problem that not all the recipients were experienced in reading and writing English. In seven countries response rates of over 30% were achieved (Germany: 35%; Netherlands: 43%; Austria 45%; Poland: 37%; Russia: 39%; Turkey: 41% and Sweden: 37%). Response rates in some other countries were extremely low: Italy: 3%; Latvia: 9% and Portugal 8%.

It should be clear that the rates are too low, especially looking at the percentages in a table where countries and disciplines are crossed. This influences the possibility for comparing the results of the different countries and determining the similarities and differences in the methods of investigation within the selected forensic disciplines. If only one respondent in country X returned questionnaire Y, one could ask: are his answers on the questionnaire representative? Perhaps they are, but there is a considerable chance that they are biased. Therefore one could not rely on a single completed questionnaire. On the other hand, it is not always true to say that high response rates produce survey data which are more representative, or

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vice versa. Krosnick wrote in his review article that “recent research has shown that surveys with very low response rates can be more accurate than surveys with much higher response rates.” Nevertheless, it is important to recognise that one should be very cautious in drawing far-reaching conclusions based on the analysis of countries or disciplines with a low response rate.

6 Dealing with the analysis of the data

The survey provided the research team with a unique amount of – mostly qualitative – information. In order to code the returned questionnaires Delphi data entry programs were written, based on a dBase structure. Because of the number of questions and the length of the answers, databases were designed with both numeric, character, logical and memo fields. Owing to the nature of their contents (long text strings), memo fields cannot be indexed or searched. It is, however, possible to collect all the information of one or more memo fields in a text file.

It should be clear that the data could be analysed according to a variety of points of view. I mention here:

• description of the results for one country
• (based on one or more ‘general’ or ‘specific’ questionnaires),
• comparison of two or more (groups of) countries,
• comparison of methods,
• comparison of the use of results of investigations and forensic reports,
• differences in opinion between the various forensic experts (and lawyers/police officers).

Final analyses, however, must be delayed until more information has been obtained, so a continuation of this project is necessary.

First, in order to obtain the basic information per country and discipline we need a careful comparison between the countries and their legal systems.

Second because the answers to questions are not always unambiguous, a number of respondents will be approached to provide more detailed information.

Third – and this is a well-known phenomenon in the social sciences – the results of analyses performed on the data lead to new and more precise questions.

A follow-up of the harmonisation project has now been designed. This study can be considered partially as a replication, but much more as an extension of the previous survey, with some modifications and improve-

13 In a series of analyses the researchers used the Paradox programme in order to obtain so called ‘reports’ for temporarily descriptions of some results, which are recorded in this volume.

32
ments. Obviously, in the improved design we will take into account new developments in the European Union such as the important outcome of the EU conference in Tampere (October 1999)\(^{14}\), where the issue of mutual recognition of products of investigation (evidence) was the subject of one of the conclusions (conclusion 36). See further the epilogue about this conclusion.

\(^{14}\) Presidency Conclusions of the Tampere European Council, SN 200/99.
Chapter I

European Developments in Harmonisation
1 European Developments in Harmonisation

Wim J.J.M. Sprangers

There are many kinds and degrees of co-operation in Europe: co-operation between countries (European Union, NATO, Council of Europe), between nongovernmental organisations (Interpol, Police Academies), between institutions (universities, especially in the medicine) and between companies (standardisation in the automobile and consumer electronics industry). The major driving force behind this co-operation in most cases is an economic one: the need to serve as many citizens and countries as efficiently as possible. In the area of forensic expertise co-operation means dealing with a variety of legal systems. National legislation plays an important role and the differences between the various continental legal systems in Europe are formidable.

The contributions in this chapter address the influence of European institutions on harmonisation. For a proper perspective, we need to consider legislative developments as well as developments in the forensic science field. Both are important and have their own dynamics with respect to harmonisation. Before turning to specific areas of harmonisation, it is important to examine a few basic questions relevant to harmonisation, such as what we mean by harmonisation, what we would like to achieve and what routes we must follow in order to achieve our goal. These somewhat philosophical questions are the subject of André Klip's paper. It is important to keep in mind that we are dealing with individual states that do not share a common structure, or with a kind of federal state. In Europe especially, with its many different states each with a distinct culture and language, unification (the ultimate form of harmonisation) is highly unlikely. People ruling states behave much like they do in their everyday personal lives, that is, they need be convinced that a change is necessary and they find changes easier to accept if there is something positive in the proposed changes for them. This implies approximation or convergence rather than full harmonisation processes. Each country has its own complex and more or less balanced system of law which has developed over a long period of time and which takes the national culture into account. New legislation imposed from outside can disturb this careful balance. At the same time, countries have always borrowed elements of law from other states, adapting them to suit their own culture.

The European institutions, like the European Union (EU), the Council of Europe and Europol, influence the law in their member countries. The
situation is complicated by the fact that the various European institutions do not comprise the same group of countries. Nevertheless, within the EU (formerly the European Community) there are numerous examples of action taken in civil and administrative procedures in the past that have led to a degree of harmonisation. More recently, such action has expanded into the area of justice as well, into judicial and police co-operation in criminal cases. Where national legislation already exists, EU regulations or directives will lead to certain adaptation of the national laws because countries are relatively free in the way they implement these. With the enormous differences between legal systems in Europe harmonisation of existing law is a slow and time-consuming process. Where new legislation is needed, for instance to combat new types of crime, EU regulations can have a much stronger harmonising effect.

Ron Van Geffen and Marieke Lugt use Community food law to illustrate the effect of EU directives and the degree to which Member States are bound by them. States have considerable freedom in enforcement of food law, leading to differences in enforcement practices in the EU. As long as the results of the law (sanctioning systems) in the various countries are equivalent, total harmonisation is not necessary. The situation is quite different with respect to the Council of Europe. The 41 Member States retain their sovereignty and agreement has to be reached on the basis of new treaties, unless such a basis already exists in the European Convention on Human Rights. Recommendations of the Council of Europe generally lead to 'soft law' and cultural differences will be perceptible in the resulting national laws. Peter Csonka explains these processes from the viewpoint of the Council of Europe, using seizure of objects and assets, and computer search and seizure of data as examples. From a more historical perspective Julian Schutte describes the overall developments with respect to the 'third pillar' in the European Union in the last ten years and shares his expectations for the future.

Edwin Kube and Rainer Dahlenburg discuss the role of Europol as a European institution with respect to harmonisation in the forensic science field. Europol started in 1994 as the Europol Drug Unit (EDU) so one would expect that much effort has been put into harmonisation of drug-related (analysis) methods in the meantime. This is not the case, however.

1 The EU institutions comprise the 15 members countries of the EU, however 10 of these form the Schengen area (not included are Denmark, Ireland, Finland, Sweden and the United Kingdom). The Council of Europe (Strasbourg) has 41 members.
2 The treaties of Maastricht and Amsterdam have introduced the 'third pillar' within the EU: the fields of justice and home affairs, including judicial and police co-operation in criminal matters.
3 From the Treaty of Rome (1957) until the Treaty of Amsterdam (1997) members of the EU have step by step assigned sovereignty with a kind of legislative power, however unanimity is required. As a consequence, EU directives are binding on the 15 member states.
5 For a discussion of developments in information technology (computer crime), see also Hans Henseler and Jaap Roording in this volume.
The European Network of Forensic Science Institutes (ENFSI) Drug Working Group (WG) began work in 1998 and it took some time before the forensic experts and the Europol representative reached agreement on a program. The drug problem is very diverse and also different in the various countries. In addition, the public attitude toward drug problems and official drug policies vary from country to country. This makes it difficult to agree on a program that is well balanced and within the available budgets of the participating national forensic institutes. If funds could be obtained from the EU or with the help of Europol much more progress could be made. The fact that ENFSI covers 26 participating countries while the EU comprises 15 Member States at present complicates the discussion between ENFSI and the EU Police Co-operation Working Group (PCWG).

It is clear that the forensic science institutes cannot respond to the call for a greater contribution on their part to projects required for forensic scientific support in the fight against drug abuse. They lack the necessary manpower and financial resources and their main focus is on performing analyses of drugs and determining the quantity of active components. Changing this national focus to international drug trafficking calls for an entirely different way of thinking about the methods of analysis and means that drug profiling and drug profile databases will become key issues.

Harmonisation in the forensic sciences is less hampered by legislation. More and more working groups have been formed since ENFSI started. These ENFSI Working Groups (ENFSI-WGs) consist of experts in a particular area (usually one representative from each institute involved). Overall, the ENFSI-WGs aim to support the international development of their particular area of expertise through the exchange of information and know-how, promotion of quality assurance and development of professional standards, harmonisation of methods, joint research and development projects, provision of education and training within the particular expert area and by establishing international access to data collections. These goals provide a good basis for the development of harmonised methods and techniques in the forensic sciences. However, due to the late start of most ENFSI-WGs harmonisation efforts in the various forensic sciences have only just recently begun hesitantly. In the forensic sciences as elsewhere, colleagues have to gain confidence in their fellow-colleagues before co-operation can begin. At present, the major driving force for harmonisation in the forensic science area is the necessity for exchangeability of the results of forensic investigation. Within ENFSI this impetus developed spontaneously and in response to the needs of external organisations like Europol, the EU Police Co-operation Working Group and Interpol.

About four of the 15 ENFSI-WGs already have projects aimed at standardising already applied methods. The most striking examples are the
DNA-WG and the Paint-WG. The DNA-WG started in 1997 to develop a European Standard Set of loci (ESS), stimulated by a request from Interpol to propose a method that would make it possible for countries in the Interpol European Region to exchange DNA profiles. Funds from the EU STOP program helped tremendously to speed up this project. Currently, there is an agreed ESS of 7 loci. The second example is the ENFSI Paint WG that aims to build a European reference collection consisting of all vehicle paints and standardised analyses of each paint sample. The existing paint collection of the Bundeskriminalamt (BKA, Wiesbaden, Germany) forms the basis. It is no longer possible for the BKA to maintain this collection alone; international co-operation is necessary. As described above, the ENFSI Drugs WG recently started a drug profiling program and the Scene of Crime WG started developing standardised sampling kits. Recently some of the other ENFSI WGs have started preparing a best practices manual for their respective areas of expertise. This is a first step in harmonisation.

Another good example of harmonisation can be found in the field of forensic pathology. At the beginning of 1999, the Committee of Ministers of the Council of Europe adopted the already mentioned Recommendation No R (99) 3 on the harmonisation of medico-legal autopsy rules. Arguments in favour of developing this recommendation were the increasing mobility of the European population and the growing internationalisation of legal proceedings. This recommendation provides uniform guidelines for performing autopsies and for drafting the report of the autopsy. It is now up to the Member States to take measures to follow the principles and rules laid down in this Recommendation.

This brings us to more general questions about harmonisation in the forensic science areas and its consequences for the forensic expert report or testimony. The forensic expert must address the scientific and legal questions separately. Individuals engaged in scientific investigation are generally subject to ethical rather than legal restraints. It is in the communication of the results of this scientific investigation to the police or judicial authorities that criminal law is of importance to the forensic scientist. This

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7 On specific sites (loci) on the chromosomes variable numbers of tandem repeats (STR) are present. The polymerase chain reaction (PCR) allows amplifying selected short segments of loci of the DNA molecule. By using a fluorescent tag (marker) it is possible to detect the various amplified fragments after separation by electrophoresis.


9 Sexual Trafficking Of Paedophiles (STOP).

10 In the United States standards have also been developed for the use of DNA loci by the SWG-DNA under the umbrella of the FBI. Almost all loci of the ESS are also included in the FBI set of 14 loci. This enables the exchange of DNA profiles between Europe and the USA.

11 At present the ENFSI Paint WG (or European Paint Group) has 41 member institutes from 25 countries. The WG aims to procure information and samples from automobile and paint manufacturers in order to provide analytical data on automotive paints and to add 1500 samples to the database every year.

12 See 'The focus of this Book' in this volume, p. 9.
means that in principle people working within the forensic sciences encounter no obstacles to the development of harmonised or standardised methods and technology. Stimulating circumstances are sufficient to induce experts to overcome the psychological barriers posed by lack of time (due to a heavy workload) and money (most forensic science institutes have limited budgets). In Europe the conditions needed in order to progress in harmonisation of forensic scientific methods of investigation have greatly improved since the creation of ENFSI as a platform where the directors of the forensic science institutes meet regularly. These directors can create the right circumstances for forensic experts to co-operate with their colleagues in other countries and work on harmonisation of methods. The ENFSI WGs are pre-eminently the carriers of the harmonisation thoughts. The areas of forensic expertise use both objective and more or less subjective methods. Objective methods can be harmonised far more easily than subjective methods. Harmonisation of subjective methods is hampered by the fact that the scientist's observations need to be interpreted before results (some kind of 'mean value') can be formulated. It will be much more difficult, if not impossible, to harmonise the individual interpretations based on personal experience of the scientists. Where we deal with subjective methods, priority should be given to investigating the possibilities of developing objective methods rather than to putting a lot of effort into harmonisation of existing methods. In the situations in which we can rely on objective methods a mean value and a confidence interval for the mean value can be obtained. Then, interpretation of the obtained value with respect to possible hypotheses of the events can take place. Under no circumstances is the expert allowed to draw conclusions; this is the task of the legal decision-maker. The expert's interpretation of the results of analysis is the subjective part of the investigation. This results in an expert report that is partly subjective in nature. It is very important for the expert's report to make a clear distinction between the part of the investigation that is objective (results of tests used to examine the evidence) and that which is subjective (opinion evidence). This could be a first step in the development of a harmonised checklist for expert reports. Such a checklist could contain an overview of all items that should in any case be included in every report prepared by an expert. Full harmonisation (or even unification) of expert reports is often out of the question since each case has its specific and unique aspects. Harmonisation of the expert report can only be realised in cases involving the results of an objective analysis as such. Blood alcohol analysis in relation to driving under influence of alcohol is a good example. The report can be standardised and only the alcohol percentage has to be put in the report in those situations in which the legal limit has been exceeded. As soon as more expert inves-

13 For a more in depth discussion, see Marjan Sjerps in this volume
14 In most EU countries the legal limit is 0.05%.
Harmonised methods of investigation and reports are, however, no guarantee that expert reports can be exchanged internationally when these are intended for use in court. As soon as legislation differs in the countries in question it is possible that the receiving party will not be able to use the information legally. The exchangeability of information (including expert reports) between countries that is intended for use in criminal investigations will be the major reason for further harmonisation of the national laws in Europe.

15 This refers to the requirement of double criminality. For an explanation of this requirement, see André Klip in this volume.
2 Unification and Harmonisation of Criminal Procedures in the European Union

Julian J.E. Schutte

The European Union is the embodiment of various forms of special co-operation between the creators of the Union, its fifteen Member States, following a process of progressive integration through the voluntary surrender of some elements of their sovereignty. The various forms of co-operation have in common that they are based on treaties which create an institutional framework for its development and that co-operation can only be realised through this institutional framework whenever the treaties have conferred the power to act on the institutions concerned. For that purpose, the treaties define the objectives of the various forms of co-operation. Any matters falling within the scope of these objectives can only be realised in common through the procedures set out in the treaties and with the legal consequences the treaties attach thereto, whereas any matters falling outside the scope of these objectives cannot be realised through

1 The Treaty of Maastricht, which was signed on 7 February 1992 and entered into force on 1 November 1993, has drawn up the Treaty of the European Union (TEU), which founds the Union of the European Communities (established by the treaties establishing the European Community (TEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EAEC), as amended over the years, including by the Treaty of Maastricht), supplemented by the policies and forms of co-operation established by its Titles V and VI (containing provisions on a common foreign and security policy and on co-operation in the fields of justice and home affairs, commonly referred to as the 'second and third pillars' of the European Union, the European Communities constituting the Union's 'first pillar'). The Treaty of Maastricht has been replaced by the Treaty of Amsterdam, which was signed on 2 October 1997 and entered into force on 1 May 1999. The Treaty of Amsterdam follows the pattern set by the Treaty of Maastricht: it amends the provisions of the TEU as well as the provisions of the Community Treaties. It has transferred important parts of co-operation in the fields of Justice and Home Affairs, in particular in fields of immigration, frontier controls, asylum and judicial co-operation in civil law matters, from Title VI of the TEU to the TEC, leaving only provisions related to police and judicial co-operation in criminal matters for Title VI of the TEU. In addition, it was decided during negotiations which led to the Treaty of Amsterdam to completely renumber Articles of the TEU and the TEC as they stood under the Treaty of Maastricht. Consequently, references in this article correspond to the numbers of the provisions of the TEU or the TEC 'in the Treaty of Amsterdam' version, unless otherwise indicated.

2 See (in the Treaty of Maastricht version) Articles B, J.1 and K.1 of the TEU and Articles 3 of the TEC, 3 of the ECSC and 2 of the EAEC.
such procedures. If the creators of the Union wish to confer new powers on it, they have to do so by amending the existing treaties. This process implies the convening of a conference of representatives of the governments of the Member States, the results of which must be subject to ratification by the High Contracting Parties in accordance with their constitutional requirements.3

The possible forms of co-operation within the European Union can be distinguished according to the treaties upon which the Union is founded, i.e. the three Community treaties (Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community, and the Treaty establishing the European Atomic Energy Community) the Treaty on the European Union which supplements the Community treaties with some other policies and various forms of co-operation.4 However, these other policies and forms of co-operation cannot affect the policies and forms of co-operation foreseen in the Community treaties: whenever these treaties envisage the adoption of measures in accordance with the procedures set out therein, such procedures have to be followed to that end and the legal consequences of their adoption as measures of Community law have to be accepted.5

It is assumed that the reader is acquainted with the implications of the adoption of measures such as measures of Community law pursuant to the objectives of the Community treaties. Such measures, whenever they are intended to be binding, may take the form of regulations, directives and decisions. The distinction being that regulations have general application, are binding in their entirety and are directly applicable in all Member States; directives are binding with respect to the objective, but leave to the national authorities of the Member States the choice of form and method of their implementation; and decisions are only binding upon those to whom they are addressed.6

Community instruments are subject to interpretation by the European Court of Justice, following various procedures set out in the Community treaties.7

3 As provided in Article N of the TEU (in the Treaty of Maastricht version).
4 I.e. the Provisions regarding a Common Foreign and Security Policy and, under the Amsterdam Treaty, the Provisions on Police and Judicial Co-operation in Criminal Matters.
5 This follows from the new Article 47 of the TEU, which states that '(...) nothing in this Treaty (i.e. the TEU) shall affect the Treaties establishing the European Communities or subsequent Treaties and Acts modifying or supplementing them.'
6 Cf. the new Article 249 (ex Article 189) TEC.
7 See Section 4 of Chapter 1 of Title I of Part V of the TEC, and in particular its new articles 226 (ex Article 169), 227 (ex Article 170) and 234 (ex Article 177). See also the new Article 68 of the TEC which limits the scope of the powers of the Court of Justice under Article 234 in respect of matters covered by the new Title IV of Part III of the TEC (visas, asylum, immigration and other policies related to free movement of persons).
The Member States are in principle responsible for the enforcement of Community law and their national judiciaries may be involved to that end whenever necessary. The national courts are therefore an essential instrument for ensuring compliance with the provisions of Community law. Questions concerning the proper application of provisions of Community law may arise in proceedings under national civil law, administrative law, or criminal law. This being the case, one might ask whether Community law has ever addressed the question as to how such proceedings, in which questions about the application or interpretation of provisions of Community law are at stake should be conducted. Has the Community the power to regulate and to harmonise provisions of procedural law of the Member States?

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Until recently, the answer to this question was clearly no. Under the terms of the Community treaties, in the versions established by the Treaty of Maastricht, the harmonisation or approximation of the provisions of procedural law of the Member States was not considered a Community objective, even if it could be argued that such harmonisation is not necessarily excluded by the terms of Articles 100, 100a and 235 TEC (in the Treaty of Maastricht versions).

As a matter of fact, the Community has never adopted any directives or regulations aimed at the harmonisation of rules of procedural, civil administrative or criminal law in the Member States, even though it has adopted rules which may have a bearing on certain international private law provisions applicable to rules of jurisdiction in the Member States. But this is something clearly distinct from the adoption of rules which govern the conduct of trials, the position of the parties, the use of evidence, the powers of the judges and the legal remedies against their decisions. Community law has nothing to say on such matters.

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With the entry into force of the Treaty of Amsterdam, however, the TEC has been amended to empower the Community to adopt measures aimed at a certain degree of harmonisation at least in the field of civil procedure and certain aspects of administrative procedure. According to the new Article 65, measures may be adopted in the field of judicial co-operation in

8 See footnote 1.
civil matters with cross-border implications and where necessary for the proper functioning of the internal market. This includes:

"eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

Of course, 'promoting the compatibility' of certain rules is not the same thing as 'adopting measures for the approximation' of the provisions laid down by law, regulation or administrative action in the Member States, but at least an opening has been made for the adoption of Community rules governing civil proceedings in national courts, which was not accepted before.

Similarly, according to the new Article 63, paragraph 1 point (d) the Council is to adopt:

"minimum standards on procedures in Member States for granting or withdrawing refugee status",

which opens the door for the establishment of certain common provisions governing administrative procedures in immigration matters.

Another provision, newly introduced in the TEC by the Treaty of Amsterdam, might confer even greater powers on the Community in order to protect the financial interests of the Community against fraud and other illegal activities. According to Article 280, paragraph 4, the Community shall adopt the necessary measures in the fields of prevention of and fight against fraud affecting the financial interests of the Community "with a view to affording effective and equivalent protection in the Member States". In particular, the need to afford 'equivalent protection' in all the Member States may require an assessment of the procedural rules applicable in these States. However, the provision goes on to say that "these measures shall not concern the application of national criminal law or the national administration of justice", which seems to rule out any measure adopted on the basis of Article 280 TEC aimed at the approximation of criminal or other judicial proceedings.

Under the Treaty of Maastricht, co-operation within the European Union in the field of criminal law, including co-operation between law enforcement authorities (police, customs, etc.) for the purpose of investigating crime, was one of the various forms of co-operation set out in the Treaty

10 The latter terminology has been adopted in Articles 100 and 100a of the TEC (in the Treaty of Maastricht version, renumbered as Articles 94 and 95 in the Treaty of Amsterdam version), being the specific legal bases for the adoption of Community measures in order to further the establishment and functioning of the common/internal market.
on the European Union to supplement the policies and forms of co-operation established by the Community treaties.\(^\text{11}\)

The procedures and instruments for the realisation of this form of co-operation within the European Union are different from those set out in the Community treaties, even if the differences as they existed under the Treaty of Maastricht have become less obvious under the Treaty of Amsterdam.\(^\text{12}\)

Under the Treaty of Amsterdam, the development of close co-operation in the fields of justice and home affairs is no longer defined as an objective in its own right (as was the case under the Treaty of Maastricht),\(^\text{13}\) but rather as a means to realise the much more ambitious objective of providing citizens with a high level of safety within “an area of freedom, security and justice”.\(^\text{14}\)

11 Thus, under Article K.1 of the TEU in the Treaty of Maastricht version, the forms of co-operation listed were considered as matters of common interest to the Member States “for the purposes of achieving the objectives of the Union, in particular the free movement of persons”, and such co-operation was to be conducted “without prejudice to the powers of the European Community”. In the Treaty of Amsterdam version, the Union’s objective has been reformulated as the provision of “citizens with a high level of safety within an area of freedom, security and justice”, by developing “common action among the Member States in the fields of police and judicial co-operation in criminal matters”. Providing security has thus become a self-standing objective and is no longer a ‘flanking measure’ to the establishment of an area where the free movement of persons has been ensured.

12 As far as the procedures under the Treaty of Amsterdam are concerned, measures are to be adopted under both Title IV of Part III of the TEC (at least for the first five years to come) and Title VI of the TEU by the Council, acting unanimously, at the initiative of either the Commission or a Member State and after having consulted the European Parliament. In either case (most of) the acts adopted by the Council can be annulled by the Court of Justice in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of important procedural requirements, infringement of provisions of primary law or misuse of powers, or in actions brought by the European Parliament for the purpose of protecting its prerogatives. As far as the instruments are concerned, there will be nothing comparable to Community ‘regulations’ under Title VI of the TEU, nor anything comparable to ‘conventions’ under the relevant provisions of the TEC. However, the legal character of Community ‘directives’ and ‘framework-decisions’ under Title VI of the TEU is at first sight strikingly similar and this may also be the case for certain ‘decisions’ to be taken under the TEC and the TEU. However, it should be noted that measures adopted under the TEC will belong to the special legal order of Community law, which in case of conflict with other legal rules, take precedence over such other rules.

13 According to Article B of the TEU in the Treaty of Maastricht version “The Union shall set itself the following objectives: ‘(...) to develop close co-operation on justice and home affairs; (...)’.”

14 Article 2 of the TEU in the Treaty of Amsterdam version had the following language: “The Union shall set itself the following objectives: ‘(...) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime; (...)’.”
During the period between the entry into force of the Treaty of Maastricht on 1 November 1993 and the entry into force of the Treaty of Amsterdam in 1999, a considerable number of legal instruments has been adopted by the Council of the European Union in the field of justice and home affairs, including on judicial and police co-operation in criminal matters. In the judicial and police field there are some 17 Conventions (including protocols to Conventions), more than 20 'Joint Actions' and a dozen resolutions and recommendations. Going through these instruments, one notes that questions related to the harmonisation or approximation of rules in the field of procedural criminal law have hardly been touched. Two examples of the cautious way in which this field is handled can be given.

a. In the Convention on mutual assistance and co-operation between customs administrations \(^{15}\) drawn up by the Council on 18 December 1997, one finds two basically identical provisions with regard to the use as evidence of information obtained either through assistance on request or as a result of spontaneous assistance. These provisions read as follows:

**Article 14**
Findings, certificates, information, documents, certified true copies and other papers obtained in accordance with their national law by officers of the requested authority and transmitted to the applicant authority in cases of assistance provided for in Articles 10 to 12 may be used as evidence in accordance with national law by the competent bodies of the Member States where the applicant authority is based.

**Article 18**
Surveillance reports and information obtained by officers of one Member State and communicated to another Member State in the course of the spontaneous assistance provided for in Articles 15 to 17 may be used in accordance with national law as evidence by the competent bodies of the Member States receiving the information.

From the legal point of view, these provisions do not achieve any harmonisation of the national laws of the Member States in the use of evidence in criminal proceedings. If the national laws of certain Member States were in principle to exclude the admissibility of written evidence or evidence obtained on commission, these Member States would not be acting contrary to the provisions of the Convention if they chose to uphold these laws. The permissive rules of the Convention do not go beyond the mere description of the actual state of affairs.

\(^{15}\) O.J. C 24/1 of 23.01.1998.
b. On 9 June 1997 the Council of the European Union, adopted a (non-binding) resolution on the exchange of DNA analysis results. In this resolution the Member States are invited to consider establishing national DNA databases and to build them in accordance with the same standards and in a compatible manner. The choice of standard should be studied and there should also be further study as to the possibility of introducing a system for information exchange. This information exchange should be restricted to comparative DNA analysis which may show whether a person appears in a file and can be connected with traces found in the investigations of a given offence.

Again, this is far from establishing harmonised rules on the use of certain information, in this case DNA data, as evidence in criminal proceedings. And it is indeed highly questionable whether the Treaty on European Union, in its version under the Treaty of Maastricht, would have constituted an appropriate legal basis for the establishment of harmonised rules in that field.

This may be different under the Treaty on European Union in its version under the Treaty of Amsterdam. Its objective of establishing progressively an area of freedom, security and justice is to be achieved through the adoption of measures at the level of the Union which may take the form of the definition of common positions, ‘framework decisions’ for the purpose of approximation of the laws and regulations of the Member States, other decisions for any other purpose, and the establishment of conventions, which are subject to adoption by the Member States in accordance with their respective constitutional requirements. It is clear that both ‘framework decisions’ (which resemble Community directives since they are binding upon the Member States with respect to the objective, leaving the choice of form and method of the implementation to the national authorities) and conventions are instruments which can be used for the approximation of the laws, regulations or administrative provisions of the Member States in the field of police and judicial co-operation in criminal matters.

Does this also cover the laws, regulations and administrative provisions in the field of criminal procedure? This is not clear. Close examination of the way in which the objectives of the European Union and the ways and means of achieving these objectives have been described reveals the following formulations:

17 Cf. Article 34 paragraph 2 of the TEU.
Chapter I: European Developments in Harmonisation

"The objective (i.e. to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters) shall be achieved by preventing and combating crime, organised or otherwise (...) through:

- closer co-operation between police forces, customs authorities and other competent authorities in the Member States (...) in accordance with the provisions of Articles 30 and 32;
- closer co-operation between judicial and other competent authorities of the Member State in accordance with the provisions of Articles 31(a) to (d) and 32;
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with Article 31(e)."

What does Article 31(e) say? It states that common action on judicial co-operation in criminal matters shall include:

"(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and illicit drug trafficking."

It is clear that the drafters of this article only had in mind questions related to the legal definition of offences and the penalties prescribed. Harmonisation of questions related to the law of criminal procedure, i.e. the rules governing the conduct of proceedings and evidence, are not explicitly covered by the terms of this provision.

As far as the other provisions of Articles 30, 31 and 32 of the new version of the TEU are concerned, some seem to address matters of criminal procedure. For example, Article 30, paragraph 1 (d) states:

"Common action in the field of police co-operation shall include:
(d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime."

This provision not only serves the purpose of enabling the law enforcement authorities of the Member States to learn from each others’ successes and failures, but also to develop practices which would prevent evidence resulting from the use of a particular investigative technique from being inadmissible or technically infeasible in the courts of other Member States. However, the provision limits itself to action consisting in ‘common evaluation’ and does not expressly envisage the drawing up of harmonised rules in this area.

18 Cf. Article 29, second paragraph of the TEU.
Another relevant provision might be Article 31(c) of the new version of the TEU which reads:

“Common action on judicial co-operation in criminal matters shall include:
(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation.”

This provision covers a wide range of rules varying from rules governing criminal liability (corporate bodies!) and rules governing the substantive conditions under which co-operation shall be provided or may be refused, rules governing the procedures for rendering assistance and the recognition of foreign judicial acts, to rules with respect to the consequences of delays or the scope of bank secrecy laws.

In principle, one cannot exclude the possibility that the Council adopts measures on the basis of this provision which also envisage greater compatibility of rules of criminal procedure, including the law of evidence, applicable in the Member States, although one has to be able to demonstrate that such measures would indeed improve judicial co-operation between the Member States. To the extent that such measures are adopted by the Council in the form of ‘framework decisions’ (and not of a convention subject to adoption by the Member States in accordance with their constitutional requirements), the legality of such measures is subject to control by the Court of Justice of the European Communities. According to Article 35 paragraph 6 of the new version of the TEU, the Court of Justice has jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence (...). This entitles the Court to determine the scope ratio materiae of the provisions of Articles 30 and 31.

It should be added that these Articles state that common action in the fields of police and judicial co-operation in criminal matters shall include the issues subsequently listed. This may imply that these lists are not necessarily exhaustive and allow the Council to address other matters.

Even if promotion of the compatibility of the rules of criminal procedure in the Member States is not as clear an objective as in the case of rules of civil procedure under the new Article 65 TEC, there seems to be room for the adoption of such rules as rules of the European Union under the new provisions on police and judicial co-operation in criminal matters in the TEU.
This leaves us with the final question: What are the prospects for the adoption of such rules? Quite frankly, my expectations are not very high. The reasons for my scepticism are as follows:

In the first place one has to remember that any measures to be adopted by the Council on the basis of the provisions of the TEU have to be adopted unanimously. The delegations of all the Member States have to agree and I see little likelihood that this principle will be relinquished in the near future. Under the new Treaty provisions it would be possible to establish forms of 'closer co-operation' between at least a majority of the Member States in accordance with the provisions of Articles 40 and 43–45 TEU, but this is unlikely for the purpose of harmonisation of criminal procedures, simply because there are too many fundamental differences in the legal systems of too many Member States. It is an illusion to believe that there are only two basic systems of procedural law in Europe, the Continental system and the Anglo common law system. The differences between the various European continental systems are formidable:

The principle of mandatory prosecution divides Austria, Germany, Italy, Greece, Portugal, Spain, Sweden and Finland from the Benelux countries, France and Denmark which share the principle of prosecutorial discretion with the United Kingdom and Ireland. This distinction has very far-reaching consequences for the structure of trial procedure and the organisation of the judiciary.

Such is also the case for the distinction between legal systems which rely to a very large extent on adversarial procedures in court and those in which the conduct of pre-trial investigations by investigating magistrates is much more important. This has consequences for the division of powers between the police, the public prosecution authorities and, where they exist, investigating magistrates.

The capacity of the criminal justice system to deal with the total volume of crime directly influences the extent to which extra-judicial sanctioning mechanisms exist. This will inevitably vary from one Member State to another as long as the financial means available for the functioning of the criminal justice system and the allocation of particular means to the

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19 According to these provisions it would be possible for a limited number, but at least a majority, of Member States to establish closer co-operation between themselves while making use, for that purpose, of the institutions, procedures and mechanisms laid down in the TEU and the TEC, subject to a number of conditions. Where such closer co-operation is authorised in the area of Title VI of the TEU, it should have the aim of enabling the Union to develop more rapidly into an area of freedom, security and justice.

Court system rather than to the police, the prison system or prevention, vary from one Member State to another.

Procedures may differ depending on whether the trials are by professional judges, lay judges, or juries. The role of private parties (victims) in criminal proceedings has been regulated very differently from one Member State to another and this in turn influences the organisation of court procedures.

The organisation of proceedings may heavily depend on whether it is possible to try a person *in absentia*, and if so, under what circumstances.

Special summary proceedings have been introduced in some Member States solely in order to cope with petty offences committed on a mass scale (e.g. traffic offences), but not necessarily in the same manner in all Member States.

The rules of evidence are governed by different principles: in some Member States there are no legal restrictions on the kind of evidence which may be used in criminal proceedings; in other Member States such restrictions have been introduced either by statutory law or case law. As far as the evaluation of evidence by the courts is concerned, the laws of most, but not all, Member States allow their courts a wide measure of discretion, but the principle of relying on the 'conviction intime' of the judges is certainly not universally recognised. And of course the rules both on admissibility of evidence and on the weight to be given to various types of evidence have a considerable effect on the way in which evidence is produced and on the extent to which proceedings are conducted with a view to possible admissibility challenges in court.

By way of example one might consider the ways in which the various legal systems of the Member States – and their practices – deal with the phenomenon of witness intimidation and the need to balance the interests of conducting a fair and public trial against the interests of protecting the physical integrity of individuals put under an obligation to not to obstruct the course of justice.21

Given the extent to which rules of criminal procedure are directly related to, and may affect the organisation of the entire criminal justice system, given the fact that detailed modifications in one stage of the proceedings necessitate changes in other stages, and given the fact that organisational changes in the criminal justice system inevitably have financial consequences, it is obvious that harmonisation of procedural rules at the European level is much more complicated and drastic than harmonisation of substantive rules, which do not have these same effects.

Only if all Member States are convinced that their administration of justice will benefit from the introduction of common European procedural rules,

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to be applied at the national level, does such an exercise have any chance of success. So far there is little evidence that this will be among the priorities on the political agenda of the Council.

The forty-year history of the EC shows that it is possible to create an internal market, where the free movement of goods, services and capital has been guaranteed as a result of the realisation of a vast programme of approximation of substantive laws, regulations and administrative provisions of the Member States, without harmonising the procedural rules applicable in the Member States for their enforcement. Many will argue, and probably argue convincingly, that the same is likely to be true for the creation of an area of freedom, security and justice.
The Growing Impact of International Instruments on Domestic Criminal Procedural Law

Two Examples from Recent Council of Europe Practice

Peter Csonka

1 Introduction

International criminal law has long been restricted to some specific forms of inter-state co-operation, such as extradition of fugitives or mutual legal assistance. This traditional area of international criminal law has also been the focus of the first generation of Council of Europe criminal law conventions (for example the European Convention on Extradition – 1957 or the European Convention on Mutual Assistance in Criminal Matters – 1959) and responded to specific needs of their time and to a certain kind of criminality. While these conventions served their purpose well and proved to be indispensable pillars of multilateral co-operation¹ in criminal matters in Europe, States soon realised, particularly from the 1960s – 1970s, that new forms of criminality, e.g. traffic offences, terrorism and drugs, as well as problems experienced in mutual assistance, made it necessary to harmonise certain elements of substantive criminal law as well.

The harmonisation of substantive criminal law has always been within the remit of the Council of Europe and current trends seem to suggest that it will remain so in the foreseeable future. Such 'harmonisation' conventions, which one could see as the second generation of Council of Europe criminal law conventions, are fairly recent instruments (Money-laundering – 1990; Environmental Crime – 1997; Corruption – 1999) and they differ on several points from the first generation – international co-operation instruments:

They require contracting parties to incorporate into domestic legislation provisions which criminalise certain types of conduct, in a uniform manner;

- Often there is little domestic legislation available on the subject matter;
- They require a high-level of substantive and not procedural compliance of contracting parties, which increasingly leads countries to supplement them by procedures following up practical implementation.

Some of the second generation instruments also contain provisions on criminal procedural law, though not systematically. Procedural law issues are usually included in harmonisation conventions because of their international co-operation provisions: as several of these conventions 'update' or supplement the first generation conventions on international co-operation and provide for new means of co-operation (e.g. tracing or seizure of objects), the corresponding domestic powers have to provided for as well, so that contracting parties will be able to use these new means of co-operation. The next part of this paper will deal with two different procedural law issues, both recent examples of the harmonisation of certain investigative powers through international instruments: (i) the first is seizure of objects, including assets and other criminal proceeds as well related powers (freezing and forfeiting/confiscating such proceeds), though some of these may have substantive law variations, (ii) the second is computer search and seizure of data.

2 Seizure of objects and assets as well as related powers

When adopting the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990, the Council of Europe not only sought to establish common elements for the co-ordinated criminalisation of money-laundering, but also to complement already existing instruments, drawn up within the framework of the Council of Europe. The Explanatory Memorandum noted in respect of the European Convention on Mutual Assistance in Criminal Matters that Article 3 (1) of that Convention, which concerns the execution of letters rogatory “relating to a criminal matter (...) for the purpose of procuring evidence or transmitting articles to be produced in evidence” does not apply to search and seizure of property with a view to its subsequent confiscation. Furthermore, at the time of the negotiations, many States had no domestic laws enabling them to use powers to trace, seize or confiscate assets. Investigations, searches, seizures and other measures were often carried out on the basis of Codes of Criminal Procedure which had been drafted many years before. Equally, Member States’ legislation differed widely with respect to confiscation – often regarded as an acces-

sory penalty and not as a tool which can be used to ultimately combat serious crime – in respect of both substantive and procedural rules.

Chapter II of the Convention deals with “measures to be taken at national level”, anticipating that contracting parties will harmonise an important part of the Codes of Criminal Procedure, namely, that which concerns (1) confiscation measures (Article 2), (2) investigative and provisional measures (Article 3) and special investigative powers and techniques (Article 4).

Article 3 imposes an obligation to enact legislation so that property which is liable to confiscation can be traced and identified and that such property can be seized or ‘frozen’ (blocked). Similarly, bank, financial or commercial records should also be liable to seizure and available for the purposes of investigation or ultimately for enabling confiscation. The Convention clearly indicates that bank secrecy may not be an obstacle to this. The proposed Directive by the European Communities should be considered in this context.

Under Article 4, the Convention gives contracting parties an incentive to look into the use of so called new investigative techniques, such as the use of telephone tapping, monitoring orders or computer searches. The Explanatory Report specifies that a monitoring order is an order by a judge directed to a bank which is obliged to give the judge information about transactions concerning bank accounts, etc. Such orders usually specify that all transactions within a limited period of time must be reported to the judge. Many countries have monitoring orders today.

Article 5 provides that measures must be taken at the national level to ensure that ‘interested parties affected by’ investigative measures, searches and seizures and by confiscation have effective legal remedies in order to preserve their rights. The provision concerns mostly bona fide third parties but might in some instances, in particular before the final decision to confiscate has been rendered, be interpreted as concerning the accused or the subject of a confiscation order. The ‘legal remedies’ referred to implies that contracting parties will make provisions for a system whereby the authorities inform the parties in a timely manner of the possibilities for challenging decisions or measures taken. Equally, they are to be informed that such challenges may be made even after a confiscation order has already become enforceable if the party had no earlier opportunity to do so and that such remedies allow for a hearing in court. Finally, they are to be informed that any interested party has the right to be assisted or represented by a lawyer and to call witnesses or present other evidence in addition to the right to have the court decision reviewed.

Harmonisation of domestic powers related to the seizure and freezing of assets is, however, not the sole objective of the Convention. It is in fact a preliminary condition to enable contracting parties to provide legal assis-
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tance to other contracting parties, based on these specific measures. Article 8 of the Convention obliges the parties to provide, upon request, the widest possible measure of assistance in the identification and tracing of instrumentality, proceeds and other property liable to confiscation. Such assistance should include any measure to provide and secure evidence about the existence, location or movement, nature, legal status or value of the property. It is clear that this paragraph converges with assistance rendered under the 1959 European Convention on Mutual Assistance in Criminal Matters, but it goes further: it allows, for example, police co-operation which does not involve coercive action. The Explanatory Report also mentions that assistance to customs authorities might be included if the assistance does not involve coercive action.

Though the Council of Europe Laundering Convention itself does not contain specific procedures for monitoring the compliance of contracting parties with the Convention’s provisions, it is possible to gain some insight into its implementation at domestic level, and thus measure its impact on domestic procedural laws. The Financial Action Task Force (FATF) and its regional FATF-style sister body operating within the framework of the Council of Europe, both carry out so-called ‘mutual evaluations’ or ‘peer reviews’, through which multinational teams assess the antilaundering regime of participating countries against international antilaundering standards. In addition, both organisations conduct so-called ‘self-assessment’ surveys, by which countries periodically assess their own performance in implementing the same international anti-laundering standards, which include the 40 recommendations of the FATF as well as — for the Council of Europe evaluation process — its Convention on Laundering.

For the purposes of international co-operation, which supposes some level of harmonisation of certain procedural powers, the FATF considers a country to be in compliance with Recommendation 37 (Use of compulsory measures for evidentiary purposes — production orders, search of premises, seizure of objects) when it is able to give effect to a legal assistance request related to a money-laundering investigation or prosecution concerning the proceeds of a serious offence and covering (i) production of records, (ii) searches of offices and homes and (iii) seizure of records in relation to financial institutions, other juridical persons and private persons. Partial compliance has been treated as the ability to do some of the above. All but three members were in compliance (among the exceptions there were two contracting parties of the Laundering Convention which

4 Ibid., pp. 135–139.
6 This Recommendations corresponds to a large extent to Article 4 of the Laundering Convention.
only partially complied). Italy could not require production of records, but achieved the same result by search and seizure and was therefore treated as being in compliance. As the Explanatory Report of the Laundering Convention noted, “if the ‘freezing’ of a bank account has been requested, the requeste state should not refuse to co-operate merely on the ground that the national law only provided for ‘seizure’ in the case under question. (...) that national procedural laws could sometimes differ widely but the end result would often be the same despite formal differences”.

As far as Recommendation 38 (the identification, freezing, seizure and confiscation of the proceeds of crime) is concerned, countries were considered to be in compliance with this Recommendation when they were able to give effect to a request for legal assistance in a money-laundering case by doing all these things in relation to the proceeds of money-laundering of serious offences, or of the predicate offence, and of property of corresponding value. Partial compliance was seen as an ability to assist in relation to at least half of these measures, or to provide all types of assistance in relation to drug trafficking or drug money-laundering only. Again, while most contracting parties of the Laundering Convention were said to be in compliance, four only achieved partial Compliance and one was found not to be in compliance at all.

It can be inferred from the above survey results that most contracting parties do not consider internal legal or other difficulties to be insurmountable for harmonising procedural legislation with the provisions of the Convention, at least as far as seizure for evidentiary purposes is concerned, nor when it comes to introducing provisional measures aimed at locating and blocking (freezing) property liable to confiscation. Nevertheless, it seems that this optimistic judgement may need to be revised in the light of mutual evaluations, where more loopholes (and even lack of implementation) are detected.

3 Computer search and seizure of data

Recommendation No R (95)13 concerning problems of criminal procedural law connected with information technology addressed computer search and seizure as a fundamental tool to investigate computer crimes. It recommended, in particular that:

“(i) The legal distinction between searching computer systems and seizing data stored therein and intercepting data in the course of transmission should be clearly delineated and applied.

This Recommendation covers broadly Articles 2 and 3 of the Laundering Convention.
(ii) Criminal procedural laws should permit investigating authorities to search computer systems and seize data under similar conditions as under traditional powers of search and seizure. The person in charge of the system should be informed that the system has been searched and of the kind of data that has been seized. The legal remedies that are provided for in general against search and seizure should be equally applicable in case of search in computer systems and in case of seizure of data therein.

(iii) During the execution of a search, investigating authorities should have the power, subject to appropriate safeguards, to extend the search to other computer systems within their jurisdiction which are connected by means of a network and to seize the data therein, provided that immediate action is required.

(iv) Where automatically processed data is functionally equivalent to a traditional document, provisions in the criminal procedural law relating to search and seizure of documents should apply equally to it.

The Recommendation's main objective was to establish a comprehensive set of principles which could give guidance to national legislations when dealing with computer search and other related problems of criminal procedural law. In so doing, the Recommendation filled in a gap that was created by the emergence of computer crimes and, in particular, by the uncertainty of whether or not traditional coercive powers, such as search of premises and seizure of tangible objects, could apply in an information technology environment.

A previous Council of Europe Report on computer-related crime (1990)* also examined, on the margin of the substantive law issues, similar procedural law and international aspects. It pointed out in its conclusions on procedural law aspects that "in most countries, it is unclear how the traditional coercive powers can be applied and suffice for effective investigations in computerised environments". It added that "in common law countries there are specific legal problems related to the admissibility of computer data in trial process". The committee which elaborated the report recommended that "in future, consideration should be given to these questions either in computer-specific context or in the context of a more general harmonisation of the various national coercive powers. In the long run, a harmonisation of coercive powers and of the respective legal safeguards would promote international legal co-operation in all fields".

The Explanatory Report of Recommendation No R (95)13 further specified the problem: "The purpose of criminal investigations in respect of

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8 Recommendation No R (89)9 on computer-related crime and Report, Council of Europe, 1990.
computer-related crimes is to obtain certain data from computer networks and systems. Traditional tangible objects may be the object of seizure by investigating authorities and, if appropriate, brought to the forensic laboratory in order to be searched further. Such search would be possible with a simple Personal Computer or Pocket Computer, but is factually impossible when a multi-user system is involved, consisting of numerous devices connected by means of cables or by the telecommunication system. Moreover, given the gigantic quantity of data which can be processed and stored by these systems as well as the nature of the logical computer operations during the processing and storage, in a considerable number of cases, it will be practically impossible to identify and to access the data in those systems, needed as evidence. Therefore, a search in a computer system of any significance will only be possible via the normal functions of the system and will, to a certain extent, require the co-operation of the system operator or the user who has the specific data under his control. Legislation currently in force in member States do not provide in general for adequate rules to enable such investigations and to establish the duties of the persons involved, nor do they regulate the rights of the defence in this field in an appropriate manner”.

Traditionally, Member States’ procedural laws contain different legal powers that enable investigating authorities to gather data in computer networks, notably search and seizure as well as interception of telecommunications. In this respect, part of the problem in devising adequate law enforcement powers to enable interception of computer communications or other functions is that there is a conceptual difference between ‘search’ and ‘interception’. While the end result is the same (i.e. the acquisition of data and information), these conceptual differences result in two distinct coercive powers, which may require differences in their definition and application (such as preconditions to use, scope of the power and safeguards). Some states do not clearly distinguish between the two and, therefore, both coercive powers are exercised pursuant to the same legal authority. To avoid such confusion, Recommendation No R (95) 13 made a number of useful suggestions to national legislators and clarified under what circumstances which powers should apply. In particular, it set out the main differences between ‘search’ and ‘interception’.

‘Search’ is *ex tunc* and aims at gathering evidence (e.g., data and information) that has been recorded or registered in the past in either tangible or intangible electronic form. The investigators search or inspect such recorded data, and often seize or physically take away the tangible record or the medium upon which intangible data is recorded, or make a copy of such data. The gathering of this data occurs during a single moment in time; that is, with respect to the period of the search and data existing at that time. The preconditions for obtaining legal authority to undertake a search is the belief that such data exist and will afford evidence. Generally,
the investigators are physically present at the premises where the recorded data is stored in order to undertake the search (although this may not necessarily be required in the case of a search of an interconnected computer system, discussed below). Search is generally non-secretive; it is executed openly and the person whose records are being searched, or the custodian of the records, is aware that the search is taking place or, if not present, becomes aware upon the discovery of the removal of the records or by formal notice by the investigators.

As opposed to search, 'interception' is ex nunc and aims at gathering evidence (data and information) generally being created at the time of the gathering. The data are not in a tangible form, but are in the form of audible sound waves or some type of electrical, electronic, optical or other format. The flow of the data is generally not interfered with and, instead of seizure, a recording or registration is made of the data being communicated. The gathering of this evidence takes place during a certain period of time. Authority to intercept is sought in respect of a future event. The pre-conditions for obtaining legal authority to undertake the interception is the belief that such data will be created or, if already created and recorded, will be transmitted during a period of time in the future. Interception is generally secretive in nature. At least one of the individuals who is creating or transmitting the data is unaware of the surreptitious recording or registration of the data flow. The physical presence of an investigator is not necessary at the time of the data flow, although this can occur where the investigator is a participant in the exchange of data or the investigator is physically, albeit surreptitiously, nearby.

In the computer environment, however, some of the above characteristics overlap or distinctions become blurred. For example, it was stated above that, generally, in the case of search, the investigators are physically present at the premises where the recorded data are stored or present in order to carry out the search. The execution of search is generally not secretive. The situation of interconnected computer systems provides the possibility of carrying out the search of stored data from remote terminals, and without the knowledge of the holder or custodian of the data (as long as the data are only examined or copied, and not transferred).

It was also stated that, generally, search refers to existing recorded data, while interception refers to data that are being processed into the form in which they are concurrently transmitted and intercepted. However, data, which has been previously recorded, may be transmitted in the same or other electronic format, and during this period of transmission may be intercepted. Computerised data are transmutable. Data within a computer system can change forms (e.g. be converted from electromagnetic form to a paper printout, a visual representation on a monitorscreen or an auditory simulation of human speech) and it can be transmitted from one location
to another. In each of the above situations, which legal regime (search or interception) should apply? What is the important characteristic that should distinguish the two forms of evidence gathering, particularly in situations where some characteristics overlap? In the case of, for example, E-mail or voice mail, which legal regime should apply (search or interception)? Is it dependant on the format or the inertness of the data at the time of the gathering; that is, are the data static, recorded and stored (in which case search and seizure would apply), as opposed to the data, being fluid and in movement (in which case interception would apply)? Can one regime be circumvented by waiting for a time when the form of the data has changed (e.g. from a state of transmission to a state of storage), and utilising the investigatory power applicable to the new form?

In order to avoid ambiguity as to which legal regime should apply in any particular situation, Recommendation No R (95) 13 recommended that Member States ensure that the legal distinctions between searching computer systems and seizing data stored therein and intercepting data in the course of transmission are clearly delineated in law and applied in practice.

Search is traditionally carried out, among others, with a view to a possible seizure of objects. Seizure serves different purposes, namely to safeguard evidence, or to safeguard the object in order to possibly confiscate it or give it back to its lawful owner when it has been illegally acquired. In most jurisdictions, search in the classical situation requires a search warrant or a legal order which is traditionally limited to a specific physical place. During a search, the investigating authorities look for objects which can serve as evidence. If written information is found in or on an object (e.g. an address list in a notebook), the object as a data-carrier is seized as it could be used as evidence in court. It can also be confiscated subsequently so the owner or the person under whose control the object was seized can no longer make use of it. If this classical approach were followed in an automated environment, this would necessitate seizing whole computers if they contained relevant data. This could be a disproportionate measure in cases where the computer can be left in its usual location while copying the data for the purposes of investigation or as evidence. If the same result may be obtained with a less intrusive measure, this measure should have priority. During a search of premises the investigating authorities should have the power, if not already implied by existing powers of search, to conduct investigations in a computer and see whether there are any relevant data that should be copied in order to safeguard the evidence. Compared to the classical situation, this approach offers the advantage that the person under whose control the data are seized is not deprived of the data, when they are seized for evidentiary purposes. In certain cases, for example when data are stored in unique operating systems which cannot be copied, it is unavoidable that the data-carrier as a whole has to be seized. This may also be necessary when the data-carrier has to be examined in order to
possibly retrieve from it older data which were overwritten but have nevertheless left traces on the data-carrier. In these cases, it is not possible to distinguish between the data-carrier and the data upon it. The situation is different when the purpose of seizure is to deprive the person concerned of the data, e.g. when the object has to be confiscated because of its illegal character. If, during a traditional search, an illegal weapon or drugs are found, these objects are seized in order to be confiscated. In such a situation (for example when during a search a booklet is found which was published contrary to copyright law or contains illegal racial propaganda), the data will also be seized in order to be confiscated later by a court.

There is a wide variety of criminal offences besides those already mentioned, which may be committed either by possessing or disseminating information. An intermediate form of perpetration is also possible: mere possession with the apparent intention to disseminate information may constitute a criminal offence. The dissemination, or in some countries even the possession of data containing secrets of state security, libel, blasphemy, child pornography, etc. is, if not in all, at least in many countries a criminal offence. Likewise, the dissemination of data not representing such information, but simply consisting of computer programmes, can constitute a criminal offence: for example, the illegal possession or dissemination of computer viruses, software encryption engines or copies of computer programs.

In the classic situation, when the data or its content are illegal, the data-carrier would be seized in order to be subsequently confiscated and the investigating authorities should be able to take the technical measures to prevent the misuse of the data by the owner of the data-carrier. The person concerned should be deprived of the possibility to use or disseminate the data illegally. This can be done in various ways, e.g. by encrypting or deleting the data on the data-carrier (also the back-ups) belonging to the illegal owner after having been copied to data-carriers of the law enforcement authorities. This may also be necessary if no confiscation order is issued and the data has to be given back.

Under some circumstances it may be necessary to copy computer programs in order to make the seized data readable to the investigating authorities, e.g. when the data are processed by non-commonly-used system software or special application software. The seizure of data for this purpose is the only one that has no analogy to the classic situation. For the seizure of data, it is not relevant whether the data originate from the owner of the data-carriers or from someone else. If any data are stored on a data-carrier in premises that have been searched, the data can be copied and if necessary made inaccessible or deleted. In the case of a provider of an electronic mail service or the owner of a bulletin board owner who has stored, with or without knowledge, data that are capable of being seized,
these data can be seized without the consent or the previous knowledge of the originator of the data. Therefore, for the purposes of Recommendation No R (95)13, the notion of seizure includes the use of the functions of the computer system searched, the use or seizure of programs needed to access the data being seized, as well as the making of data inaccessible by means of encryption or the deletion of the dataset in the computer system from which the data were copied.

By clearly delineating computer search from interception, and explaining the differences between traditional seizure and seizure of data in a computer environment, Recommendation No R (95)13 made an important step towards harmonisation of these procedural powers. Naturally, a Recommendation has no binding legal character but it is certainly a genuine source of inspiration for national legislations. It is hoped that Recommendation No R (95)13 will usefully contribute to the emergence of specific, computer-related procedural powers in Council of Europe Member States. This process, of which we are just at the beginning, may be aided by the adoption, in 2000, of a Convention on cyber-crime, containing specific rules on computer search, interception of telecommunications or preservation of traffic data. It is expected that the evolving nature of cyber-crime, assuming unprecedented proportions and varieties with the globalisation of computer and telecommunications networks, will soon convince national lawmakers that such phenomena cannot be combated with 19th century criminal procedural laws and corresponding police powers.  

4 Harmonisation and Harmonising Effects in Criminal Law

André Klip

1 Introduction

At first glance harmonisation of the law of several nations bears a self-evident attractiveness. It makes complicated things simple. It provides a clear view instead of a jumble of differing legal systems. However, a closer look reveals that there is more to be taken into account. In this article I will try to identify the issues relevant to harmonisation. Many questions and aspects seem to be interrelated. What is harmonisation? What law could or should be harmonised? Why is harmonisation necessary? What methods of harmonisation exist? What are the consequences of harmonisation? My focus will be mainly European and limited to criminal law.

2 What is harmonisation?

The question whether to harmonise or not seems to call for outspoken opinions. For this reason, it is important first to define what is meant (or might be meant) by harmonisation. I will distinguish three degrees or forms of harmonisation. My remarks will concern the harmonisation of a specific aspect of the law rather than harmonisation of entire legal systems, which would amount to unification. Unification implies a common legislative and democratic structure, in addition to uniform laws and a common judicial review. I will focus on degrees or forms of harmonisation which do not require or imply common state structures or federalisation.

The first degree or form of harmonisation is full harmonisation which means that various legal systems adopt exactly the same legislation, combined with a common mechanism of judicial review. The regulation under community law for instance is an example of such a system. The regulation shall be binding in its entirety and directly applicable in all Member States (Art.189 EC Treaty). The Court of Justice provides common judicial review. Full harmonisation does not yet exist in criminal law.

The second degree or form of harmonisation consists of harmonising effects, approximation or convergence. Many examples could be given from current legal practice. Conventions may impose the obligation to crimi-
nalise certain behaviour under national law. Under community law, directives (and regulations) have a harmonising effect (Art. 249 EC Treaty). With the entrance into force on 1st May 1999 of the Treaty of Amsterdam, the European Union may take a 'framework decision' which may result in harmonising effects in the field of criminal law. There are also conventions which do not require special legislation but bind the parties to a common result. The European Convention on Human Rights is an example. It imposes minimum standards on States in criminal proceedings.

This brings us to the third degree or form of harmonisation. Some legal instruments aim at harmonisation, while others do not. A distinction should be made between intentional harmonising effects and accidental harmonising effects, that is effects that are the result or by-product of certain legislative developments or of co-operation between law enforcement agencies.

We have now established the existence of various degrees or forms of harmonisation and unification. This may help us to answer the questions below.

3 What should be harmonised?

What should be subject to harmonisation? Should substantive or procedural criminal law (or perhaps both) be harmonised? Should we also take into consideration the legislative process of the structure of application of the law in practice (administration and judiciary)? In other words, are a common legislator and a common legal remedy prerequisites for harmonisation? Is it possible to consider what should be harmonised without making these distinctions?

The German scholar Sieber is in favour of harmonisation of substantive law, but sees no need for harmonisation of procedural law and does not even mention other parameters, such as the common legislator or judicial review. He excludes procedural aspects because these depend to a very large degree on cultural and historical developments. But surely this is true of substantive law as well? The questions whether abortion and euthanasia should be criminalised or whether corporations can be prosecuted are perhaps even more closely linked to cultural, religious, political and historical developments than the question whether a witness should testify at the...
hearing. On the other hand, requirements of procedural law\(^3\) are sometimes neutral in the sense that a choice simply had to be made. Why does one state require that the accused be indicted 50 days before the trial, while another finds 40 days sufficient? In Switzerland there is a single Penal Code for the entire country, but each Canton has its own Code of Criminal Procedure. Does this mean that harmonisation of norms is more important than harmonisation of forms? The United States has substantive and procedural criminal law at both the state and federal level. This stems from the wish to regard some specific crimes as federal crimes, subsequently calling for Federal Rules of Criminal Procedure.

When we look at harmonisation efforts within the European Community, we see that they are linked to a specific aim. Harmonisation is not a goal in itself and has no open end.\(^4\) Harmonisation within the European Community, for instance, aims at the realisation of the internal market. It therefore seems logical to conclude that it is not possible to determine what should be harmonised without taking into consideration the goal of harmonisation. Here too, however, we must not draw conclusions too quickly. The Treaty on the Establishment of the European Community deals with harmonisation of issues that are equal as such: goods; capital; services and workers. Does criminal law, the definition of a crime, fit in that type of definition? Apart from the material question: which provisions of the law should be harmonised, there also appears to be a territorial aspect. Which countries should be included in the harmonisation? Is the ultimate goal universal harmonisation? If so, why? If not, why not? How do we select countries to be involved in harmonising efforts, or is the structure of a specific legislative body (United Nations, Council of Europe, European Union) decisive here?

4 Why is harmonisation necessary?

4.1 Solution to existing problems
It seems relevant to make a distinction here. One approach starts from the existing situation. In this case, the emphasis is on practical problems in the present legal situation which could be solved by harmonisation. Let us call this a negative approach towards harmonisation. In a positive approach towards harmonisation, theoretical aspects prevail. Here, it is important to formulate the goal of harmonisation.

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\(^3\) It is my understanding that criminal procedural law not only governs the criminal trial, the powers of the state and the rights and obligations of the individual, but also the collection and admissibility of evidence, including expert evidence, such as forensic expertise.

It is essential to raise the question of the necessity of harmonisation because it is sometimes regarded as self-evident. It is striking to see that those calling for harmonisation are very often simply referring to international co-operation, which will improve as a result of harmonisation. Supposedly, co-operation is currently hindered by legislative differences. Whereas some forms of co-operation require double criminality, harmonised law as such is not a prerequisite for forms of co-operation. International co-operation is blamed for many enforcement problems, however no evidence has been produced to demonstrate the shortcomings of international co-operation. I suggest that it is not the structure of international co-operation itself that causes problems, but a serious lack of knowledge of the possibilities of the network of co-operation on the part of those who have to work with it in practice.

Is it possible to discover where the need for harmonisation comes from? Or to identify the players who are calling for harmonisation (do they see or encounter a problem due to legal differences)? In the European context, the proponents of harmonisation seem to come from countries that hold high hopes, either real or symbolic, of the criminal justice system and its potential for social change. The call for harmonisation of substantive law seems to be greater than for procedural law. Those in favour of harmonisation emphasise its contribution to repression of crime. A call for harmonisation of rules on the protection of fundamental rights of the accused is virtually absent.

What about those who oppose harmonisation? They seem to question the feasibility and usefulness of harmonisation. They underscore the negative consequences of harmonisation for the rights of the individual. Does it help us understand harmonisation if we discover that those calling for harmonisation are 'believers' in the power or symbolic function of criminal law who have high expectations of harmonised law? Or that those who oppose harmonisation stress the importance of national sovereignty as well as human rights?

Will the answers be any different when international co-operation is involved? The Amsterdam Treaty between the Member States of the European Union defines harmonisation or approximation as a means of facilitating international co-operation (Art. 31). Two aspects dominate the discussion concerning harmonisation as a means of facilitating international co-operation: The need for harmonised substantive law in order to fulfil the double criminality requirement and the need for harmonisation of the

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6 This means that a state can only give assistance to another state if the offence is a crime under the law of both countries.
collection of evidence in order to avoid inadmissibility. Some forms of international co-operation, as a rule those involving the use of coercive means, require double criminality. This means that the offence for which assistance is requested must be a crime both in the requesting state as well as in the state receiving the request. The underlying rationale is that the state receiving the request should not be obliged to assist in combating behaviour which it itself does not regard as criminal. Non-coercive forms of co-operation, such as exchange of information and collection of evidence in general, do not require double criminality. In this regard, whether abolition of the double criminality requirement forms a suitable alternative to harmonisation is a legitimate question.

The wish to harmonise procedural aspects is linked to the need for admissible evidence in international litigation. It clearly does not make sense to execute requests for international legal assistance when the evidence thus obtained is not admissible in the requesting state. Such a problem can be resolved in three ways. First, the requesting state could apply its rules on the admissibility of evidence less strictly, a solution also found under community law which prescribes mutual recognition of official documents and acts performed under foreign law under certain circumstances. Second, the state receiving the request could apply its rules on the collection of evidence more flexibly, opting for methods that will enable admissibility in the requesting state. Third, states could harmonise evidentiary rules. The last approach inevitably requires choosing between systems. Or does harmonisation automatically lead to a compromise? The first two approaches indicate that harmonisation is not the only option available for solving problems related to the admissibility of foreign evidence.

The need for harmonisation is definitely more urgent when the issue is whether evidence collected in one state should also be admissible in another state. One may even question whether it serves a purpose to harmonise evidentiary rules when evidence will not be used transnationally. Generally speaking, states are more willing to follow rules of another state, if the evidence will be used abroad (e.g. Art. 3 European Convention on Mutual Assistance in Criminal Matters). This must be seen as a friendly act between states based on the expectation or condition of reciprocity. It does not necessarily mean that the assisting state will copy the procedures in its own trials. Flexibility is less, although not completely absent, when it comes to the admissibility of foreign evidence. In practice up to now the willingness to apply aspects of foreign law seems to be limited to procedural law.

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Some scholars indicate that while criminals make use of open borders, law enforcement authorities of the Member States are hindered by them.\(^8\) Does this have anything to do with harmonisation? Personally, I think there is a point to arguing that from the perspective of the perpetrator positive effects derive from crossing borders when committing crimes. As soon as authorities of different countries are involved in the investigation, there is a fair chance that information obtained by one official will not reach the other. Even when the perpetrator intends the prosecution to lose track of him or the crimes, one may ask what factors are working to the advantage of the perpetrator and whether harmonisation could remedy this. The different structure of separate law enforcement agencies definitely plays a role here.

Some authors argue that harmonised law will be more effective, however they present no evidence to this effect.\(^9\) Although some positive effects may be expected from cases in which international co-operation is necessary,\(^10\) it is difficult to imagine that national authorities would be significantly more effective in cases by following the same system used elsewhere than by following separate national systems. Harmonisation cannot be expected to result in less crime.

4.2 Realisation of an ideal situation

Does harmonisation result in better law? This depends on standards used to define 'better'. Harmonised law itself indicates nothing whatsoever about the quality of the law. A harmonised system can be very practical and highly efficient. Harmonisation can also result in an impractical, undogmatic and incomprehensible system. Full harmonisation (from the binding legal text to its implementation in practice) should result in equal treatment of citizens in the same circumstances, irrespective of the country, authority or court where the rule is being applied. This must be considered a major achievement of harmonisation. Or, taking a more sceptical view, one could say that it is not harmonisation itself, but the equal treatment which results from it, that is the positive aspect.

For example, suppose a group of states decides to harmonise the criminal law related to drugs. These states decide to choose between two existing systems. The Dutch criminal law system, which makes a distinction between hard and soft drugs, prosecutes dealers of hard drugs and more or less tolerates the use of soft drugs. The Singapore system does not differ-

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\(^10\) In those cases where co-operation does not take place because of lack of double criminality.
entiate between hard and soft drugs and imposes severe sentences (including the death sentence) even for possession of small quantities. Although the basic characteristics of these two systems are very different, the wish to harmonise provides no guidance as to which system is preferable. It is therefore fair to conclude that harmonisation is neutral as to the contents and character of the system. Apart from the equal treatment aspect, then, harmonisation tells us nothing about the quality and value of a system. Is it possible to discuss the need for harmonisation without discussing what should be harmonised and how this should be done? Where it is apparent that nobody would be happy with only one kind of cookie, one brand of beer or one language, the question arises whether harmonisation of criminal law too is closely related to taste, identity and culture.

Do the reasons for harmonisation which were valid for the realisation of the internal market of the European Community hold for harmonisation of criminal law? Harmonisation in the context of the European Community has thus far been limited to economic sectors and activity. It created a free flow of goods, services, workers and capital. Can we find criteria to help us determine whether it makes sense to have the same criminal law/procedural law throughout the European Union? Are the conditions for the internal market also valid for a free flow of criminal law or are they perhaps limited to a free flow of information and evidence? Again, for whom should it make sense? For the citizen, for the governments or for those involved in crime?

Under the aegis of the European Parliament and the European Commission a Corpus Juris has been developed. This project aims to establish a central European Prosecutor, competent to prosecute EC-fraud and related crimes only. However, the 'law' of the Corpus Juris, like the law of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, as well as the future Permanent International Criminal Court, is not exclusive. National law deviating from or concurring with 'higher' law continues to exist and is applicable without influence. Here supranational law was developed for two reasons: supranational enforcement is regarded as more effective and the nature of the crimes (EC-fraud and war crimes) was considered to be the responsibility of the larger community rather than a single state.

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5 Methods of harmonisation

Up to now legislation has been the method of choice for harmonisation. This practice has existed for a long time. States have concluded conventions, treaties and other binding agreements which require them to apply certain identical provisions. Depending on the national system, legal texts are harmonised directly or binding common provisions (i.e. conventions) require implementation into national law. There are many examples in the field of criminal law. It is interesting to see the effects of harmonisation in substantive as well as procedural law. For instance, the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime requires the parties to criminalise money-laundering in the definition of the convention. Article 6 of the ECHR grants the accused the right to a fair trial in the states that are parties to that Convention. Council Regulation 515/97 prescribes states to collect evidence on the enforcement of community law in a specific manner and to admit evidence collected by the authorities of another Member State without any impediment. All these examples lead to a certain degree of harmonisation.

Full harmonisation of these methods, or more specifically, the methods chosen by the European Union, is out of the question. They create an additional layer of legal instruments on top of existing national and international law. Some measures are only relevant for Member States that have failed to ratify already existing legal instruments. There are two reasons for this effect: the method chosen (additional binding texts which require implementation) and the contents and wording of the instrument of harmonisation (a text which leaves great latitude for interpretation). The harmonisation achieved within the Third Pillar of the European Union must to a large extent be characterised as a formality and symbolic. In this respect the harmonising effects are not impressive. One could even say that the current method chosen by the European Union is counterproductive.

It is well known that there is sometimes considerable disparity between the law on the books and the law in practice. Where this is the case, even

13 Regulation 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure correct application of the law on customs and agricultural matters, OJ 1997, L 82/1.
15 'Die Binsenweisheit der Rechtsvergleichung, daß ein Rechtssystem nicht ohne umfassende Berücksichtigung der Rechtswissenschaft zu verstehen ist, muß daher zum Programm für die gesamte Strafrechtswissenschaft gemacht werden.' Walter Perron 'Sind die nationalen Grenzen des Strafrechts überwindbar? Überlegungen zu den strukturellen
more variation can be expected when common binding texts first have to be implemented into national systems. This means that harmonisation cannot be regarded as the end of a process in the sense that once harmonisation has been achieved there is nothing more to do. Without a common legislator and judiciary states may go separate ways again after the harmonisation of a certain aspect of the law.

Apart from common binding legislation, co-operation may also lead to harmonising effects. Since the Second World War, various United States’ police forces have been especially successful in introducing their techniques of investigation throughout the world.¹⁶ Such harmonisation or convergence is nothing new.¹⁷ It has always existed. States have always copied elements of the law and sometimes even entire Codes from other states. Nowadays liaison officers and liaison magistrates are often used in co-operation between states. These too have a harmonising effect, to the extent that their activity may result in compromises in application of the law of the separate co-operating states.

There seems to be a link between the framework of international co-operation in criminal matters and the method of harmonisation chosen. A state whose law only provides mechanisms for extradition and judicial assistance may expect more positive results from harmonisation, than states that have a variety of forms of co-operation at their disposal. A state that can also transfer the proceedings or a judgement to another state is automatically more flexible in accepting elements of foreign law. However, if states employ co-operation to impose their own system on another state, this may have counterproductive effects if pushed too hard. It may make the differences between two states central to their discussion. Then prestige may make it more difficult to come to an agreement as well as to co-operation.

In my opinion full harmonisation is hard to achieve when there is no common legislator or uniform application of the law. It will then not reach beyond the stage of harmonising effects. If states have to implement, they will do so according to their existing national criminal law systems and using their own language. As a result, states may not come closer to each other. Apart from the legal text the language may be an impediment to full harmonisation. Translations will not always lead to the same meaning of the text. A specific word may form a legal definition in the existing system and therefore lead to confusion. The European Community, with a dozen

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official languages has already experienced additional problems due to differences between authentic texts. The disturbing influence of legal language on harmonisation should not be underestimated. To a certain extent harmonisation requires equal circumstances. However, this does not help us. If equal circumstances were already in existence, there would probably be no need for any harmonising measures. In addition, the question arises whether harmonisation requires or could be stimulated by a common political culture. Some authors have argued, for instance, that the lack of a common European political discussion explains the resistance against a common legislator.18

6 What are the consequences of harmonisation?

There is a serious risk that because of the current framework which involves many independent states, harmonisation will result in more static law than law made by a single state. As long as states decide independently whether to accept and implement new legislation, the legislative process will be time consuming. Another example serves to illustrates this point. The Member States of the European Union have agreed upon a common definition of EC-fraud in the Convention protecting the financial interests of the European Community. As a result of that, in the process of negotiating new agreements against corruption in the Council of Europe and the Organisation for Economic Development and Co-operation, they now aim at a definition which corresponds to their own definition from the convention.19

Should changes be necessary or desired, it is inevitable to have to go through the time consuming process of adopting new legislation. This process will be especially slow when there is no common legislator, and consensus or compromise must be reached among negotiating parties who are not in a hierarchical relationship. The fact that compromises may be necessary, can lead to texts which leave room for interpretation. This then becomes a vicious circle, because room for interpretation may be contrary to the aims behind the new proposals. Flexibility at the legislative level will decrease. On the other hand, enforcement authorities may enjoy greater freedom. The control of the administrative authorities over the practical implementation of the law could become less stringent. If these are the

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consequences of harmonisation, it will not only fail to achieve its aims, but also endanger the rule of law.

Some opponents of harmonisation point out that the harmonisation of a single aspect may have consequences for an entire system. Basically, this argument comes down to the following. A national criminal law system is balanced in its context. By harmonising one aspect of the criminal law, this individual aspect is removed from its national context. Consequently, the national balance may be disturbed. In the words of Jörg, Field and Brants: “We must not lose sight of the risk involved in adopting strategies and safeguards from each other’s procedural styles. Each depends on its own historically developed institutions and the faith that the different authorities place in them.”

7 Conclusion

The existence of diverse definitions of harmonisation form a disturbing element in the discussion about harmonisation. More questions have been raised than answered. What is clear, however, is that harmonisation is not a simple solution to complicated problems. I do not believe that the consequences of harmonisation have been fully assessed. Harmonised law neither takes away the need for co-operation nor will it lead to a reduction of crime. Harmonisation is not the only means of improving international co-operation. The legislative framework in which harmonisation takes place seems to be a condition for its ultimate success. Whether one is in favour of harmonisation or not seems to be linked to his/her expectations about the importance of the criminal justice system as an instrument for regulating society, but also to the contents of the instrument of harmonisation. I believe that the positive effects of harmonisation in terms of efficiency are overestimated, while the negative effects especially on the protection of fundamental rights are being neglected.

References


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Harmonisation of National (Criminal) Law Related to the Inspection, Sampling and Analysis of Foodstuffs:

A European Perspective

Marieke Lugt and Ron A. van Geffen

1 Introduction

Despite the large quantity of European food law, it consists mainly of substantive food law provisions laid down in order to establish the internal market. European food law contains few provisions on how the Member States should enforce this law. The European Union (EU) is still in the process of developing a food policy. A shift can be perceived in the objectives of EU food policy and law. Whereas in the past the free movement of goods was the European Commission's main priority in preparing new Community food law, food safety and consumer protection are now high on the agenda.

In most EU Member States criminal law plays quite an important role in food law. The role of criminal law is determined at the national level and not by Community legislation. For instance, there is no European rule stipulating that a violation of food law that entails a risk of injury to health should be punishable by criminal law. In several Member States, in the UK for instance, food law is enforced by national criminal law. Other Member States, for example Germany and the Netherlands, make use of both administrative and criminal law in food law enforcement.

Although the majority of Member States' substantive provisions on foodstuffs have a European origin, States have maintained their own structures of food law. These structures have developed autonomously over the last few centuries sometimes resulting in obstacles to the free movement of foodstuffs. From a historical perspective, national food law is deeply rooted in a country's own culinary traditions, eating habits and...
foodstuff production patterns, which in turn find their origin in divergent climatic and agricultural conditions.  

1.1 Definition of Foodstuffs
Although Community food law has been enacted since the beginning of the 1960s, there is still no uniform Community definition of foodstuffs. This deficiency can be explained by the fact that several Member States adhere to their own definitions. This contribution adopts the definition of foodstuffs used in common parlance:

Foodstuffs are all substances meant for or suitable for human consumption, except tobacco, medicines and drugs.

This broad definition encompasses a set of regulations covering the production and marketing of both non-processed and processed food.

After presenting a brief history of European food law, this contribution takes a look at the enforcement provisions in Community food law: supervision, investigation, prosecution and penalties. Attention then turns to Dutch enforcement provisions relevant for foodstuffs and food law enforcement practice. The concluding section assesses whether there is a need for more European harmonisation in food law.

2 History of European food law
In 1962 the first Community foodstuffs directive, concerning colorants, was issued. The basic idea behind the early food directives was that every national measure in principle required a Community measure in order to ensure the free circulation of goods. This led to lengthy drafting procedures for European food law and resulted in vertical food law directives which lay down standards for all aspects (e.g. raw materials, manufacturing process, ingredients, labelling) of a particular food (e.g. honey, chocolate or coffee).

As part of the “New Approach”, a real acceleration in the legislative process related to foodstuffs took place after the 1985 Commission Communi-
cation on Foodstuffs (the Mini White Paper or White Paper-bis) and incorporation of article 95 (ex article 100a) in the EC Treaty by means of the Single European Act. Article 95 (ex article 100a) only requires a qualified majority in the legislative process instead of unanimity as required under article 94 (ex article 100) of the EC Treaty. In the Mini White Paper the Commission stipulated that a distinction be made between matters which by their nature must be subject to legislation and matters whose characteristics are such that they do not need to be regulated. In principle, the Community should not issue vertical harmonisation legislation. The enactment of Community food law should be limited to provisions justified by the need to:

1. protect public health
2. provide consumers with information and protection in consumer-related matters other than health
3. ensure fair trading
4. provide for the necessary government controls.

At present, Community food law is enacted mainly in the form of horizontal directives, that is legislation applicable to all foods or a group of foods, such as directives related to labelling, additives or sweeteners.

3 Community food law enforcement provisions

It is important to note at the outset that in principle Community food law grants Member States discretion in enforcement of this law. General European law requirements for the enforcement of food law will be reviewed before examining the enforcement provisions in selected European food law directives.

Although the enforcement of Community law is primarily a task for Member States, this national enforcement obligation has been increasingly "communitarised" as a result of Community legislation and European Court of Justice (ECJ) caselaw related to article 10 (ex article 5) of the EC Treaty. The enforcement obligation for Member States stemming from article 10 (ex article 5) of the EC Treaty (Community loyalty) has been

10 Craig and De Búrca 1998, pp. 1115-1124.
11 COM (85) 603, para. 7.
12 The Commission mentioned three grounds for this opinion: it is neither possible nor desirable to confine in a legislative strait-jacket the culinary richness of the Member States, legislative rigidity concerning product composition would prevent the development of new products and would thus constitute an obstacle to innovation and commercial flexibility, and finally, consumers' tastes and preferences should not be a matter for legislative concern (COM (85) 603, paras. 16-17).
13 COM (85) 603, para. 9.

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elaborated by the ECJ in the famous Greek Maize case in particular. National enforcement measures, including penalties, and enforcement systems should adhere to four principles: assimilation, proportionality, effectiveness and deterrence. Under these conditions, Member States are free to choose the kind of law and organisation used for enforcement as long as they respect the general principles of Community law, such as the free movement of goods and human rights.

Here we discuss the most important European Community food law directives containing enforcement provisions addressed to Member States:

1. Directive 89/397/EEC on the official control of foodstuffs
2. Directive 93/43/EEC on the hygiene of foodstuffs
3. Directive 93/99/EEC on the subject of additional measures concerning the official control of foodstuffs
4. Directive 98/53/EC laying down the sampling methods and the methods of analysis for the official control of the levels for certain contaminants in foodstuffs

3.1 Directive 89/397/EEC on the official control of foodstuffs

Council Directive 89/397/EEC of 14 June 1989 is the first Community directive to deal specifically with the official control of foodstuffs. Official control of foodstuffs is defined as “inspection by the competent authorities of the compliance of foodstuffs with provisions aimed at preventing risks to public health, guaranteeing fair commercial transactions or protecting consumer interests, including provisions on consumer information”. It is a horizontal directive containing general rules for inspection of foodstuffs by the national enforcement authorities of each EC Member State. It is a framework directive and does not prescribe in detail how inspections have to be carried out. The directive aims to prevent risks to public health, to ensure fair trading and to provide consumer protection. The Official Control of Foodstuffs Directive is based on article 95 (ex article 100a) of the EC Treaty.

The Official Control of Foodstuffs Directive shifts control of foodstuffs from the point of sale to the point of manufacturing/production. It requires Member States to subject foodstuffs to regular inspections at any point along the food chain without prior warning. In this way, the official control of foodstuffs leads to more information about the causes of deviation of foodstuffs? The Member States had to comply with this Directive before 20 June 1991.

15 Vermeulen 1994, p. 64; Widdershoven 1993, pp. 53-54; Craig and De Bürca 1998, p. 217.
16 De Moor-Van Vugt 1994, p. 83.
3.2 Directive 93/43/EEC on the hygiene of foodstuffs
After three years of negotiations, the EC Council adopted Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs.\footnote{Council Directive 93/43/EEC of 14 June 1993 on the Hygiene of Foodstuffs, OJ L 175/1, 19.7.93.} Although several directives already contained product-specific hygiene provisions, the Hygiene Directive was issued as a ‘framework’ directive. The subject ‘food hygiene’ has become increasingly important as the food chain from farmer to consumer has lengthened and grown more complex, and as the larger scale of production and wider distribution have increased the risk of foodborne diseases. The Hygiene Directive is based on article 95 (ex article 100a) of the EC Treaty. The Member States had to comply with this Directive as of 15 December 1995.

Two important novelties of the Hygiene Directive are the introduction of the Hazard Analysis of Critical Control Point (HACCP) system and guidelines for good hygiene practice. HACCP is a food safety system initially developed by the U.S. National Aeronautics and Space Administration to protect astronauts from hazards that could cause foodborne illnesses. It is based on the assumption that a food manufacturer analyses the whole food production process, identifies critical control points as regards food hazards, and sets up and implements effective control and monitoring procedures. Food manufacturers can comply with their HACCP obligations in two ways. First, by setting up their own food safety system based on HACCP. Second, by working according to the guidelines for good hygiene practice. Guidelines for good hygiene practice determine for a specified food branch how the branch should work in order to comply with HACCP obligations. The guidelines for good hygiene practice are drafted by branches of national food industries. After approval of these guidelines by national authorities, food producers can comply with their HACCP obligations by following these guidelines. The guidelines have no force of law, however. According to the ninth consideration of the Hygiene Directive's preamble, food business proprietors are responsible for the hygiene conditions in the food business. This obligation can be met by means of guidelines for good hygiene practice.

3.3 Directive 93/99/EEC on the subject of additional measures concerning the official control of foodstuffs
Council Directive 93/99/EEC of 29 October 1993 lays down measures supplementing the Official Control of Foodstuffs Directive (89/397/EEC) of 14 June 1989.\footnote{Council Directive 93/99/EEC of 29 October 1993 with additional measures on the official control of foodstuffs, OJ L 290/14, 24.11.93.} The intended purpose of these additional measures is to harmonise food law enforcement between Member States. States began to feel the need to improve existing control procedures. This directive is based on article 95 (ex article 100a) of the EC Treaty. The deadline for compliance by Member States with this Directive, except article 3, was 1 May 1995. The deadline set for compliance with article 3 was 1 November 1998.
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According to the Additional Food Control Measures Directive, Member States must ensure that the national enforcement authorities have a sufficient number of suitably qualified and experienced staff, in particular in areas such as chemistry, food chemistry, veterinary medicine, medicine, food microbiology, food hygiene, food technology and law to enable them to exercise the controls referred to in Article 5 of the Official Control of Foodstuffs Directive (89/397/EEC). The Additional Measures Directive also provides that the official food control laboratories must operate according to certain standards. This quality assurance system must meet generally accepted standards and the laboratories must use recognised methods of analysis whenever possible. Finally, provisions are included to improve co-operation between the officials designated by the European Commission and the competent authorities of the Member States in evaluating operation of the official food control systems.

3.4 Directive 98/53/EC laying down the sampling methods and the methods of analysis for the official control of the levels for certain contaminants in foodstuffs

Commission Directive 98/53/EC of 16 July 1998 lays down the sampling procedure and the methods of analysis for the control of the levels of certain contaminants in foodstuffs.20 The legal basis of this Directive is article 95 (ex article 100a) of the EC Treaty. This Directive establishes maximum levels of aflatoxins for certain foodstuffs. The sampling method is very important to reliably determine the level of aflatoxins because these are generally unevenly distributed throughout the material. To ensure that the laboratories charged with control use comparable reliable methods of analysis, the annexes establish general criteria to be met by the methods used. The competent authorities of the Member States currently use many very different sampling methods. States must meet the criteria concerning the taking of samples and methods of analysis established in this directive before 31 December 2000. There is no other directive containing general requirements to be met by sampling and analysis of foodstuffs. This is left up to the Member States.

4 The enforcement provisions for food law in the Netherlands

4.1 Introduction

This section highlights the enforcement provisions for food law in the Netherlands. It concludes with a discussion of the introduction of the bestuurlijke boete (administrative fine) in the Warenwet (Consumer Goods Act). Substantive provisions of food law have been laid down in the Consumer Goods Act, framework legislation which is the basis for several secondary legal instruments on foodstuffs. This Act contains few provisions on enforcement. These

can be found in the Algemene Wet Bestuursrecht (General Administrative Law Act) and the Wet op de Economische Delicten (Economic Offences Act).

Two distinctions are made in this overview of enforcement provisions. The first distinction is between the two kinds of enforcement provisions: (1) inspection provisions and (2) investigation, prosecution and sanctioning provisions. The second distinction is between general acts containing enforcement provisions, such as the General Administrative Law Act and the Economic Offences Act, and food laws containing particular enforcement provisions.

4.2 Definition of enforcement
Enforcement encompasses official actions designed to secure compliance of the parties with the rules expressing official policy or to make non-compliance liable to a sanction.\(^\text{21}\) The general notion of enforcement can be subdivided into four phases: supervision, investigation, prosecution and sanctioning.

Supervision refers to activities carried out when there is no suspicion that a criminal provision has been violated and to random checks executed to ascertain whether companies fulfil their legal obligations.\(^\text{22}\) A supervision body can undertake supervision only when this competency has been conferred on it by a Minister. Regular visits to a bakery by an inspector of the Inspectie Gezondheidsbescherming, Waren en Veterinaire Zaken (Inspectorate for Health Protection, Consumer Goods and Veterinary Affairs, c&v Inspectorate) in order to check the condition of the premises are examples of inspection.

Investigation is carried out when there is a concrete suspicion, a reasonable assumption that a specific criminal offence has been committed. The distinction between supervision and investigation is not always clear, and in food law enforcement practice the supervision phase easily turns into an investigation.\(^\text{23}\) A body is allowed to carry out investigative activities only when this power has been conferred on it by the Ministry of Justice. An inspector of the C&V Inspectorate who visits a restaurant in response to a consumer's complaint about severe diarrhoea after eating at this restaurant is an example of investigation.

Prosecution is conducted by the Public Prosecution Service, which has a monopoly over prosecution of criminal law violations. The court might impose a sanction. In the case of a food law violation this court is usually an economic police court\(^\text{24}\).

22 Inspectie w&v 1998, p. 3.
24 The term police judge may appear to suggest that this judge is a member of the police agency or that he has some special relationship with the police, however, this is not the case. One or more of the full-time judges of the district court are appointed to serve as police judge. They hear those cases punishable mainly by fines and the cases that are not exceedingly complex.
4.3 *Algemene Wet Bestuursrecht* (General Administrative Law Act)

With entry into force on 1 January 1998 of the third part of the General Administrative Law Act (GALA), the Act also lays down (Chapter 5, Section) the powers of all inspectors in the food sector. These provisions are a minimum codification of existing inspection powers. Article 5:11 of the GALA defines inspectors as persons who are responsible according to legal provisions for inspecting compliance with other legal provisions. This definition includes the officials of the c&v Inspectorate and of the National Inspection Service for Livestock and Meat while inspecting compliance with food and meat hygiene law.

Articles 5:15-5:19 of the GALA give inspectors five specific powers; articles 5:13 and 5:20 contain general inspection provisions. According to article 5:13 inspectors are allowed to use their powers only provided this is reasonably necessary in order to fulfil their task. Article 5:20 obliges everyone to assist inspectors, to the extent that this assistance can reasonably be demanded to enable them to fulfil their task.

Article 5:15 of the GALA concerns the power to enter premises. Every inspector has the right to enter any place, with the exception of private homes, without the inhabitant's permission. When necessary the inspector can ask the police to assist entry. Inspectors can be accompanied by persons designated by themselves. According to article 5:16, inspectors have the right to order inquiries. Article 5:17 empowers inspectors to demand access to commercial data and documents and to make copies of them. Article 5:18 empowers inspectors to examine goods and to take samples. At the request of the person who is subject to inspection the inspector will take a second sample wherever possible. The person involved is to be informed of the results of the examination and sampling as soon as practicable. Finally, inspectors are empowered to examine means of transport (article 5:19) and to order them to be halted.

By the Act of 6 November 1997\(^\text{25}\) most inspection provisions laid down in the Consumer Goods Act were transferred to the GALA. The Consumer Goods Act still contains some special provisions containing inspection powers. Under the Consumer Goods Act inspectors can exercise these special powers in addition to the general powers laid down in the GALA. Article 26 of the Consumer Goods Act provides for possible compensation for all goods examined under article 5:18 of the GALA. Upon his/her request, the person subject to inspection will receive compensation equivalent to the decrease in sales value of the goods as a result of examination. Article 29 of the Consumer Goods Act grants inspectors the power to enter homes without the inhabitant's permission. This entry may be required in order to go to or to enter further premises in the house.

The Minister is empowered to use administrative coercion in the case of article 21 of the Consumer Goods Act (public warning). Appeal is possible to the Economic Appeals Tribunal. Article 5:20 of the GALA (obligation to assist inspectors) requires everyone to co-operate with an inspector upon request (article 32 of the Consumer Goods Act).

4.4 *Wet op de Economische Delicten* (Economic Offences Act)

The Economic Offences Act contains provisions on the investigation, prosecution and penalties for economic violations. Penalties for violations of Dutch food law, which are economic violations, are not laid down in food law itself, but in the Economic Offences Act. This special criminal law applies to more than 120 acts and regulations, including the Consumer Goods Act.

Article 17 of the Economic Offences Act concerns the designation of investigation officials. In food law enforcement, the major investigation officers are the inspectors of the C&V Inspectorate. Investigation officers have several powers, laid down in articles 188-23 of the Economic Offences Act. In principle, these powers can only be used in the interest of the investigation and as far as these powers are reasonably required to fulfil the investigation task. In 1993 the Dutch Supreme Court decided that the investigation powers laid down in the Economic Offences Act can also be used when there is no reasonable suspicion of guilt in the sense of article 27 Code of Criminal Procedure, thus also for inspection purposes.

Article 18 of the Economic Offences Act provides the power to seize goods. Article 19 contains the power to request an inspection of data and documents, and to make copies of them. On the basis of article 20, investigation officers have the power to enter all places. According to article 21, investigation officers are allowed to examine and inspect goods and to take samples. At the request of the person involved, the officer will take a second sample. When possible, the samples taken are returned. Upon request the person involved will be notified of the results of the examination, inspection or sampling as quickly as possible. Article 23 empowers investigation officers to examine means of transport and to order them to be halted.

4.5 Introduction of the administrative fine in the Warenwet (Consumer Goods Act)

The administrative fine has been introduced in the Netherlands in various laws, including the Consumer Goods Act. The Government is of the opinion that this Act in particular contains many violations that qualify for enforcement by means of administrative fines. Most of the regulations meet the criteria for administrative enforcement applied by the Review Committee for legislative projects. However, the general administrative measures introduced in recent years consist largely of extremely vague and undefined norms. The Government is nevertheless also of the opinion that criminal law is indispensable for a number of violations of the Consumer Goods Act, especially for those posing a grave danger to public health. These standpoints

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26 For a general introduction into the *Wet op de economische delicten* (Economic Offences Act), see Mulder and Doorenbos 1993; Keulen 1995, pp. 17-50.
29 Article 22 Wet op de economische delicten (Economic Offences Act) has been repealed.
30 Government’s standpoint with reference to the (Review Committee for legislative projects) recommendations *Handhavings door bestuurlijke boeten* [Enforcement by administrative fines], p. 22, Parliamentary documents II 1994/95, 23462/23710, nrs. 3 en 4.
have resulted in a legislative proposal that aims to introduce the administrative fine into this Act as an enforcement instrument.\(^{31}\)

The new article 1 (1) of the Consumer Goods Act defines the administrative fine as “the administrative sanction consisting of the obligation to pay a fixed amount of money to the state”. Violations can be dealt with either via criminal or civil proceedings. The amount of the administrative fine is set by a general administrative measure. In addition, the legislator has described a number of violations that due to their seriousness are liable to punishment by criminal law only. Primarily these are violations committed with intent or that result from recklessness that also pose an immediate danger to the health or safety of human beings. The amount of the fine is calculated on the basis of the table of tariffs developed in practice by the Public Prosecution Service and the C&V Inspectorate.

The Consumer Goods Act grants the Minister of Health, Welfare and Sports the authority to impose the administrative fine by means of a ministerial order. The report made by the inspector of the C&V Inspectorate subsequent to detection of a violation of the Act serves as basis for this order. The inspector sends this report to a new, still to be created, unit within the C&V Inspectorate that will impose the fine by order of the Minister. The ministerial order to pay the fine is mailed together with a pre-printed giro credit slip to the party obliged to pay the fine. The latter has the right of appeal to the administrative court. Before entering an appeal, he must lodge a notice of objection with the Minister who must reconsider the ministerial fine order.

The authorisation to impose an administrative fine makes it possible to punish offenders without delay and lightens the workload of the prosecutorial office, leading to improvement of law enforcement in general. There are also some drawbacks attached to introduction of the administrative fine in the Consumer Goods Act. There is still much uncertainty about what norms should apply in the investigation preceding the imposition of an administrative fine. The administrative fine is punitive in nature. It is not clear whether administrative or criminal legal norms are applicable.

Besides, a new unit has to be created within the C&V Inspectorate to issue the ministerial orders and there is the danger of loss of independence. In the administrative legal system the Minister of Health, Welfare and Sports is responsible for drawing up regulations, enforcing them and punishing offenders. In the criminal legal system these powers are separate. Independence must be established through separation of functions. Those who impose the fine may not be involved in the process leading up to the inspection report which serves as the basis for the fine. Is this sufficient to ensure independence? A free doctrine of evidence applies in administrative law. In a free evidentiary system no legal constraints are placed on the presentation and

assessment of evidence, unlike criminal law of evidence now binding on the Inspectorate. The free evidentiary system has no legal constraints on the way in which the facts are to be presented and evaluated. The administrative agency should at least be able to explain why it is convinced that an offence has been committed. Hartmann suggests incorporating the administrative rules of evidence into an Administrative Criminal Law Act. This Act could serve as framework legislation for all administrative legal sanctions. No discussion of evidence should leave out the doctrine of unlawfully obtained evidence. This is a very extensive doctrine in criminal law. In administrative law, however, this doctrine still has to take shape. Jurisprudence indicates that the criminal legal rules concerning unlawfully obtained evidence are not binding on the court and that evidence rejected in criminal proceedings as unlawfully obtained evidence can be used in administrative proceedings unless it has been obtained in a manner so in conflict with what can be expected from good government that its use should be inadmissible under all circumstances. As a rule, the procedure followed by the official in question will be examined with respect to the general principle of good administration and to international agreements with regard, for example, to the fair trial principle.

5 The enforcement practice of food law in the Netherlands

5.1 Inspectie Gezondheidsbescherming, Waren en Veterinaire Zaken (Inspectorate for Health Protection, Consumer Goods and Veterinary Affairs)

This Inspectorate is the main Dutch food law enforcement authority. In common parlance, it is referred to as the Inspectie Waren en Veterinaire Zaken (Inspectie w&v) (Inspectorate for Health Protection, Consumer Goods and Veterinary Affairs (c&v Inspectorate)). In practice, it is better known under one of its former names, Keuringsdienst van Waren (Food Inspection Department) or Inspectie Gezondheidsbescherming (the Inspectorate for Health Protection). The c&v Inspectorate is the responsibility of the Minister of Public Health and has five major tasks:

32 Wetboek van Strafprocedure [Code of Criminal Procedure], Articles 338 - 344a.
33 Hartmann, A.H., Bewijs in het bestuursstrafrecht [Evidence in Administrative Criminal Law], Deventer, 1998, p. 227. Hartmann argues that administrative criminal law should be regulated in separate legislation. From the point of view of legal instrument, legal protection and symbolic value, separate regulation of administrative criminal law can provide a suitable legal framework for evaluating conflicting interests in an administrative legal setting.
34 CRvB 28 November 1995, JB 1995 nr. 329 (strafrechtelijk onrechtmatig verkregen bewijs [unlawfully obtained evidence]).
35 The Inspectorate translates its name as: Inspectorate for Health Protection, Commodities and Veterinary Public Health, but in this work the more literal translation of Inspectorate for Health Protection, Consumer Goods and Veterinary Affairs is used.
36 Most of the information in this research on the Inspectorate for Consumer Goods and Veterinary Affairs has been based on its predecessor, the Inspectorate for Health Protection. To a large extent the Inspectorate for Consumer Goods and Veterinary Affairs
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1 control and promote the compliance of several acts, such as the Consumer Goods Act
2 examine situations which endanger public health
3 advise policy bodies
4 examine consumers' complaints
5 develop and publish methods of examination or analysis.

The C&V Inspectorate has both inspection and criminal investigation tasks under the Consumer Goods Act. The C&V Inspectorate consists of a General Inspectorate in The Hague and five Regional Inspectorates. The Regional Inspectorates are responsible for the day-to-day inspection activities and function more or less independently of the General Inspectorate. The General Inspectorate is responsible for strategic policy development in the field of foodstuffs control.

5.2 Three kinds of inspection
The C&V Inspectorate is charged with carrying out controls on some 172,000 locations, about 40% of which are catering and retail premises. The Inspectorate takes repressive action; it only inspects foodstuffs which have al-

continues its predecessor's activities and objectives. All Ministerial Orders in which the name Inspectorate for Health Protection was included have been amended to incorporate the new name by means of the Amendment of Ministerial Orders with respect to the New Name Inspectorate for Health Protection, Consumer Goods and Veterinary Affairs (Wijziging ministeriële regelingen in verband met nieuwe naam Inspectie Gezondheidsbescherming, Waren en Veterinaire Zaken), Stcrt. 1999, No. 18. For a brief English introduction to the Inspectorate for Health Protection, see Van Buuren 1993, pp. 372-375. Only the activities of the Inspectorate for Consumer Goods and Veterinary Affairs concerning food will be examined in this research. The Rotterdam Inspectorate for Health Protection spent approximately 80% of its resources on food and 20% on non-food, which is a representative percentage for the entire inspectorate. The resources spent on non-food activities are, however, still increasing.

Customs are also responsible for supervising the Consumer Goods Act, but as their role is very limited in practice, no further attention will be paid to their role (Order of the Secretary of State for Finance of 4 March 1994 on the Designation of Custom Officials for Supervising Compliance with the Consumer Goods Act [Aanwijzing ambtenaren der invoerrechten en accijnzen als ambtenaren, belast met het toezicht op de naleving van de Warenwet], Stcrt. 1994, No. 46).


38 Damman 1999, p. 45.
already been put on the market. The Inspectorate carries out three types of inspection: (1) basic inspection, (2) system inspection, and (3) additional inspection.39

Basic inspection aims to control compliance with legislative provisions, such as those on labelling, temperature, pathogens and composition. Only when basic inspection confirms the suspicions, does the Inspectorate decide to carry out (certain parts of) system inspection. A complete inspection visit consists of both basic and system inspection.40

System inspection aims to control legally prescribed food safety systems, that is either a food company's own food safety system or industry guidelines to good hygiene practice, as prescribed by the Hygiene Directive 93/43/EEC. The major difference between basic and system inspection is the complexity of standards in food safety systems, which require interpretation by the inspector while taking into account all relevant circumstances. A single deficit in a food safety system does not automatically lead to a punishable violation, but all deficits together are evidence of the fact that the business operator has an insufficient food safety system. This shortcoming is communicated to the business operator in a letter. If the business operator takes no action, an official warning or a police report follows, depending on the seriousness of the deficits.41

The C&V Inspectorate carries out additional inspection42 in areas where another public or private enforcement body is already active. Additional inspection focuses on public health protection. For instance, the C&V Inspectorate carries out additional inspection at the National Inspection Service for Livestock and Meat. This additional inspection consists of checking whether the National Inspection Service pays sufficient attention to public health protection in slaughterhouses. The Inspectorate inspects or audits the Inspection Service’s inspection system.

5.3 Inspection practice

As a rule, an inspector carries out inspection visits without prior warning. The inspector's right to enter companies, including homes when it is necessary to do so to reach the premises to be inspected, has been laid down in Articles 5:15 of the GALA and article 29 of the Consumer Goods Act. When an inspector visits a company, he often reports to the director or manager or to one of the company's employees. A company can request the inspector to provide proof of identity and the company cannot refuse the inspector entry, provided the latter is able to provide such proof of identity. Companies do not have to pay for the visits as the task of the Inspectorate is considered to fall under the Government's responsibility for public health.

41 Inspectie W&V 1998, 4.
42 The notion additional supervision used by the C&V Inspectorate is not quite correct as additional supervision may consist of both supervisory and investigative actions.
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An inspector will himself determine when to visit a company and he has a wide degree of freedom in carrying out his inspections. Inspectors have several powers at their disposal during visits. One major power is the taking of samples, as laid down in article 5:18 of the GALA. An inspector is free to decide when to take a sample and how many samples to take. In general, an inspector takes a sample when he has doubts about the microbiological or chemical safety of a foodstuff, when he does not trust the situation or when highly perishable foodstuffs are involved.

The inspector’s sample of a foodstuff is packed and sealed and brought to the laboratory of the Regional C&V Inspectorate, where the sample is then analysed or examined in order to determine whether it complies with relevant legislation. When an inspector takes a sample, the company in question can ask for a sample for itself, a counter-sample (article 5:18 of the GALA). A counter-sample is only taken at a company’s request. The inspector leaves this counter-sample packed and sealed with the company, which can have it examined by another laboratory.

5.4 Measures and penalties
In general, if the first violation is not too severe, the inspector gives the company a written or oral caution. Cautions are inspection measures. In practice, a caution means that the company must rectify the situation within a specified period of time. The inspector will re-inspect the company in a few weeks’ time in order to ascertain whether the violation has been rectified. If insufficient steps have been taken to prevent future violation, or if more serious violations or repeated violations are involved, the inspector compiles a police report in his function of investigative officer in preparation for prosecution. The police report is sent to the public prosecutor via the Director of the Regional C&V Inspectorate. Serious violations are violations that lead to an immediate and/or serious risk to public health or safety or seriously mislead consumers. Annually about 6,000 police reports are compiled for violations of the Consumer Goods Act.43

When a violation involves foodstuffs which are dangerous to public health or unfit for human consumption, the inspector can seize these foodstuffs (article 18 of the Economic Offences Act). He must then compile a police report. In the case of a violation which requires immediate action, the Public Prosecution Service can impose certain demands on the accused, such as requiring the accused to ensure that the goods in question are stored in a specified place (article 28 of the Economic Offences Act). If there is a need for direct action, a court can (partially) close down the company temporarily (article 29 of the Economic Offences Act). In practice closure is rare.

43 Van Geffen 1998, p. 4. The 6,000 police reports involve both food and non-food violations and it is unknown how many police reports deal with violations of food law provisions, but the majority of these 6,000 reports, however, do involve food law violations.
5.5 Public Prosecution Service

The Public Prosecution Service prosecutes about 600 violations of the Consumer Goods Act annually, the majority of which involve foodstuffs and occur in the larger cities. On the basis of a police report the public prosecutor has three options:

1. out-of-court settlement (transactie in Dutch, articles 36, 37 of the Economic Offences Act and 74 Criminal Code)
2. dismissal/non-prosecution (sepot in Dutch, articles 167 (2) and 242 (2) Code of Criminal Procedure, only occasionally)
3. prosecution.

Food law violations are commonly settled out of court and the percentage of cases disposed of in this way reflects the percentage of out-of-court settlements of economic offences in general. The Public Prosecution Service can invite the offender to pay a fixed sum of money to avoid prosecution. In practice, this means that the Public Prosecution Service sends the accused a giro payment slip for the amount due for settlement out of court. It is the Public Prosecution Service which decides whether a case will be settled out of court or taken to court. The Procureurs-General of the courts of appeal have developed a tariff system (a recommended range of payments and equivalent number of days in prison) which can be used as an indication. This tariff table applies to less serious violations, when the accused is a first offender. Public prosecutors may depart from the tariff table depending on the circumstances of the case. A judge is neither bound by these tariffs, nor by the amount of the out-of-court settlement set by the Public Prosecution Service, as long as he/she remains within the legal limits. The maximum amount for out-of-court settlement is Dfl. 10,000 or 80 days in prison. In practice, first-offenders often pay no more than Dfl. 750 and one may seriously question the deterrent effect of such settlements.

5.6 The Court

A case comes before the court if the accused does not accept the proposed settlement or does not pay the amount set or if the public prosecutor considers the case to be so serious that prosecution is required. Food law violations that are economic violations and come before a court are decided by economic chambers or the police court for economic offences (politierechter) at a district court (article 38 of the Economic Offences Act. Appeal is possible

44 Van Geffen 1998, pp. 4-5, these 600 prosecutions involve both food and non-food, but the majority involve food law violations.
45 Mulder and Doorenbos 1995, p. 115: about 80% of the economic criminal cases registered yearly with the Public Prosecution Service are settled out of court.
46 The list of tariffs for amounts for settlement out of court and claims at trial for violations of the Wet op de economische delicten (Economic Offences Act) is published in the Schuurman & Jordens Edition of the Wet op de economische delicten (Economic Offences Act), No. 128 1994, pp. 73-180; and in the Wet op de economische delicten (Economic Offences Act), Edition Cremers.
from the district court to the economic chamber of a court of appeal (article 52 of the Economic Offences Act) and, under certain circumstances, an appeal in cassation is possible to the Supreme Court (article 56 of the Economic Offences Act).

In the committal of a case for trial the public prosecutor also requests a specific penalty to be imposed. Proposed sentences for economic violations are also incorporated into the table of tariffs in the Economic Offences Act. The table contains a range of financial penalties and the equivalent length of detention for each of these. For Consumer Goods Act violations by retailers, the table recommends that prosecutors request a financial penalty of between Dfl. 300 and Dfl. 1200 or between six to fifteen days of detention. For manufacturers and importers, the recommended range is between Dfl. 1200 and Dfl. 3000 or between fifteen and thirty-five days detention. Eventually the judge imposes a punishment and/or a measure for a violation of the Consumer Goods Act on the basis of articles 6-8 of the Economic Offences Act.

On the basis of article 6 of the Economic Offences Act, all violations, including violations of the Consumer Goods Act, are punishable with either penalties of detention of no more than six months or a fine of no more than Dfl. 25,000. The maximum fine for corporations is Dfl. 100,000. If the value of the goods with which or in relation to which the economic violation has been committed amounts to more than one fourth of the fine's maximum value, the fine can be increased by one category. This means that the fine for an economic offence against the Consumer Goods Act fine can be increased from Dfl. 25,000 to Dfl. 100,000 (article 6 of the Economic Offences Act). 47

In addition to the principal penalties named in article 6 of the Economic Offences Act, article 7 foresees additional penalties, such as deprivation of certain rights, complete or partial closure of a business for a period not longer than one year (which is referred to as an "economic death penalty" in practice), confiscation of objects or publication of the court decision. In addition to principal and additional penalties, article 8 of the Economic Offences Act makes it possible to make additional orders, such as seizure, deprivation of unlawfully obtained advantages, administrative orders relating to a company and the imposition of the obligation to carry out what has been unlawfully neglected or to undo what has been done unlawfully.

In practice, few food law cases reach the courts. The number of food law cases brought before the courts in the Netherlands and the ensuing decisions are not officially registered, either by the Public Prosecution Service or by the courts, and they are seldom published in legal journals. For this reason, it is unclear how many food law cases are decided and what their outcomes are. The small number of food law cases decided by a court show the same pattern as economic criminal cases in general. Only a fraction of all economic criminal cases registered yearly by the Public Prosecution Service are eventually decided by a judge. 48 In most food law cases judges impose a fine and an order forbidding the foodstuffs in question to be used for human consumption. Closure of a company or incarceration are hardly ever imposed in practice.

47 In addition, Article 23 (7) Criminal Code provides the possibility to upgrade a fine when a legal person is convicted.
6 Conclusions

Community food law grants Member States much freedom in enforcement of food law. A disadvantage of this freedom is that it may lead to differences among Member States' enforcement practices. These differences are not disadvantageous in themselves provided they do not hinder the free movement of foodstuffs and are justified for reasons of public health or consumer protection. Although Community (food) law enforcement is primarily the responsibility of the Member States, the view that the Community is empowered to regulate the enforcement activities of Member States is gradually prevailing.

As for the incorporation of minimum enforcement provisions in Community food law, a distinction can be made between inspection, investigation, prosecution (erbij toch?) and sanctioning provisions. Some minimum inspection provisions have already been laid down in Community food law, in particular in the Official Control Directive 89/397/EEC. This directive can be extended by making its present provisions more precise, more imperative and less voluntary. The uniformity of enforcement throughout the Community will be strengthened by determining at the Community level what minimum investigation powers national food enforcement officers should have and by clarifying how these powers should be applied in practice by issuing guidelines that provide examples. Total harmonisation of Member States' sanctioning systems in Community food law is not necessary as long as the outcomes of these systems are equivalent. This equivalency will probably be increased as a result of clearer inspection and investigation provisions for Member States in Community food law and guidance on their use. For the incorporation of enforcement provisions in Community food law inspiration can be drawn from other fields of Community law, such as fisheries, customs and agricultural law, which already include provisions harmonising national enforcement practices.

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6 Europol and Forensic Science

_Edwin Kube and Rainer Dahlenburg_

1 Responsibilities and development needs

The tendency towards globalisation is becoming increasingly evident not only in the business world but in organised crime as well. Effective responses to this trend are possible only within the framework of international co-operation among the relevant law enforcement and judicial authorities. In this context, Europol, whose existence is attributable largely to an initiative proposed by former German Chancellor Helmut Kohl in the European Council on 28/29 June 1991, is regarded as a 'quantum leap in law enforcement policy'.

Europol is tasked with promoting co-operation in the field of internal security within the context of the process of European integration. This objective will be achieved primarily through systematic strategic and tactical analyses of specific forms of transborder crime viewed as especially harmful to society.

Before Europol actually began its work, the Europol Drug Unit (EDU) was established and commenced operations in The Hague in January 1994. The legal foundation for the EDU was laid down in the Ministerial Agreement of June 1993 and later solidified in the Joint Action of March 1995. The Europol Treaty took effect on 1 October 1998, paving the way for the accelerated development of Europol into a fully operational organisation. To this end, it will be necessary to complete work on the yet outstanding secondary instruments of the Treaty – particularly as they relate to logistics – on a priority basis and to accomplish full implementation of the Europol Computer System TECS (Treasury Enforcement Communication System) as the technical foundation for the preparation of strategic and operations analyses as soon as possible.

The initiated expansion of the Europol mandate to cover crimes of terrorism and counterfeiting (to include the forgery of payment instruments) must also be implemented at the practical level. This takes on particular significance in light of the scheduled introduction of the Euro as tender for cash transactions.

The assignment of a so-called operational authority to Europol, which is demanded by various parties but can probably be realised in the long term only, may potentially enhance the effectiveness of this police agency in the fight against transborder crime. Efforts to achieve this goal are likely to encounter obstacles in the form of reservations expressed by certain Member States concerned with issues of national sovereignty. Other difficult hurdles relating to criminal law will also have to be overcome. In this
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context, at least a compatibility and a long-term harmonisation of formal and material laws governing criminal proceedings is a must. The question of the relationship between national judicial authorities and Europol has already arisen. It is high time for the Member States of Europol to begin to make intensive use of the opportunities presented to them with respect to the initiation and co-ordination of specific criminal proceedings relating to transborder crime. Europol should also be enabled as soon as possible to support - through international task forces - the investigative activities of police officials from the various countries (cf. Article 30 II of the Treaty of Amsterdam in its entirety and the five-year period specified in this context).

In the interest of the development of an all-European security partnership, the countries of Central and Eastern Europe - especially the countries regarded as candidates for membership - should be given the opportunity to send liaison officers to Europol. It would be appropriate for Europol to commence negotiations with respect to co-operative relations with these third countries on the basis of a corresponding mandate. This would represent a significant step towards the harmonisation of security standards throughout Europe.

As an electronic search network, the sis (Schengen Information System) effectively augments the spectrum of Europol's responsibilities. Future integration of the sis into the complex of Europol functions would make good sense within the context of efforts to achieve harmonisation among the respective signatories of the Schengen Implementation Treaty of 19 June 1990 and the Member States of Europol.

Europol complements many years of successful work by the ICPO (International Criminal Police Organisation), which is now preparing itself on the basis of the 1998 Strategic Development Plan to deal with the challenges of the present and the future. Both institutions are called upon to solidify and expand their co-operation in a relationship of mutual trust in the interest of effective crime control.

2 Europol and the national forensic science institutes

In our opinion, it would be expedient to establish, under the auspices of Europol (whose future tasks, according to the declaration included in the Appendix to the Maastricht Treaty (1992) and in Title VI of the Amsterdam Treaty (1997), also include research in the field of forensic science), an association between Europol and the national forensic science institutes of the EU Member States. One possibility would be the model of research networks developed by the European administrative authorities in Brussels within the framework of the basic research concept ESPRIT ('Network of Excellence'). Under the overall control of Europol, which, in this respect, would primarily perform an 'umbrella' function, the forensic science institutes of the Member States would have to define a frame of reference into which the research and development projects of the individual mem-
bers would fit. If consensus cannot be achieved, priorities and responsibilities would be decided by means of co-ordination through Europol. Institutes outside this network, including police research institutes from non-EU countries (e.g. members of the European Network of Forensic Institutes (ENFSI) from states that are not members of the EU), would not be excluded from co-operation. The close link between the forensic science institutes (i.e. the ‘network nodes’) would – in the long run – result in access for all participants in the network to each network node and to its resources (e.g. to any expensive special equipment owned by a national forensic science institute but not being used to its full capacity).

The forensic research groups would also have the task of harmonising their advanced study programs measures (see Article 30/1 of the Amsterdam Treaty) and would have to link individual, highly specialised subdisciplines to interdisciplinary fields.

The expertise of all participants could be combined as required so that small national research groups could also make a fundamental contribution to the overall results and share in the success achieved by all. This is extremely important, particularly with regard to complex fields such as pattern recognition and expert systems.

At the present time, it is next to impossible to set up really large working groups in the EU countries for certain highly complex projects. It has not been possible thus far, for example, to carry out multidimensional projects with an extremely large functional scope. For the future we envison a European expert system to support forensic scientists. Such a system could help the examining scientist by providing information about pertinent methods and their possible limitations and about persons who have special expertise or laboratories practising such methods. Know-how concerning evidential value and existing information systems developed by various laboratories for certain areas of specialisation could be integrated into this system. In view of the number of special issues and the required expertise alone, the complexity of such a project makes a purely national approach impossible.

An Europol co-ordination centre to be established in the rather distant future could assume direct control in that case and become the lead agency for such projects. Ideally, the task of steering projects of this kind – i.e. subdividing them into segments, assigning tasks to the working groups involved, defining interfaces, monitoring deadlines and conducting integration tests – should be performed by the co-ordination centre.

Through a Forensic Science Centre Europol could serve as one of the essential points of contact for the Police Co-operation Working Group of the K4 Committee (European Union Technical Committee on Problems in International Justice) with respect to issues of forensic research and development as well. On the one hand, Europol could become a ‘client’ of ENFSI (similar to the scientific consulting assistance provided on the basis of agreements between ENFSI and the Police Co-operation Working Group). Additionally, Europol would then contribute to the implementa-
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tion of the results of consultation within the context of its own responsibilities.

On the other hand, Europol could represent a nucleus within the framework of the forensic science function which would assume de facto certain steering responsibilities that could ideally be assigned to all ENFSI members – even beyond the scope of the EU.

This would apply, for example, to the development of a DNA (Desoxy-riboNucleic Acid) analysis database oriented towards best practice and compatibility and fed with multi-national data. It would then be the task of decision-makers at other levels to determine whether – and if so which – non-EU countries should be considered for participation in the DNA analysis database. A central agency such as Europol would at least be able to make a significant contribution to ensure that the various DNA analysis databases were designed in conformity with system requirements so that, in individual cases at least, searches could be conducted in multiple files, including those of non-EU countries, and vice-versa.

3 Projects in the field of drug-related crime

Aside from possible future forms of co-operation between national forensics institutes and Europol, concrete steps in project-based co-operation have already been taken in the area of drug-related crime in particular.

These activities were initiated primarily in response to the spread of synthetic drugs (especially the tablets known as ‘Ecstasy’), which reached epidemic proportions in the early 1990s. With this development, drug abuse assumed an entirely new dimension, most notably in the countries of Europe. Europe was no longer only a market for narcotics but had also become one of the most important centres for the production of and trade in synthetic drugs.

At an early stage the law enforcement authorities recognised that the traditional methods of criminal investigation did not allow for an optimum fight against this complex phenomenon. Especially the dynamics, the epidemic character and the users’ circles but also the illicit manufacturers’ and distributors’ potential and know-how required the development of suitable control concepts.

Conceptual problem-solving approaches were derived in part from experience gained in ‘older’ projects within the framework of efforts to control heroin smuggling into and within Europe and to deal with the problem of amphetamine abuse in the Scandinavian countries. However, these projects hardly took into account the importance of multidisciplinary co-operation at both the national and international level.

At the national level, these insights culminated early on in the installation of a Synthetic Drugs/SyDro project group at the Bundeskriminalamt (BKA, German Federal Crime Agency). The group’s objectives include improvement of the overall situation, the development of new crime control strategies/concepts or the review of existing strategies/concepts, the
collection, analysis, evaluation and distribution of secondary information and services within the context of its role as a central office for the German states. Success in achieving the goals of this complex project required co-operation and resource sharing between police and forensic science institutions early on, whereby the contributions of the latter were no longer restricted to traditional narcotics analysis and/or chemical profiling.

This initiated an integration process which can co-ordinate and develop to a greater extent the activities of the law enforcement authorities taking into account the necessary co-operation with natural science, and with institutions involved in treatment and prevention.

Due to their conventional appearance as tablets or capsules, synthetic drugs manifest themselves as quasi-multidimensional industrial products with definable resources which provide much more information than ‘classical narcotics’ and thus open up the possibility of complex forensic assessment of their design and overall composition. These hypothetical considerations led to the establishment of the Central Analysis Programme Ecstasy – Synthetic Drug Monitoring (CAPE). Employing an interdisciplinary approach involving the dynamic integration of the resources of chemistry, toxicology, physics, material science and pharmacology, this program examines the entire process of tablet production from ingredient synthesis through tablet manufacture to finishing/packaging and distribution of the final product.

This approach also incorporates pharmacological/toxicological analyses and expert assessments, particularly as they apply to new designer drugs which appear on the scene, focusing especially upon aspects of prevention and education as well as coverage by existing laws (inclusion under the BtMG,¹ German narcotics law). This complex pool of information (forensic intelligence) is compiled with the aid of computers in such a way that it can flow into and support police intelligence work.

It should be noted that CAPE represents a primarily strategic approach to crime control which – like search methods, witness-protection concepts, etc. – cannot be admitted into court records.

Initially, information gathering and assessment efforts focused on national seizures. It became clear very quickly, however, that this global mass phenomenon could be thoroughly investigated only through international co-operation. With the founding of the European Drug Unit as the precursor organisation for Europol in early 1994, the EU Member States created an institution that was to serve as a hub for the necessary collection and transfer of relevant information. That same year, the EDU Task Group on Synthetic Drugs and Precursor Substances initiated the LOGO project, a program for the preparation of ‘ballistic’ profiles of ecstasy tablets. The aim of this project was to use analyses of pertinent information for the purpose of establishing links between the various types of tablets seized in the course of operations throughout the European Union and to provide

¹ Betäubungsmittelgesetz.
the Member States with information for both intelligence and evidence purposes.

To realise this objective, a database system was developed which, aside from forensic data, also encompassed physical characteristics of tablets. In this area, EDU was — and Europol remains — dependent upon the supply of information from outside sources, as existing law does not provide for the collection of original evidence by these agencies, and they are neither equipped nor authorised to conduct forensic testing. The quality and quantity of these data and the structure of the database system are two sensitive and fundamental prerequisites for effective system function. The need to incorporate special forensic knowledge becomes quite obvious.

On the basis of cooperation established between European Drug Unit/Europol and the Bundeskriminalamt during the preparation of the Synthetic Drugs Catalogue, joint activities were intensified through the inclusion of knowledge gained through the German CAPE program.

Europol modified and refined the original database system on the basis of conceptual proposals for the architecture and contents of database fields containing forensic information.

The end product is a binary system capable of storing and searching for complex (appropriately processed) criminalistic and forensic data. Cross-linking of the elements is ensured via a coding system that permits police intelligence read-only access to forensic data. Access for other purposes is not possible. Accordingly, data must be entered by the specialists in accordance with the standardised format. In the current testing phase, the Toxicology Laboratory of the BKA Forensic Science Institute is responsible for entering forensic information.

Fully effective operation of this (thus far only bilateral) project on an EU-wide basis will require prior clarification of a number of fundamental questions and modalities.

In the EU basic police document Cordrogue 69, adopted by the December 1995 Madrid European Council, the European Council approved a catalogue of measures including a number of action plans for the enhancement of international cooperation among law enforcement authorities in the fight against illegal drug trafficking. Several of these focus specifically on the role of forensic laboratories. Three proposals have since been passed as joint plans of action by the Council of Ministers of Justice and Home Affairs — the ‘drugs purity indicator system’, the ‘chemical profiling of drugs’ and an ‘early warning system for new synthetic drugs’. These plans of action aim to pass on the increased benefits of forensic information to law enforcement authorities in the fight against illegal drug production and trafficking. This document names Europol as the agency to which Member States are to forward information. It provides a clear indication of political commitment to cooperation between investigative agencies and forensic science institutes.
It is no longer necessary to ask whether forensic laboratories are to be integrated into the process of police intelligence work; instead, we need ask how and how soon this integration is to be accomplished. While Europol represents a central co-ordinating agency with a clearly defined mandate, forensic science manifests itself within the European Union as a disparately structured web of institutes with nationally defined responsibilities and functions, a situation that tends to be counterproductive to efficient co-operation.

One approach to overcoming the existing discrepancies could proceed through a loose association of forensic science institutes within the European network of ENFSI. As this is a pan-European platform, however, the acceptance of this body and its activities is not beyond dispute within the European Union and will therefore require a time-consuming, static process involving considerable persuasive effort.

As experience gathered in the SYDro/CAPE Project and the current EU feasibility study on the expansion of the ongoing Nordic Amphetamine Profiling Project to all EU Member States has shown, the co-ordination and harmonisation of activities in the field of forensic science are essential for the effective use of available resources in police intelligence work. The most effective line of action would probably be to optimise the potential of existing institutes of forensics and toxicology and then identify them as pilot institutions for co-operation and communication with Europol. Such an approach would be justified on the basis of equipment, logistics and manpower requirements alone.

It is indispensable to jointly develop clearly defined, operative and strategic objectives during the planning phase in order to develop realistic and promising modes of implementation. At the same time, effective administrative regulations relating to the internal and external communication required must be created and put in place.

Benefits will accrue from the positioning of investigative agencies and forensic institutes in proximity to one another. Equally important is the creation of a basis of trust and collegial partnership among all concerned institutions. An indispensable prerequisite for all future-oriented planning and implementation on an EU-wide scale is a feasibility test for all concepts and methods developed. Although this would make it impossible to integrate all national and/or regional levels completely during the initial phase, these could be gradually integrated later taking into account the results achieved. The need for continuous transfer of information among all participating levels could be met with a common or standardised communications system, e.g. using the resources of the Internet.

In general, the absolute decentralisation of all testing phases down to the lowest-level laboratories should be avoided in the interest of efficiency and practicability. Instead, supraregional, object-oriented and/or method-oriented service centres should be created or expanded as appropriate. These would then form the interface with Europol.
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From the standpoint of forensic science, a structure of this kind is needed in order to enable Europol to fully assume its role as the binding link in the chain joining police and forensic intelligence on a timely basis. Europol must specify and contribute to the realisation of clear channels of communication, while creating and implementing uniform required procedures for sample transfer.

At the same time it is necessary to concentrate and upgrade information stored in the Early Warning System on New Synthetic Drugs for the law enforcement authorities. Within this system Europol acts as a point of contact and interface among Member States. This system requires improvement with regard to both effectiveness and availability of information.

A goal-oriented initiation and/or more effective promotion/co-ordination of research projects appears to be appropriate and necessary. It is indispensable to stimulate and co-ordinate international co-operation with Interpol, the United Nations International Drug Control Programme and potential partners in non-European countries (USA, Australia, Japan, etc.).

All in all, it is becoming clear that Europol should assume an important initiating, supportive and co-ordinating function in the field of forensic science as well. It is also essential to ensure that effective existing international networks such as ENFSI, in particular, are taken into account in the strategic planning of this Europol function and that specific national circumstances and interests are also sufficiently considered.

References

Chapter II

Interdisciplinarity
1 Introduction

In this chapter the main focus is a vital quality of forensic expertise. Interdisciplinarity is inherent in the term 'forensic expertise', which literally means expertise practised on behalf of the 'forum'. In ancient times the forum was the place in a Roman city where judgement took place and where one or more judges decided over the violations by Roman citizens of the law. In modern times legal systems in Europe have developed more complexity and more variety. The assistance of (scientific) experts is of an increasing importance in criminal procedure.

Interdisciplinarity is an important aspect of the professional function of forensic experts. In a criminal case an expert often co-operates with colleagues working in other fields of forensic expertise. Professional discussion about the planning and sequence of different forensic investigations is of great importance for optimal use and usefulness of available traces of evidence. Also an interdisciplinary discussion about the coherence of the investigations is desirable. Interdisciplinary communication between experts in different fields is necessary in order to guarantee the right combination of the various disciplines involved in forensic investigations in a complex criminal case. After all the experts have presented their conclusions, the results are integrated to produce an optimal product; the expert report.

Here interdisciplinarity stands for co-operation between the experts themselves.

In this chapter various authors give their views and opinions about interdisciplinarity in five articles. The first two contributions share a common organizational approach towards the numerous disciplines of forensic expertise, each described from a different perspective. They discuss institutionalisation and the possibilities for concentration or dispersion of forensic expertise in the criminal procedure.

Ian Freckelton suggests organising forensic expertise by institutionalising the different disciplines. An overview of crucial factors with respect to the 'Institutionalisation of Forensic Expertise' is given in an abundantly illustrated essay. He describes how habits can become rules, and rules can develop into standards for specific types of forensic expertise. The author mentions another important factor in the institutionalisation process, a description of the boundaries of the different areas of expertise.

Here the notion of distinguishing the various disciplines can develop. As a third element for institutionalisation, the description of quality of education is recommended. As a last factor in the development of institu-
Chapter II: Interdisciplinarity

tional forensic expertise, the author emphasises the examination, and cer-
tification of the experts and accreditation of the forensic institutes.

In writing about the possibilities of decentralising the investigations of the forensic expert, *Lia van der Westen* explains ideas about effective dispersion of the capacities necessary for forensic expertise. In her contribution 'Concentration or dispersion of Forensic Expertise', the author mentions as an example, the establishment of 'satellite-laboratories' at the technical police, working under the umbrella of a central official forensic laboratory. She also makes distinctions of economic aspects with respect to investments.

In addition, the objectivity of the forensic expert and the independence of the forensic expertise are discussed in terms of the factors which may influence them.

A distinction is made between two different aspects of each forensic investigation; inquiry and evidence. Depending on the case, one aspect may weigh more than the other, but both are always represented. Quality-control and education by independent organisations are two important criteria for forensic expertise, practiced in both concentrated and dispersion forms.

The following three contributions deal with the interdisciplinary approach between experts of different forensic disciplines.

*Pierre Margot* translates the need for interdisciplinarity into the need for the ability to handle data of a general nature in a wide spectrum of disciplines. The multidisciplinary study of data, originating from different resources, such as police and forensic institutes, must be encouraged. This method of study can lead, via multidisciplinary conclusions, to new discoveries and insights and thus to better results.

This underlines the value and the necessity of interdisciplinarity in forensic investigations. Margot also mentions the matter of equipment-sharing, both nationally and internationally, to avoid the waste of the limited resources of forensic institutes. Concerning standardisation and international co-operation, the author advocates researching solutions of a more general nature rather than the development of standards. For the future, the creation of databases is emphasised as being useful in international circles. To guarantee future international exchange and combination of data, it is necessary to make the appropriate arrangements now.

Finally, the integration of concepts and methods of crime investigation, crime analysis, forensic sciences and artificial intelligence has to be encouraged and should have the highest priority.

*Harald Merckelbach* and *Eric Rassin* discuss in 'Interdisciplinarity in medical and psychological forensic expertise' an example of existing and frequently used co-operation between medicine and psychology. They point
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out that problems appear when therapists act as forensic experts. Attention must be paid to the special forensic role and attitude of the psychotherapist or other healthcare professional. They suggest that even during the education, the difference between therapeutic and forensic aspects need to be incorporated and highlighted. The incompatibility of the roles of forensic expert and (psycho) therapist in one person needs to be recognised because of the different approaches required in the courtroom and the doctor's office. The authors conclude by considering the testimonies of such 'double-role' forensic experts as being inadmissible.

An example of a successful co-operation between two forensic fields of expertise is described in 'Interdisciplinarity' by Joan Holthuis, as she discusses co-operation in the areas of odontology and pathology. A few practical examples are given, such as the functioning of a Disaster Victim Identification Team (DVI team) as a semi-permanent co-operation project, in which forensic odontologists work in combination with forensic pathologists and other experts. The author illustrates successful 'DVI-operations', both on a national basis (the Dutch DVI team in Faro 1990) and an international basis (DVI-team initiated under the direction of the International Criminal Tribunal for the former Yugoslavia [ICTY]).

One of the main tasks of the 'ICTY-Teams' is to give certainty to the surviving relatives, by identification of the bodies found, in relation to missing persons.

Another important task is the collection of evidence relating to war crimes. The interdisciplinary approach of odontologists, anthropologists and pathologists turned out to be a satisfying co-operation between various fields of expertise.

Livio Jakobs
2 Institutionalisation of Forensic Expertise

_Ian Freckelton_

1 Introduction

Most of the areas of forensic expertise, whether one contemplates forensic science, psychiatry, psychology, medicine, dentistry, or accounting, were not born in their current incarnations. They are applied disciplines, each of them, having emerged from their core areas of expert discourse and having been translocated into the anterooms of the courts and into the courts themselves. However, the process has not always been a natural or an appropriate one.

Often the transference has been characterised by phases of error and claims at first made by the proponents of techniques and theories that have turned out not to be founded in verifiable data or sound scientific method.

This chapter describes a variety of disciplines whose removal of expertise from the laboratories, therapeutic couches, dental chairs and hospitals into curial portals has highlighted the risks attendant upon the process. Sometimes, areas of expert endeavour have legitimacy and utility within their context of origin but when applied for another purpose they should no longer be viewed as commanding acceptable efficacy or usefulness. Other times, their removal carries with it latent flaws which become more significant when applied for forensic purposes with the needs and demands of litigious resolution of disputes. On other occasions the rigour demanded of information by the courts and the arbitrariness of the dyad of proof and disproof has revealed that the move of an area from its provenance to the forensic has been premature.

The application of a number of disciplines to forensic needs has demanded indicia or reliability. On occasions, this has commenced as a hobby or as a personal investigation on the part of a professional. The pattern that can be perceived in many areas, though, is one in which professionalisation, accountability and institutionalisation of areas of forensic expertise have emerged. The result in some instances has been significant refinement of the area of expertise or even its complete abandonment for forensic purposes. In others the result has been a degree of rigour and focussed research that has substantiated the area as a valid and reliable contributor to forensic analysis, even on some occasions in turn feeding back into the discipline proper.
2 Forensic expertise

The overwhelming majority of the forensic disciplines emanate from the mainstream body of professional activity. They are applications of research and development, of expert work used in a variety of non-forensic contexts. Just a few exceptions to this phenomenon exist such as dactyloscopy, better known as fingerprinting, a science originally developed by Bertillon exclusively for the purpose of establishing consistency of crime scene exhibit and characteristics of a suspect.

More standard is the development of areas such as forensic paint analysis, examination of hairs and fibres, DNA profiling, forensic entomology and forensic dentistry. Each one of these fields now constitutes a mainstream contribution to criminal investigation, but each is an application of learning and research from within chemistry, biology, zoology and dentistry. The utility of each became apparent as a means of facilitating matching of a crime scene sample with a sample associated with a suspect or in identifying a victim or an offender or a time of death. However, a common impediment lay in the way of each form of analysis being applied helpfully for forensic purposes – namely, in order to gauge the significance of any finding of consistency or equivalence between samples it is necessary to compile detailed databanks indicating with high levels of discernment the frequency of the existence of such samples or phenomena generally and in circumstances particular to the commission of a crime or the nature of a crime scene.

Thus, it might be that a form of soil found at the scene of a homicide and upon the clothing of a suspect suggests that the suspect was in the vicinity of the crime scene. However, the strength of such an inference (and thus its admissibility as being more probative than prejudicial) needs to be articulated for forensic purposes. Amongst other things, it is a function of how common such a soil is within the general area of movement of the suspect. It might be that the soil is specific to a particular geographical area, or that it is the soil to be found also around the area where the suspect lives and works. It may be that only a very small number of people might have such a residue upon their shoes or that it would be extremely common amongst people in circumstances comparable to those of the suspect. Such statistically reducible information is essential for the trier of fact to be able to evaluate the probative value of such a finding. In turn, the capacity for such information to be statistically reducible presupposes a substantial repository of research and data collection – a significant maturity within the area in question.
3 The transition stage: a case example

Partly, such a process is a question of the area's developmental stage. A latter-day example of an area in transition as it emerges from the therapeutic milieu to the forensic is podiatry. Podiatry is an area of specialised knowledge developed to facilitate the alleviation of pain and dysfunction in the feet and lower limb, a science focussed upon reduction of pathologies, the rehabilitation of pathogenic gaits and the development of footwear with the potential to make walking easier and more comfortable. Jones has defined podiatry assessment in its pure form as "concerned with identifying structural characteristics and biomechanical forces which influence patterns of wear within and outside shoes and characteristics transferred to foot impressions or gait impressions".1 Clearly enough, podiatry has the potential to assist in human identification by reference to both impressions made by shoes and feet and by reference to the state of shoes. However, the utility of such evidence depends upon the degree of discernment that contemporary techniques of comparison permit.

In its early phases of evidentiary application, forensic podiatry confronts a range of logistical difficulties. While common and unusual wear patterns in shoes and in foot impressions can readily enough be identified by experienced podiatrists, the focus of the law is upon features of an exhibit which are uniquely identifying or at least such as to exclude considerable percentages of potential suspects. Footwear/foot impression results are recommended by the Federal Bureau of Investigation to be classified as 'identification', 'probable identification', 'non-conclusive', 'probable non-identification', 'non-identification/elimination' and 'insufficient detail'.

For such categorisation to be of forensic utility, it is crucial that false positive matchings be of a low order and that identifications be of a high level of statistical discernment. In the early phases of forensic podiatry this was not possible. Jones concedes that footwear impression evidence is still, as of 1999, unlikely to provide sufficient detail alone to enable an unequivocal positive identification.3 However, there have been a small number of instances where suspects with highly individualising characteristics in respect of their gait and their footwear have been identified by podiatry analysis.4

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2 See the Seminar of Barefoot Impression Evidence, FBI Academy, Quantico, Virginia, February 1998, as cited by Jones op. cit.
A range of logistical difficulties, largely irrelevant in the treatment context, have the potential to confuse forensic podiatry results. Included amongst these are the fact that there are, generally at least, slight differences between any two impressions, due to the nature of the human foot and leg. For instance, they adapt to different media and surfaces in different ways. In addition, the same foot may fit into different shoes disuniformly, thereby affecting the biomechanics of the walking motion and in turn the wear pattern of the shoe and the impression it makes upon a surface. Carrying heavy weights can also affect the kind and quality of impression made, as can the sustaining of an injury to the ankle, knee or pelvis, even the shin. Changes in impression can also be caused by the speed at which a person walks or runs. These and other factors impair significantly the utility of footwear impression evidence for the present, as does the paucity of data-bank information about a range of pertinent information relating not so much to pronation and supination, but to subcategories of ambulatory motion and the effects of such motion upon both footwear and the impressions that they make.

4 Premature demands of expertise

Another area of forensic enterprise which has caused significant difficulty is forensic dentistry. Insofar as it can contribute to the identification of the remains of deceased persons, particularly those disfigured by intense heat or the degrading effects of longtime exposure to the elements, it has a worthy and generally accepted forensic role. However, there have been a number of occasions in which forensic dentists have overreached, claiming matchings that the state of the science at the time did not permit. An example was forensic bitemark or dental bruising analysis, an area which in the 1980s was questionable indeed, save perhaps in the clearest of cases. In dentistry there is limited reason to compare dental records of the shape and characteristics of a bite, with the impression that they leave, save perhaps to contemplate the need for orthodontic work – mostly for teenagers. However, the demands of criminal investigation can pose dentistry questions that it would not normally ask of its practitioners or contemplate their answering.

Forensic bitemark analysis in the 1980s postulated the reconstruction of dentition from bitemarks or dental bruises, for example inflicted by a sexual assailant upon a victim. In principle, dentition may be sufficiently identifying to enable a person to be uniquely or nearly uniquely pinpointed. However, as J. Kneipp observed in *Carroll v The Queen*,5 “There is a body of eminent opinion which holds that valid identifications cannot be made by reference only to bruise marks or that they should not be referred to only for the purpose of excluding suspects, and not for the purpose of

5 *A Crim R 410,* 1985, 19, p. 414; see also *Lewis v The Queen, A Crim R 267,* 1987, 29.
positive identification”. A number of courts, upon studying the level of professional disagreement about the legitimacy of the technique of identification, declined to permit its forensic reception, awaiting the achievement of greater consensus within dentistry of the technique, its validity and its reliability. However, for a time, dentists were prepared to offer opinions about the matches between dentition and impressions caused by dental bruising.

It is entirely understandable, but no less dangerous for being so, that scientists should make extravagant claims in relation to their area of research. Many areas of scientific endeavour have been through this phase until quality controls, peer review and moderation resulted in modest reports. The most prominent example of this phenomenon occurred during the early phases of DNA RFLP analysis. The early experimenters who brought DNA profiling from molecular biology and chemistry into the forensic domain heralded RFLP analysis as foolproof, the ultimate identifier. Claims of the chances of a false positive matching in the billions were advanced. It was only when embarrassing methodological errors, contamination of samples, anomalous statistical interpretations and other hiccups emerged that a more sober reanalysis took place. The result was further development of the technique, imposition of rigorous quality control, and a rethinking of the techniques of statistical analysis applied to results. In due course the numerical results in respect of the significance of matches between crime scene samples and suspect samples began to return with PCR (Polymerase chain reaction) analysis to very substantial figures, this time bolstered by much better science.

5 Insanity, diminished responsibility, malingering, mental illness

The core business of mental health professionals is to treat those with what are now classified by DSM-IV and ICD-10 as ‘mental disorders’. It is not to allocate blame, to assess the extent of a person’s ability to be aware of the nature and quality of their actions at a time in the past or to evaluate whether they knew that what they were doing at that time was wrong. Mental health professionals attempt to alleviate suffering arising from mental disorder, where possible to cure, and otherwise to manage mental disorder so that it causes minimal disruption to the person with the disorder and as low a level of risk to others with whom the person interacts as can be orchestrated.

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Ex post facto evaluation of culpability via insanity assessment is not a therapeutic evaluation. It is a forensic task, using legal criteria for legal purposes. Significant questions exist as to whether it is a function that mental health professionals should fulfil, given the limited extent to which the tools of the treating physician can be employed to arrive at the assessment. Much the same can be said of the process by which psychiatrists and psychologists provide opinions to courts about whether defendants functioned at a given time in the past as automatons or at the time were suffering from ‘diminished responsibility’. Neither automatism nor diminished responsibility form a traditional part of medical discourse. They have been engrafted onto psychiatry by the demands of the law to evaluate whether defendants’ actions can be regarded as willed and whether, if they were, the mental state that generated them was impaired by ‘abnormality of mind’, as legally defined.

Mental health professionals are also from time to time asked to express opinions upon whether persons claiming to suffer from physical or mental disorders are ‘malingering’, that is to say consciously faking symptomatology. Again, the term is one emanating from law, not medicine.

So too are assessments of fitness for interview or to stand trial questions outside standard clinical focus, requiring application of a range of legally generated tests and criteria that have little to do with the provision of clinical services.

Psychiatrists and psychologists have also been prevailed upon for some decades to provide opinions about the risk posed by individuals whom they have assessed – dangerousness assessments. The task once again is often quite removed from the therapeutic milieu. Dangerousness assessment, however, is not as unfamiliar to medical assessors as insanity, diminished responsibility and automatism investigations. This is because clinicians continually need to have regard to when treatment should reduce in its intensity and when it should change in form, such as from inpatient treatment to treatment in the community. Thus while dangerous assessment is a function that the responsible mental health professional is called upon to undertake, the difficulty occurs when it is reframed and reformulated by the demands of the law. For instance, in Victoria, Australia, persons who have committed homicide but have been found not guilty on the ground of insanity can be downgraded by the Supreme Court in their need for supervision, from custodial to noncustodial, after 25 years, if they are determined no longer to seriously endanger themselves or others. Not surprisingly, the decisions of the Supreme Court are highly dependent upon the evidence given by mental health professionals. However, the notion of ‘serious endangerment’ is a legal term of art, not a term employed in standard clinical discourse.
A key clinical issue is whether the criteria that mental health professionals are asked to use in their forensic assessments are those that they employ in the clinical domain. If they are significantly different, there is the potential for abuse of expert opinions as professional reasoning is moved from the clinical forum to the legal. There is a risk that speculation will masquerade as expert opinion. Traditionally, assessments of dangerousness, for instance, have been highly flawed, being shown on some occasions to be little better than the predictions by non-professionals. Sustained criticism of psychiatrists' and psychologists' preparedness to undertake such prediction has generated a new scientific rigour. Rather than unverifiable and empirically naive assertions, research such as the MacArthur Study is producing a refinement of risk factors and a new conservatism of assertion. The result is that evaluations of dangerousness are now recognised as having legitimacy in some circumstances, such as where there is coincidence of schizophrenia and substance dependence, but not in factual matrixes where the requisite risk factors are not present. Little by little, the area of expertise of psychiatric assessment has inched toward the accuracy demanded by the courts with forensic research in due course supplying the data on the basis of which the opinions needed by the courts can be expressed in the way and with the precision required by the courts.7

6 Syndrome evidence

One of the most problematical areas of professional interface with the legal system for mental health professionals over the past two decades has been in the context of 'syndrome evidence'. For approximately twenty years numbers of psychiatrists and psychologists have volunteered, often for ideologically driven reasons, to give evidence that persons do or do not suffer from constellations of 'symptoms' that fulfil the requirements of battered woman syndrome, rape trauma syndrome, child sexual abuse accommodation syndrome, premenstrual syndrome, Vietnam Veterans syndrome, repressed memory syndrome, false memory syndrome, cult indoctrine syndrome, and others. Each one of these syndromes, though, is not to be found in the pages of diagnostic manuals. The closest is 'rape trauma syndrome' which is closely aligned with post-traumatic stress disorder, but nonetheless postulates that there are symptoms characteristically exhibited by persons who have been sexually assaulted.

Syndromes such as battered woman syndrome, rape trauma syndrome and child sexual abuse accommodation syndrome all have the capacity to provide insights into the psychological consequences of assaulitve behaviour. They consist fundamentally of a distillation of the observations of treaters and counsellors of persons who have been violated and abused. They op-

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erate as a means of explaining to victims what might not otherwise be easily understood – that it was not their fault that they did not leave a violent relationship; that they were not to blame for having been sexually abused; that the fact that they did not report or complain to anyone about being sexually abused when a child did not mean that they were consenting to what happened. Repressed memory syndrome too provides an explanation, albeit a very controversial one, for why a person might not complain or report about something traumatic that was visited upon them – they did not for a long time recall it because they repressed the memories.

There is a clear clinical utility in such insights and the potential for them to promote recovery and free patients from guilt. However, application of such generalised insights to courtroom processes via elevating the constellations of behaviour into diagnoses and para-psychiatric disorders is another matter altogether. The syndromes, as initially applied by counselors and therapists, were not diagnostic. They did not need to be. Counselors and therapists generally have no reason to disbelieve what is told to them or to undertake investigations into the reliability of what their patients say to them. They are not psychic detectives. They are not dealing with an investigation into whether the details of abuse reported to them are actually true but with the need to alleviate the distress being experienced by those reporting traumatic incidents and with the imperative to assist victims/survivors to resume their lives in a reasonably functional way.

With battered woman syndrome, the first difficulties in the syndrome phenomenon became apparent. The syndrome was never clearly defined by its creator, Lenore Walker. Its diagnostic criteria have never been explicitly articulated. Worse, Walker did exactly what had been proscribed by Seligman, the psychologist whose experiments with dogs, to which electric shocks had been applied, had inspired her theories of ‘learned helplessness’ on the part of victims of domestic violence. She extrapolated between species in asserting that women who had undergone cycles of homefront violence exhibited the same kind of involuntary passivity that had been observed by Seligman. The syndrome medicalised women’s experiences of abuse. It was based upon dubious samples. It did not explain why some women erupted out of learned helplessness to kill their assailants, whereas the overwhelming majority did not. Walker’s own figures established that most women who had been victims of cycles of violence were not archetypally passive. Most in fact left their partner is due course, and did not assault him.

The growing concerns about the syndrome has cast into doubt its forensic utility as an adjunct to pleas of not guilty on the basis of the defences of self-defence, provocation and duress. More and more, the syndrome is

8 See e.g. M. McMahon, Battered Woman Syndrome Revisited, Psychiatry, Psychology and Law, 1999.
valued as a means of potentially disabusing jurors of myths and misconceptions about domestic violence, which they might harbour, but is viewed as of limited utility in facilitating understanding of a woman's allegedly distorted perceptions of risk and threat. Until such time as the syndrome becomes more precisely defined and more scientifically characterised, its forensic utility will be circumscribed.

With rape trauma syndrome, its creators, Burgess and Holmstrom, hoped to classify for forensic purposes typical reactions of the victims of sexual assault. This had the potential to assist prosecutions so long as the women's responses were consistent with the standard victim. However, when victims' responses were atypical, when women contained their distress, when they continued to work, when they kept associating with the assailant without overt signs of distress, the potential arose for the syndrome being used against them — if they did not display the supposedly standard responses, they did not suffer from the syndrome exhibited by 'real victims' of sexual abuse, so they may not have been involved in non-consensual sexual contact. The syndrome came to be used in the courts against women whom it had been imported to help. What became evident was what sexual assault counsellors had recognised for some time; commonalities amongst victims' reactions to rape can be described but victims are no more uniform in their responses than are other members of the community.

The commonalities are not diagnostic. The presence or absence of 'typical' reactions may be statistically suggestive, but no more than that. The syndrome should be viewed as of limited utility in the courts and as of possessing significant potential to be more prejudicial than probative.

Child sexual abuse accommodation syndrome was the most prominent and, in some jurisdictions, the most widely forensically used of the counter-intuitive syndromes. It served to assist prosecutions in child sexual abuse cases and plaintiffs in damages actions seeking compensation for the results of child sexual abuse. Again its purpose was to disabuse decision-makers of potential sources of error in evaluating the evidence of complainants. However, it confronted the difficulty that in its initial incarnation it was not diagnostic. It simply promoted the sensitisation of counsellors and clinicians in respect of common behavioural sequelae or abuse and it served as a tool in therapy to explain to children who had failed to complain or report promptly or who had recanted on their disclosures of abuse or been imprecise in the allegations that they had made that their responses were common, the common product of such trauma and in no

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way their fault. However, courts repeatedly demanded expert syndrome evidence that was diagnostic and then threw out the Child Sexual Abuse Accommodation Syndrome (CSAAS) baby with the bathwater when it became clear that all that the syndrome could aspire to doing was to counter misplaced expectations and assumptions, rather than reasoning that children displaying certain behaviours had therefore been abused and those who did not had not been. In short, the syndrome had a therapeutic application, but little by way of a useful forensic one, save perhaps by way of provision of myth-dispelling information.

7 Institutionalisation of expertise

Many examples clutter the pages of forensic history of areas of expertise which were imported from their area of origin only to be revealed as not yet ready for the rigours of the forensic milieu. Psychological syndrome evidence has been prominent in this regard, lacking many of the indicia of scientific analysis and not subject to psychometric or similar validation. The syndromes commanded a degree of therapeutic utility but were patienty ill-suited to use in the courts. Much of their development and then the lobby advocating their forensic application was by high profile, individual practitioners, often motivated by ideological reasons.

On occasions, such as with DNA profiling, new areas of forensic expertise were heralded with grandiose and inaccurate expectations and claims. On others, they were revealed as inappropriate for removal from the research laboratories or the therapeutic milieu into the courts.

However, for those techniques and theories that gained a tentative foothold in the courts, significant levels of stringency have characterised their consolidated presence as an adjunct to fact-finding. In accounting and auditing, professional standards have been developed to guide the administration of different forms of analysis, the professional associations encouraging the application of techniques to the legal environment, partly no doubt for reasons of kudos, partly because of the recognition of new professional opportunities, but also to assist in the task of accurate fact-finding by judges and jurors.

In forensic science, another and more sophisticated phenomenon can be discerned. Forensic science became the domain of entities, mostly adjuncts to bureaux of criminal investigation within police forces, whose members practised and refined their areas of scientific practice. Whole sections within such forensic units were dedicated to hair and fibre analysis, fingerprinting, blood analysis, toolmark analysis, and then paint and glass analysis, forensic botany, and a plethora of other specialised pursuits. Journals of forensic science were created. Public imagination was engaged.
Then came falls from grace when the great promise of forensic science was seen not to have been satisfactorily achieved. Mistakes were made and publicly revealed. Adulation of forensic science turned to disillusionment and a sense of betrayal by a public hoping for more than forensic science at particular junctures could provide. A need for increasing professionalisation and minimisation of error engendered application of strict scientific method – the adoption of the null hypothesis, the use of control samples, double blind reviewing of results, strict supervision, rigorous recording of the whereabouts at all times of samples.

The next phase consisted in moves toward structures and processes that would conduce against error and scientific deviancy. The drive was toward the inculcation of scientific orthodoxy and rigour within forensic science. This took the form of initiatives toward the accreditation of laboratories and the regular application of quality control procedures to evaluate the potential for and the reality of errors within the institutions.

As argued elsewhere in this volume, the institutionalisation of the various categories of forensic science brought with it a range of advantages and disadvantages. Amongst the down sides to institutionalisation was the potential for entrenched bias. With numbers of forensic scientists working side by side, generally for the same client, the police, came the risk of alignment of scientists with their clients, the potential for results to be improperly tailored to assist police investigations and prosecutions. In addition, the potential for iconoclastic, creative development of new procedures and insights is fettered by the bureaucratisation that necessarily accompanies institutionalisation of forensic science.

However, the up sides outweigh the down ones. With the creation of professionalised scientific laboratories came the opportunity to entrench sound procedures and to weed out from forensic science the individuals whose errant practices had the potential to bring the discipline into ongoing disrepute. With the aggregation of areas of scientific endeavour capable of assisting the courts came the opportunity for the benefits of institutionalisation – peer support, cross-fertilisation within different areas of forensic science, opportunities for research that would not otherwise have existed, the development of standardised protocols, and the collegiate development of accountability and effective systems of supervision and management. Part of this process involved the generation of systemic processes, of checks and balances, of proficiency testing that comes with the creation of units of significant dimensions, versatility and diversity.

While individuals can be rigorous in their work and can do their utmost to validate their methods, the process of institutionalisation provides the ability for review by persons outside the immediate area of work. It enables case record review by independent assessors and allows for an environ-
ment in which continuing training becomes viable and culturally sanctioned. In a forensic laboratory, this may take the form of ongoing scientific education, and also constructive review of both report writing and giving of evidence in court.

For all the perils of aggregation of professionals with a shared purpose and function, the multi-purpose forensic science institution has the potential to professionalise the practice of forensic science in a way which should lessen the incidence of and potential for undetected error. Where once a practitioner may have worked on their own, conforming as best their discipline could orchestrate to standards of sound scientific method, the scientific laboratory with many co-workers brings with it opportunities for protocol development, quality control and proficiency assessment that should conduce to better science.

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3 The Value of Interdisciplinarity for Forensic Investigations

Pierre Margot

1 Introduction and change of perspectives

The initial title of this paper included ‘interdisciplinarity’ as well as ‘forensic expertise’ which creates the disagreeable feeling of contradiction in terms.

Forensic expertise is seen by most practitioners as mastering a highly specialised niche within laboratory services to demonstrate or prove by scientific or material means an action, an identity or a modus operandi for law courts. In essence, this has led to increasingly specialising laboratory services to offer technically sound responses in chemistry, biology, physics, etc. This is an often essential part in bringing sound evidence to the courts and it has become equated to forensic science in the mind of most laboratory managers, law enforcement agencies and counsels for the courts. In that role forensic expertise has a purely or mostly corroborative purpose, usually after the arrest and the charge of a suspect.

In my view, however, this is only part of what forensic science is about. I would like to add that this is the easy part to which, unfortunately, most resources have been oriented. This, in my opinion, is poor resource management, and is bound to give generally poor overall results. We all know about numerous anecdotal successes, but also generally of the low appreciation of laboratory services by investigators. Forensic science journals abound with technical advances and anecdotes, but few fundamental novelties, probably due to this definite orientation. This is why ‘forensic expertise’ was changed to ‘forensic investigation’ in the title which, in my mind, expresses the essence of forensic science much more clearly.

2 Forensic science is about crime

This is where interdisciplinary approaches come in. Forensic science is about crime, the use of scientific principles in its investigation, in the identification and individualisation process: it is not about chemistry, biology or physics, even if the tools come from these disciplines.... It should be an essential factor in the investigation process, in the discovery phase of evidence gathering. In essence, each crime is unique, is a past event that cannot be reproduced and as time passes, becomes more and more a historical problem: the investigation is confronted with an ever and fast changing
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picture, with physical evidence irrevocably disappearing or becoming overwhelmingly covered by noise. At the early stage of the investigation the information is necessarily fragmented, limited or uncertain and it is always complex. It is this realisation that led to the creation by large laboratories of what were called “serious crimes units” that combined groups of specialists to try to avoid the regular failures resulting from poor discovery and collection of physical evidence. This is why, in our own school, forensic science is heavily based on scene of crime investigation as an essential part of the discovery and sampling process.

Furthermore, the refusal by scientists to give limited or uncertain information (even if usually reliable) has put them on the back seat as *a posteriori* actors of the proceedings when they should have been thrilled by the very research-oriented approach of the discovery process. This, in my mind, is the effect of overspecialisation, on the one hand, and the lack of generalists “trained to think rather than operate machines” on the other. This is also why scientists in most countries are absent from the crime analysis debates. Programmes in crime analysis are set up to use all kinds of information, but are rarely based on physical evidence. But this type of evidence is not appreciated for its highly reliable and falsifiable information content, but only perceived as corroborative rather than inceptive or proactive evidence of value. How often do we see police investigators spend time, manpower and other resources to follow leads of uncertain quality, but that may have been persuasively put forward by witnesses, and forego powerful physical evidence for one main reason: the need for a ‘specialist’s’ intervention and a second ‘good’ reason in the eye of the investigator: the length of time necessary for any useful information to surface in the investigation process!

3 The need for interdisciplinarity

Thus, the question is rarely one of high technicality or specialisation, but one of handling masses of data, often uncertain, about past events which cannot be experimentally reproduced, and in *real time*.

Although physical evidence is known to bring solid informative data through the increased use of multiple databases, their informative potential is still underestimated and has been poorly integrated into investigative information systems. This calls for data analysis in a sufficiently broad and general level to warrant a fast diagnostic perception and the ability to handle data of a general nature in a wide spectrum of disciplines. Data may be of a psychological nature as in detective work and of a physical nature as in forensic science, linked together in a geo-chronological framework. Add to

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this complexity the fact that different pieces of information belong to separate research territories, due to the lack of interdisciplinarity and of time to develop performing forensic science research in the area of crime intelligence. How the different pieces of data are to be combined and what their relative participation is in the overall analysis process, is becoming a valuable aim that should prove effective, even if many investigators still consider that such an approach is unwarranted, because it mixes what they perceive should remain separate avenues in the investigation.

The appreciation of the important role of forensic investigation has become or is becoming increasingly evident with the use of DNA databases, and earlier, to a lesser extent, with the introduction of automatic fingerprint identification systems. But fingerprinting has often been left aside from forensic science as a ‘technical process’ in use in police forces with little, if any, scientific content. Therefore, the full realisation of the proactive power of physical evidence has only arisen from the DNA ‘fashion’, very much perceived as ‘forensic science’ at its best... The sudden realisation that scientific data could bring out of a hat the name of a suspect, with no other leads, and help direct the investigation, has provoked a marked change of attitude in a few countries, but there still is a largely defiant appreciation by investigation personnel. One can applaud such change of attitude, with physical evidence becoming a major piece of intelligence in the investigation process, but unfortunately the focus has concentrated mostly on DNA obscuring most other types of valuable physical evidence, which could be of as much value as DNA in certain cases and certainly have a higher probative value combined with other information. Such evidence is given by footmarks which represent the most commonly found trace on scenes of crimes (more than fingerprint marks, toolmarks or biological stains) and help link crimes of a serial nature with an efficiency that most investigators still only dream of.

4 Integrating forensic science in the investigation of crimes

The development of efficient computerised tools is allowing the successful use of complex, incomplete, imperfect and evolving data using modern communication equipment. One of the great advantages of physical evidence as such is that it overcomes legal constraints and is usable across geographical boundaries because the emphasis is on materials rather than on persons. For example, there is no formal restriction stopping the exchange of data such as the information and comparative content of a certain trace, whether it is a certain type of paint (it is a white paint from a Make, Model car of year xx), blood (with markers x, y, z), footmarks (with

certain patterns found in a series of burglaries), etc., to see if it matches traces found at another scene of crime at a different geographical location. Data protection laws, or political sensitivity, only arise when data of a personal nature are collected and exchanged.

Furthermore, it is also relatively independent from the evolution of criminality. Therefore, methodologies and logical structures can be developed to make full use of the evidence. Analogies and classification constitute the basis of many elementary types of inferences and have been used to demonstrate how scientific evidence could be used in a successful model studying a specific crime: burglary.\(^4\) One problem with most integrated databases used by police is that each time a criminal is identified, it becomes linked to the physical data rendering its exchange difficult if not impossible in view of current personal data protection laws.

### 4.1 International co-operation

Part of the discussions within meetings of forensic science laboratory managers such as ENFSI (European Network of Forensic Science Institutes) have been directed towards collaboration on a technological level rather than on the knowledge base, even if there have been strong preoccupations regarding what constitutes 'forensic science training and education'.\(^5\)

### 4.2 Instrument sharing

One of the favourite topics is whether one country should buy a specific, very costly instrumentation for its own use or whether agreements should be forthcoming to share such expensive ventures. Such an emphasis on technology ignores the overall purpose of forensic investigation and leads the debate to the hardware and tools rather than to the methods. Approaches always look at problems through the eyes of a speciality, whereas questions are usually of a much more general nature.

This is ignoring political pressures, specific needs, languages, etc., all conditions which render such proposals usually dead letters for obvious reasons: information is much more important than technology! Furthermore, most countries in Europe have access to technologies of the highest calibre, if not in a governmental laboratory, in research organisations where specific types of analyses could usually be made, if and when the rare need occurs.

### 4.3 Standardisation

The development of standards, guidelines and other 'check lists' is also a favoured topic and geared to obtaining the famous seals of approval given by accreditation. This is all fine if one talks of techniques and how they

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\(^4\) Ribaux, O. and P. Margot, \textit{op. cit.}

\(^5\) This was discussed in Linköping in 1994 (ENFSI April meeting) already, and a working group has been created to discuss and make proposals to the directors on the subject.
should best be used to obtain results with a guaranteed sensitivity, accuracy and precision and when it is necessary to know that tools used in the investigation do give meaningful results. Unfortunately, this is not sufficient and does not replace the intelligence needed to take proper action in a fast developing situation or the needs for methods to deal with complex and imponderable matters deriving from crimes. It is always all too true that “the argument that one has followed the guidelines is a powerful excuse for failure”. This is why international co-operation should be directed towards researching solutions of a more general nature than the development of standards. The intelligence which is at the basis of the work of forensic science, the police and of the justice is totally split due to incompatible systems installed in different state polices, separate databases without possibilities of links and under considerable and numerous legal and economic constraints. The fight against criminal organisations needs a coherent architecture that integrates the various components of the judicial systems, and which eliminates redundancies due to our state structures. The knowledge of criminal phenomena and of possible methods of countering must constitute the core engine of international development. The complexity of problems to tackle and solve, moves largely beyond the traditional bounds of any discipline and needs a true multidisciplinary and co-ordinated approach. Moreover, the evolution of new technologies in criminal activities implies a constant update of responses.

4.4 Databases
The specific constraints and the complexity pertaining to the analysis of criminal events can lead to models that can be tested in real time and can evolve with the crime pattern itself, but there are pieces of information which are highly amenable to data treatment and collection into databases: physical evidence.

Already numerous databases exist locally or nationally, but most are constructed in the same fashion because they are based on police investigation, i.e., personal data of authors of crimes constitute the nuclei of data organisation. A fingerprint is recorded in an AFIS database always in connection with all the personal data of the criminal. This very fact limits the possibility of exchanging data or of allowing another organisation to examine the data. The same is true for DNA, handwriting, voice databases, etc. One simple action of national coding of personal data, separate from the physical data, would permit easy exchange when the purpose and the type of collection has been well defined (pertinence, regional or supra-regional scope, on-line real-time use, etc.). To be able to say that a fingerprint found on a scene of a crime corresponds to a fingerprint in a database (that is normally of a known criminal) is essential information that would allow legal actions to be taken through proper international chan-

Kind, S.S., op. cit.
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tnels thus guaranteeing personal rights. Other databases can already be exchanged: those are on materials or objects such as firearms characters, car paints, tire types, glass manufacturing characters, fibre types, etc. Being neutral to the persons there is no legal restriction with the circulation of this data, nor are there restrictions as to the extent of the data collected.

This is where the discussion in my view should be directed in international circles: the creation of databases useful in tracking or discovering important evidence in the investigation process while keeping sensitive and personal data outside the framework. When a certain match can be found, it is then time for obtaining personal data through proper legal channels and procedures (INTERPOL, EUROPOL, intergovernmental agreements, etc.). The geographical level at which developed databases are useful, the methods of integration of the data, etc are all important parameters which needs addressing and agreements, but the creation of such databases in essence is a useful building block on which to start. Here politics can rarely interfere.

Such a useful step is being seen with automobile paint collections: many countries had some forms of paint collections usually built around cases, with limited overall usefulness except for the creator of the collection who built his/her own experience to interpret paint analysis results. This was usually lost through casework pressure and the inability to keep the collection in phase with trade and fashion developments which change at the pace we know nowadays. It is through ENFSI that paint specialists have decided to join forces and build up an extensive collection around an existing database at the Bundeskriminalamt (BKA, Germany). This led to each specialist analysing a limited set of samples each year to feed the database in order to benefit from the whole database. After the initial steps, this was linked to a North-American collection, a Japanese collection and an Australian collection. In doing this, each specialist has kept his/her ability to analyse and give results in the organisation employing him/her but has an additional interpretative base that could never have been possible in any one participating country. This sharing of information has also led to standardising procedures so that results could be directly used by all participants in the database. This is added value for everybody and of utmost value in investigating hit-and-run accidents. It is a small advance as such, but a giant step towards international co-operation. One can think of DNA, fingerprints, optics, firearms, etc. and all will be useful in their own rights and can be considered as building blocks in a better criminal intelligence strategy. Ultimately, their use in criminal intelligence may lead to predictive capabilities with great operational advantages in fighting crimes as was demonstrated using a prototype in burglary investigations.7

7 Ribaux, O. and P. Margot, op. cit.
5 Conclusion

Designing frameworks and architectures for crime analysis and integrating physical traces is one of the most challenging problems of our time and needs a typically interdisciplinary approach of the highest order. This should result in the development of adapted tools (technological) in an environment (police, justice, organisation) with constraints (laws, policies) and methods (methodology, operations, strategy) with the necessary collaboration of normally reasonably closed systems for obvious reasons (police, secrecy, etc). It is showing a multidimensional approach that can be viewed from multiple perspectives, borrowing concepts and methods from crime investigation, crime analysis, forensic science and artificial intelligence. It should integrate, in a coherent and modular way, results provided by the treatment of forensic science data which are neutral as far as data protection is concerned. Initial building blocks are being created through international databases of physical evidence. This is a shift in how forensic science can be used nationally and internationally in helping criminal investigation by taking a proactive rather than corroborative stance.

References

4 Concentration or Dispersion of Forensic Expertise

Lia van der Westen

1 Introduction

Much technical and scientific forensic investigations are carried out by specialised governmental laboratories. The organisation of laboratories within countries is diverse. The size of the country, its system of territorial administrative divisions and subdivisions, the way in which the police are organised and the historical growth of institutionalised forensic services have generally determined the evolution of a particular form of organisation. For example, Germany is a federal state. In every state (‘Bundesland’) there is an independent forensic laboratory (part of ‘das Landeskriminalamt’). The federal police force (‘das Bundeskriminalamt’) has a special forensic department for specific investigations and databases. In France there are several forensic police laboratories in the regions with a central organisation in Lyon. In a relatively small country like the Netherlands, with its 16 million inhabitants, there is only one forensic laboratory.

The rise in crime, the development of the natural sciences and their application within forensic science led to a marked growth of quantitative as well as qualitative forensic work in the criminal justice setting. These trends have placed substantial pressure on the available forensic capacity. One of the questions is whether the division of forensic work between the various professional groups, notably the technical units of the police and the forensic science laboratories (including the police-laboratories), is efficient and effective. Should a highly qualified forensic laboratory carry out all types of examination or can some types of examination be assigned to specially trained police technicians? This would mean (more) decentralisation of forensic work, with examinations carried out at more locations.

1 Ian Freckelton in Chapter II of this volume.
2 Effectivity is a measure if whether a certain activity has achieved the desired goal. Efficiency refers to the effective operation as measured by a comparison of outcome with cost (in money) as low as possible. See Wim J.J.M. Sprangers in Chapter I of this volume.
3 With decentralisation the autonomy is delegated to the other organisation. Deconcentration means that the work is carried out on several places but the autonomy stays at a central point.
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A number of starting points can underlie the decision in favour of decentralisation. One starting point is a division of labour according to the purpose of the forensic work. Special trained police officers would carry out examinations related to the investigation of crime, while specialised laboratories would conduct examinations for evidential purposes destined to be presented in court. The results of an investigation will be faster at the disposal of the police investigators of a crime if these investigations are executed locally. Another possible point of departure is the nature of the examination. Routine analyses that can be standardised and that result in objective self-evident data do not need to be performed by a forensic laboratory. Technological advances can be of decisive importance here. One such example is the development of breath-analysis equipment. By this, it is possible for the police to conduct a breath alcohol test, making a laboratory blood analysis largely unnecessary to determine whether a driver is over or under the legal alcohol limit.

Shifting the performance of forensic examinations to another site must in no way affect the reliability and quality of the final results. For this reason, forensic work that has been taught or 'delegated' must meet certain standards. These requirements correspond to a great extent to the ones that many laboratories have established for their own methods of examination. More decentralised forensic examination means it may be necessary to strengthen certain requirements. The training required of a forensic examiner, the level of education, the possibilities for control over the quality of the examination and the impartiality of the forensic examiner are examples of such critical points.

Extra attention must be given that decentralisation of forensic examination does not lead to the use of different investigation methods, in other words to de-harmonisation. To avoid this a close cooperation between the police units and the laboratory is necessary in developing harmonised or standardised methods.

With respect to the exchange of scientific results between countries, it will be interesting to see whether the organisation conducting the forensic examination – the police, a police- or a justicelaboratory – affects the acceptance of the results as evidence by the Court. Possible differences in acceptance of evidential material by the Court can serve as a catalyst to bring about harmonisation of methods used in forensic science and in the training of forensic scientists.

This contribution looks at a number of aspects related to the concentration and dispersion of forensic expertise. In addition to the organisational aspects, we will consider the impartiality and objectivity of the forensic expert, the quality of the examination and numerous practical aspects.
2 Organisation of forensic expertise

As a result of the increasing number of forensic examinations, in a number of countries a closer look has been taken to structure and organise forensic expertise. In the past a certain division of forensic work between the technical units of the police and forensic institutes developed on historical and regional grounds. In the last decennium of the 20th century other criteria have applied.

One starting point is the purpose of the forensic examination. When the research is used nearly entirely for criminal investigation, it is logical that this research should directly support police units. From this perspective, examinations carried out primarily to advance criminal investigation can best be carried out by the police so that results can be obtained rapidly and passed on to the criminal investigative team. Initial results of forensic scientific examinations can help locate a suspect and/or be used in the interrogation which may result in a confession. Traditional fingerprint examination and 'Drugfire' are examples. Technological advances, particularly in imaging and computer technology, have made it possible to use this type of examination more effectively in criminal investigation.

A large variety of technological developments have made it increasingly possible to make the investigation-techniques more objective by using video technology and to make a selection from a database with computerized comparative analysis. This has one great advantage. It is easier to obtain more objective results. These results can also be evaluated by other experts. If these results appear to be important evidentiary material in criminal proceedings, an expert of a forensic laboratory can play a decisive role as producer of expert opinions. The great advantage of this approach – in the Dutch criminal justice climate at any rate – is that exhaustive and expensive research, that prove to be unimportant during trial, are not conducted. This can be the case if the suspect has confessed and there is enough other (easy obtained) evidence on the basis of which it can reasonably be concluded that the suspect is in fact guilty as charged. Possible disadvantages can be kept to a minimum by laying down the procedure to be followed so that throughout the trial it is always clear what examination was carried when, by whom and with what results. The judge, prosecutor and the defendant always may request another examination performed by a forensic laboratory.

Allowing the technical units of the police to carry out certain routine investigations, standardised and designed to produce results that are ob-

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4 An automated comparative ballistics system recently available for the Dutch police,
5 The computer can make a selection by searching in a (huge) database. The expert has to make the ultimate comparison.
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jective and self-evident in large measure, will help speed up criminal inves-
tigation.

It is doubtful that it is sufficient to distinguish between techniques that are
immediately applicable to criminal investigation and can be carried out by
the police and other forms of natural scientific analysis conducted by a
central forensic laboratory.

The techniques applied by the police must comply with certain stan-
dards. The objectivity of some methods can be ensured, for example, by
using measurement technology. Certain comparative methods, for instance
shoe print and tool impression evidence, however, currently require the
scientist to evaluate and interpret data. Are there similarities and with what
probability can it be concluded that the impression was made by a par-
ticular tool or shoe? This type of examination requires a great deal of expe-
rience and insight. Video technology can capture the impressions and
similarities but the final conclusion remains subjective.

A choice can be made that this type of forensic work, to the extent that
it is routine in nature, can also be carried out by the technical units of the
police. However, where a subjective factor plays a role and the results are
important in the criminal trial, it can be said that investigations may be
carried out only by forensic specialists who belong to a forensic institute
rather than to a police unit. This depends partly on impartiality and to a
lesser degree on quality, aspects that will be considered below. For crimi-
nal investigation to benefit fully from the findings of forensic examination,
it is advisable to conduct this type of examination as soon as possible,
rapidly and with a reliable conclusion that is at once suitable both for the
purpose of criminal investigation and for presentation of evidence in
Court. This could be achieved through decentralisation of forensic labo-
ratories. Under the umbrella of a parent forensic laboratory, examinations
can be conducted close to those requesting the examination (the client) as
well as rapidly. These satellite laboratories can carry out the more routine
examinations requested. This construction also makes it less likely that
examinations carried out in the investigative phase will have to be repeated
before they can be used for the Court. This is often impossible with min-
ute samples of traces and very inefficient besides. The central laboratory of
course remains available for special examinations that occur only occa-
sionally and as information centre for others involved in forensic work.
The central laboratory can devote some of its time to research and to de-
veloping and perfecting methods of analysis. Of particular importance are
the development and testing of new technologies and new forms of analy-
sis in order to make results more objective. Continuous consultation and
exchange of knowledge and data between the various levels engaged in

6 In fact every investigation has aspects important to both criminal investigation and pres-
sentation of evidence. Which aspect weighs most heavily depends on the case. It is often
only possible to judge this afterwards.
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forensic examination are essential. The interaction between the levels ensures flexibility, making it possible to take advantage of new developments. Changes in the number of certain types of examination that can lead to shifting this type of examination from one level to another, illustrate this flexibility.

3 Impartiality and objectivity

Scientific research should be objective and value free. A forensic expert who performs an examination in the criminal justice setting, should do so objectively and based on generally accepted scientific norms. Theoretically, only an impartial expert, that is an expert who is in no way whatever, morally or financially, dependent on the outcome of the scientific examination, can perform research that is as objective and value free as possible.

A factor of major relevance in this matter is the position of the expert as working for the prosecution or the defence versus being an independent expert.

Traditionally, the forensic expert in most legal systems in Europe is seen essentially as an impartial expert who, on the basis of scientific examination, reports on the results of forensic investigations or scientific theories. In common law systems, such as in England, the expert is generally requested by one of the parties to carry out an examination and is therefore regarded as an expert for the prosecution or the defence. Views regarding the position of the expert are subject to change in both systems. In the Netherlands, as a rule, most experts from the Netherlands Forensic Institute are brought into a case not by the Court but by the police. In day-to-day practice this affects judicial evaluation of the experts' reports very little. In England the experts from the Forensic Science Services (FSS) are also asked by the police to carry out examinations. Despite the fact that the legal systems are very different, the FSS experts in England are increasingly regarded as impartial experts.

For the present theme of centralisation versus decentralisation of forensic investigation, it is more important to see whether the organisation within which the expert works and his/her position in the organisation influence the impartiality and perceived impartiality of the expert, regardless of the type of legal system. Impartiality can be understood in two ways: the impartiality of the expert himself/herself and the way others perceive whether an expert can be impartial in a particular position.

7 For an extensive description of the requirements to be met by an expert, see Petra van Kampen in this volume.

8 Compare the decisions of the ECHR on the impartiality of judges, among others, ECHR 26 October 1984, A 86, par. 30, Case de Cubber; ECHR 1 October 1982, A 53, par. 30, Case Piersach; ECHR 24 May 1989, A 154, par. 48, Case Hauschildt.

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All sorts of 'subjective' as well as 'objective' factors determine the true objectivity of the expert, from the police officer to the judge. Examples of relatively 'subjective' factors are direct involvement with victims following a serious crime and judgement of a serious crime against a child while the judge is the parent of a child (in the same age group). All kinds of emotional elements and personal factors related to experience may play a role. The organisation within which an individual works should be alert to these factors. This alertness is required not only with respect to the scientific or final, evaluative part of an investigation, but at the very outset because as a rule the evidence which turns out to be of decisive importance in later stages of proceedings is preserved during the initial stages of investigation. ¹⁰

For our theme of centralisation versus decentralisation of forensic examinations, the 'objective' factors that may affect the impartiality of the expert are more important in assessing the impartiality of forensic experts. Is the individual performing the examination directly involved in the criminal investigation? When there is direct involvement in the criminal investigation, it is promptly assumed that the forensic work done for the purpose of this investigation can affect the objectivity of the scientific forensic examination. This is true especially for forensic examinations in which the conclusion and the degree of probability are based on experience or subjective data and impressions, for example in the evaluation of footprint impressions.

It is for this reason that Germany has passed legislation stipulating that police officers who participate in a criminal investigation and subsequently present an opinion about this as expert can be challenged as forensic expert. ¹¹ This also holds for Bundeskriminalamt (BKA, German Federal Crime Office) experts when they are involved in the criminal investigation. When the forensic expert belongs to a service that is completely separate from the criminal investigation unit, for example the technical unit of the police, he/she is not subject to this special regulation and may carry out examinations as a forensic expert.

Police officers in Malta are also subject to restrictions with respect to giving opinion evidence concerning traces. The country's supreme court has limited police officers' possibilities to serve as experts. ¹²

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9 In an absolute way, it is not possible to achieve 100% objectivity, for mankind is restricted in the capacities of knowledge.
10 It is also necessary to keep in mind the emotional stability of future forensic experts during training and while monitoring examinations.
11 See Article 74 of the German Code of Criminal Procedure.
12 In the present study of harmonisation in forensic expertise the survey contained questions concerning the position of the expert and the requirements to be met by the expert. Respondents from Malta indicated that in this country this limitation is based on case law.
As a result of all these constructions, the organisational position of an individual determines in part his ‘impartiality’ and whether this official can serve as an expert at all. In this manner, requirements for experts are set in advance that are dependent on external factors such as organisational structures rather than on internal requirements of objectivity and expertise. Regulation in this way obviously offers clarity concerning the organisational limits applied with respect to experts. To remove all doubt certain individuals are thus barred, however, this does not guarantee the objectivity of other forensic experts operating outside the criminal investigation departments.

Whenever police units do carry out examinations it is of vital importance to establish how external factors are regulated that can affect the objectivity of police experts. Here a distinction can be made between personnel of the technical units of the police and personnel of an official (police) laboratory. Protocols can be drawn up to ensure that traces preserved by a member of the technical unit of the police are always compared by another qualified colleague who is unacquainted with the details of the case.

As we have already mentioned, objective and impartial forensic examination not only depends on the position of an individual in an organisation, but also on that person’s involvement in the investigation. Personal feelings, inadvertent influence, for example, by members of the criminal investigation team are factors that need to be borne in mind in every single case, irrespective of the position of the forensic scientist in the organisation.  

4 Quality

Over the last ten years organisations of all kinds, in the forensics field as well, have paid attention to diverse processes that can affect the quality of work and the outcome of the examinations carried out. In some laboratories, the entire forensic examination from beginning to end has been made subject to quality assurance and accreditation.  

A system of quality assurance and accreditation is currently being developed for forensic examinations carried out by technical units in the Dutch police. More and more the performance of forensic examinations must comply with certain standards (in the Netherlands the Forensic Technological Standards) and a quality assurance manual. However, a quality control system for police work from the scene of the crime to expert examination (still) does not exist.

13 See Ian Freckleton in Chapter II of this volume. The police often focus too much on one suspect.
14 See Lydia Bestebreur et al. and Iris de Kwant in this volume.
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A quality assurance system requires also certain training standards. The training of forensic scientists, both general and specialist training, should be delineated and structured. An exam concludes the training as a scientist. To be admitted to this final exam a candidate must have a certain number of years of experience or carried out a certain number of forensic examinations under supervision. A diploma or certificate upon successful completion of the exam is valid for a limited period of time. After this period a new exam is required according to the standards of that moment. The validity of the certificate can be linked to the number of forensic examinations performed per year with an interim control.

Another possibility to measure the quality of forensic expertise is by proficiency tests. For this control an external organisation (or the central laboratory) prepares a number of identical samples and sends these as a blind test to various organisations for examination. In the Netherlands, for example, they may be sent to the technical units of the police. The results of these examinations are collected and compared with each other. Comparison and a general conclusion about the quality of forensic work within different organisations is hereby possible. However, further follow-up is necessary in which there is an opportunity to meet the scientists and discuss the results of the individual examinations carried out. It should be possible to revoke a practitioner's certificate when errors occur repeatedly. Centrally organised multiple-peer review of forensic work, preferably by impartial external experts, make it possible to exercise some measure of control over the quality and reliability of results of forensic scientists.

Multiple-peer review is important at the international level as well in order to learn to recognise structural differences and interpretation of the value of certain characteristics.

5 Practical aspects

A number of practical aspects also play a part in the choice between centralisation and decentralisation. Hi-tech equipment is necessary in order to perform certain types of examination well. Investment in expensive equipment is cost-effective only if enough use is made of it. For example, not every police station can purchase expensive digital video equipment. It is often possible to make such equipment cost-effective by co-operation between several area's for instance at certain central regional locations in the Netherlands, within each judicial district. 15 A decision needs to be taken as to whether such financial investments are well-considered.

In addition, some kinds of forensic work requires more education than what the other normally rather routine examinations require. Many teams of police technicians do not have officers with this level of education.

15 A judicial district is the area of jurisdiction of one of the five courts of appeal (Gerechts- hoven). A judicial district generally covers about 5 police regions.
A description of the Dutch situation follows to illustrate these practical aspects. For a long time the Netherlands Forensic Institute (NFI) conducted examinations of all kinds itself. The growing number of examinations and the improved quality, training and possibilities for examination by special technical units of the police has changed this. A number of examinations carried out regularly have been 'passed on'. That is, these examinations have been taught to and are now carried out by specially trained members of the technical units of the police and are no longer routinely performed by the central laboratory. This is not possible in all types of forensic work. Only those examinations carried out regularly (to maintain the necessary experience) and for which the necessary means can be made available locally, in a financially sound manner, qualify for this approach. The specialised central laboratory continues to fulfil an important role in training the specialised police personnel and in monitoring the quality of their forensic work by organising multiple-peer review of results where no external agency has done so. The central laboratory continues to provide second opinions on this delegated forensic work. Furthermore, the central laboratory can, in addition to performing examinations that cannot be decentralised and general research, develop new objective methods suited for decentralised examination. At present, examination of impressions and fire investigation are mostly carried at the technical units of the police in the Netherlands.

Currently DNA analysis is an example of a centralised analysis performed by a specialised forensic laboratory. Even in a small country like the Netherlands, technological advances may in the future make it possible for satellite centres to carry out these analyses. Before opting for such a set-up, several aspects will be considered: the number of examinations, the necessary finances, the speed with which examinations are performed and training requirements.

This will mean a rise in possibilities for second opinion analysis by the central laboratory and by the colleagues in the other satellite centres.

Whether the results of examinations performed in another country can be presented as evidence depends to a large extent on the national laws and the requirements set by case law for expert witnesses and expert forensic analysis.

Counter-expertise can also be carried out by the other technical units of the police when they have qualified examiners. On the long term in the central laboratory there will be no experience left to examine these types of forensic expertise. See also Livia Jakobs and Wim Sprangers in this volume.

With an on-line link to the central computer of the database of DNA profiles.

For an extensive description of these problems, see the contribution by Chantal Joubert and Hans Bevers in this volume.

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6 Conclusion

This contribution has looked at a number of aspects related to centralisation and decentralisation of forensic examinations. Quality and impartiality of examinations are absolute prerequisites for both centralised and decentralised examinations. The organisational form and the position of the forensic scientist in the organisation must ensure that the individual performing the examination is not directly involved in the criminal investigation, but can carry out an impartial, independent and objective comparison from a more removed position. Regular quality control and involvement of a central independent organ in training remain essential.

Centralisation or decentralisation of forensic expertise is clearly dependent on the development of the forensic investigations within a particular country. A relatively small country like the Netherlands has a central laboratory. Most of the special examinations were performed by this laboratory until the mid-1990s. This has changed due partly to the increased complexity of forensic analysis and the quality of the technical units of the police. A new division of labour between the police and the laboratory developed. The routine character of an analysis and the purpose of the forensic examination among others are important starting points for deciding whether a forensic examination should be performed by the police. From this perspective, examinations aimed primarily at facilitating investigation of the crime are best performed by the police to ensure rapid analysis and to make it possible to feed back fast the results on to those carrying out the investigation. Examination of tool marks and (shoe) impressions that are performed today by specially trained police technicians are examples. This trend may differ from country to country. In countries larger in area than the Netherlands there has been a tradition of various specialised laboratories, for example per Land (state) in Germany.

From a national perspective the requirements to be met by forensic work, centralised or decentralised, should be clear. For international exchange of the results of forensic analyses carried out by specialised police technicians, harmonisation of requirements at the national level for the various regions, provinces or states is absolutely necessary.

Standardisation of methods at the national and international level, good certified training, and quality and impartiality requirements must form the basis for international harmonisation of forensic examination.
5 Interdisciplinary in Medical and Psychological Forensic Expertise:

Problems and Solutions

Harald Merckelbach and Eric Rassin

Abstract

When psychotherapists or other health care professionals act as expert witnesses, there is a serious possibility that their testimony is contaminated by therapeutic influences. Therapeutic and forensic decision-making differ in some fundamental ways and this makes a combination of these two roles highly problematic. As things stand, expert testimony by psychotherapists poses a serious threat to courtroom decisions. Therapists should be educated on forensic issues so they become well-informed about the rules that govern the courtroom arena. In cases where therapists are willing to act as forensic experts on behalf of their own patients, their testimonies should be considered inadmissible. In the long run, judicial decision-making may benefit from independent experts who are exclusively dedicated to forensic psychology.

1 Introduction

This contribution highlights the fundamental differences between therapeutic (e.g., psychological, medical) and judicial reasoning. These differences are relevant to situations in which therapists and other health care professionals without formal legal training act as expert witnesses on, for example, credibility of testimonies. Since therapeutic and forensic evaluations of credibility differ immensely, there is an urgent need to keep them strictly separated. Therefore, therapists should be reluctant to prepare expert opinions on credibility of testimonies. However, at least in Dutch courts, therapists regularly enter the legal arena as expert witnesses without having been trained in the forensic psychology. The main purpose of this contribution is to elucidate the differences between therapeutic and judicial reasoning. Furthermore, the consequences of these differences for

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1 See also: Peter J. van Koppen and Willem-Albert Wagenaar in this volume.
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the psychological expert witness are discussed. Finally, we focus on possible solutions for the problem of conflicting therapeutic and judicial roles.

2 Therapeutic and judicial priorities

Therapeutic activity, medical or psychological, is aimed at promoting the well-being of patients. In fact, cure and palliation are the primary goals of therapeutic activity. Given the obligation to act in the best interest of their patients, therapists would rather diagnose an illness that is absent or administer an unnecessary treatment than fail to diagnose a disease. Subjecting a patient to an unnecessary treatment regime is not a big mistake as long as the treatment has no serious side effects. In the therapeutic context, the failure to detect a potentially threatening symptom is regarded as a serious error. In other words, therapists put sensitivity above selectivity when diagnosing and treating symptoms. That is, they act to maximise the detection of pathology. The risk that some positively diagnosed patients are, in fact, healthy ('false positives') is considered a necessary evil. If clinicians decide to be more conservative in their diagnoses, the number of false positive diagnoses will decrease, but the number of false negatives (i.e. the frequency of undiagnosed diseases) will increase. Consequently, in the therapeutic context, false negatives are considered to be worse than false positives. A good example is provided by Faraone and Tsuang who conclude in their discussion about the diagnostic accuracy of psychiatric screening instruments: “many children who receive positive ratings according to a highly sensitive screen for developmental disorders may not truly have these disorders (because screening procedures often attain high sensitivity by compromising specificity). This is usually acceptable because the screening procedure is inexpensive”.

In a criminal justice setting, the central actors are suspects rather than patients. The prevailing doctrine here is that the suspect is innocent until proven guilty. Furthermore, one of the cornerstones of contemporary western criminal justice is that conviction of innocent people should be avoided. Indeed, criminal law contains an elaborate set of rules aimed at reducing the risk of such false positive errors. Basically, the possibility of convicting an innocent person is considered worse than discharging a guilty suspect. In other words, legal decision-makers follow a rather conservative strategy. In the judicial setting, then, selectivity of convictions is important, perhaps even more important than sensitivity.

Formulated this way, therapeutic and judicial heuristics are difficult to reconcile. In the therapeutic domain a false positive error is acceptable, whereas in the legal domain such an error is unacceptable. Meanwhile,

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different ways of appraising false positives may coexist and this is not problematic as long as the domains remain separate.

3 Different approaches to the credibility of statements

Therapists and jurists not only rely on divergent heuristics, they also seem to rely on different concepts of truth. Clearly, in court factual evidence is important. Eventually court decisions should be based on objective truth (or approximations of it). Fair trial principles (such as the principle of equality of arms, the principle of undue delay etcetera, article 6 ECHR) dictate that statements and other evidence – especially against the suspect – be carefully weighed in order to establish historical truth.

In a therapeutic context, such strict demands are unnecessary and might even be counterproductive. As clinicians are more anxious about failing to detect diseases than about treating nonexisting ones, they will readily accept a patient’s narrative. If a patient claims to have been sexually abused by his/her parents, the therapist will start by believing that the alleged abuse did take place. Some therapists go even further and argue that the question of whether or not the abuse took place is not really important. The fact that the patient thinks he or she was abused is in itself reason enough to talk about the traumatic event, considering that the patient will in some way benefit from such therapy sessions. It is not the therapist's task to evaluate the credibility of statements made by the patient. In Greenberg and Shuman's words: “The basis of the relationship is the therapeutic alliance and critical judgment is likely to impair that alliance”. Shuman, Greenberg, Heilbrun, and Foote likewise concluded “that it is unnecessary and potentially harmful for the therapist to attempt to validate the historical accuracy of the patient’s disclosures in therapy”. And formulated in somewhat more provocative terms: “assuming and communicating to the patient that the report cannot be believed unless one can prove it, is somewhat troublesome because it implies a basic lack of respect for the client’s account and is also the same message that perpetrators of abuse generally communicate to those they abuse”.

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4 Conflicting therapeutic and forensic interests

Greenberg and Shuman discuss a number of other differences between therapeutic and judicial roles, differences that should be acknowledged when therapists act as expert witnesses. Table 1 lists the most important differences. They involve goals, attitudes, type of expertise required, and patients’ privacy.

Table 1 Differences between therapeutic and forensic roles (for an extensive discussion, see Greenberg and Shuman, 1997)

<table>
<thead>
<tr>
<th></th>
<th>therapeutic role</th>
<th>forensic role</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. client</td>
<td>the patient</td>
<td>the judge</td>
</tr>
<tr>
<td>2. goal</td>
<td>to promote well-being</td>
<td>fact finding</td>
</tr>
<tr>
<td>3. attitude</td>
<td>supportive, accepting, empathic</td>
<td>neutral, objective, detached</td>
</tr>
<tr>
<td>4. expertise</td>
<td>diagnosis and treatment</td>
<td>evaluation of specific claims on the basis of scientific knowledge and forensic techniques</td>
</tr>
<tr>
<td>5. scrutiny</td>
<td>little or none</td>
<td>strict demands and evaluations by the Court</td>
</tr>
<tr>
<td>6. privacy</td>
<td>patient’s privacy is essential</td>
<td>patient’s privacy is secondary to fact finding</td>
</tr>
</tbody>
</table>

The differences between therapeutical and forensic psychology, then, are substantial. One could argue that to a large extent, the ideal forensic psychologist shares more characteristics with a lawyer than with a clinician. For example, a forensic psychological expert is expected to evaluate critically the credibility of statements. As discussed above, a therapist should not evaluate the historical accuracy of a patient’s narrative, since this undermines the therapeutic relationship. Also, the expert-witness is thought to contribute to the process of fact finding, while the therapist is primarily interested in promoting the patient’s well-being. In some cases, these differences may be so fundamental that it becomes hard to imagine how a single psychologist could combine the role of therapist and that of forensic expert.

5 Therapists as expert witnesses

The differences between clinical and forensic psychology may give rise to problems when therapists enter the courtroom as expert witnesses. That is, a therapist who occasionally acts as a forensic psychologist may not be able to completely replace the usual therapeutic stance by a forensic approach. Therapeutic concerns may in this way contaminate the psychologist’s forensic evaluations and this can lead to flawed judicial decisions. Apart from the fact that therapists may be unaware of, or underestimate the differences between the courtroom arena and the therapeutic
setting in which they usually operate, they clearly lack skills that are crucial to forensic activity. For example, therapists are unlikely to be familiar with specific forensic tools such as the Gudjonsson Suggestibility Scale or the Criteria-Based Content Analysis. Not only does the use of such tools require extensive training, but the interpretation of their results is also not without problems. Furthermore, expert-witnesses are expected to ground their opinions on evidence-based consensus. One may reason that given their daily clinical concerns and duties, therapists are not in the position to familiarize themselves with scientific literature, especially forensic literature. On a related note, expert witnesses should be willing and able to emphasise the scientific limitations of their own opinions. As Boeschen, Sales, and Koss put it: “Psychologists have a moral responsibility, one that often goes beyond requirements of the law, to stay within the limits of their knowledge”. Unlike scientists, therapists do not fit the profile of the forensic expert. Greenberg and Shuman summarise this issue as follows: “Therapists are not typically trained to know that the rules of procedure, rules of evidence, and the standard of proof is different for court room testimony than for clinical practice”.

An example of how therapists’ expert opinions can be harmful is the circular Post Traumatic Stress Disorder (PTSD) argument. Consider a psychotherapist who is treating a patient for PTSD. The diagnosis of PTSD was reached on the basis of what the patient told the therapist about his/her involvement in a serious car accident. Concurrently the patient has initiated a civil lawsuit against the person who allegedly caused the accident. If the therapist in this case testifies that, given the consequences of the accident (i.e. the PTSD) the patient’s account of the accident must be truthful, this testimony would be highly problematic. Note that in order to be diagnosed as suffering from PTSD, one must have been exposed to a traumatic event that involved actual or threatened death or serious injury. Consequently, the therapist who treats the patient for PTSD implicitly accepts the trauma narrative of the patient. The therapist’s assumption that a trauma took place is, however, based on clinical concerns. It does not meet the requirements that are necessary for legal decision-making. If the therapist testifies that the patient’s account provides an accurate description of the

accident, the therapist increases the risk that others (involved in the accidents) will be held responsible for damages. For Faust and Ziskin: “A determination that the clinical criteria have been met does not establish satisfaction of the legal criteria.”

Boeschen et al. discuss this topic in some depth and conclude that the opinions of clinical expert witnesses can operate at several levels; some of these levels are firmly grounded in facts or scientific consensus, whereas other levels go beyond these elements, and are consequently problematic. At the lowest level, a psychologist may testify, for example, that an alleged trauma victim’s behaviour is somewhat unusual. This level is closely related to a fact-witness testimony. At the second level, a psychologist can inform the Court about the general diagnostic criteria of PTSD. At this level opinions address scientific consensus. One level higher, the psychologist may testify that the alleged victim’s behaviour is consistent with the symptoms of PTSD. Actually claiming that the victim suffers from PTSD constitutes a fourth level. Boeschen et al. emphasise that a PTSD diagnosis as such provide no insight into the type of trauma that the victim experienced: “in stating that a woman suffers from PTSD, an expert is not declaring that the woman was raped, but only suggesting that she has survived one of many different types of life-threatening traumas”. The fifth and highest level pertains to opinions that go beyond diagnosis and imply that the victim is telling the truth. Boeschen et al. note that in most states in the U.S., courts do not allow expert witnessing at this level because such opinions clearly and directly touch on the credibility of the victim. Under Dutch law things are quite different. Here a therapist’s opinion about the credibility of a witness is acceptable and together with the witness’ statement may constitute sufficient evidence for an alleged perpetrator to be convicted. So, to a certain extent, Dutch law encourages clinicians to give opinions at the most problematic level.

6 Should therapists be allowed to act as expert witnesses?

Given the potential threat that therapists’ opinions may pose to the judicial decision-making process, some authors have advocated rejection of these opinions by the Court. Here, a distinction between two situations is in order. First, there are cases in which therapists act as expert-witnesses on behalf of their own patients. Second, therapists may testify in cases in which they do not simultaneously act as therapists. With respect to the first situation there are, indeed, good reasons for therapists not to act as forensic experts. As was stressed in the previous paragraphs, the roles of therapist and forensic psychologist are difficult to combine. Shuman et al.

14 Boeschen op.cit.
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speak of "an irreconcilable professional conflict of interest between the therapeutic and forensic roles that precludes mental health professionals from simultaneously performing both roles competently". The huge differences between therapeutic and forensic roles discussed above lead to the conclusion that therapists should not be allowed to give opinions about their own patients. In such situations, therapists are far too likely to lack the neutral and detached attitude that is necessary for a thorough forensic evaluation. Legislation preventing psychologists from acting as forensic experts in cases in which they are also involved as therapists seems to be an easy solution for these situations and, indeed, some authors have strongly advocated rules imposing a straightforward boundary between therapeutic and forensic roles.\(^1\)

Should such a set of rules be so radically formulated that therapists are never permitted to serve as forensic experts, regardless of whether or not their patients are involved?\(^2\) In our view, the answer depends on the nature of the expert opinion. Therapists may be very good experts on certain topics (e.g., diagnoses, prevalence of disorders, treatment options for conditions), while they are less capable with respect to other, more scientific issues such as credibility assessment, reliability of eyewitness identification, or the interpretation of neuroimaging evidence that is used to buttress certain diagnoses.\(^3\) Scientific topics should be exclusively handled by experts with a scientific background. But how should courts recruit this type of expert? Clearly, they would need to develop criteria to be met by psychologists so that their testimony can be admitted as evidence. Such criteria may pertain to scientific publications or other public records that imply scientific expertise.

A subtle way of keeping therapeutic and judicial settings separated is presented by Vogeltanz and Drabman.\(^4\) These authors argue that forensic evaluations should be carried out by two co-operating psychologists. For example, if a young child is to be interviewed about having been sexually abused, one psychologist should conduct the intake interview. The second psychologist should then conduct the actual interview, without having been fully informed about the suspicions. This enables the psychologist to begin the interview unbiased and more objectively. This proposal not only recognises that a therapeutic alliance (starting at the intake) may undermine an objective interview style, but also provides an elegant solution for this possible problem.

\(^{16}\) For example, D.W. Shuman, op. cit.


Apart from courts not permitting therapists to prepare expert opinions about their own patients, it is important to increase therapists’ sensitivity to the differences between therapeutic and forensic roles. In this context, it is relevant to ask to what extent therapists acknowledge the uniqueness of forensic decision-making heuristics. So far, no systematic research has addressed this issue. From earlier studies, we know that under ambiguous conditions (i.e. conditions in which a single decision has impact on conflicting clinical and judicial interests), therapists tend to put clinical interests before judicial consequences. To explore therapists’ receptivity to judicial information, we conducted a preliminary study on the flexibility of therapists’ decision-making heuristics. More specifically, we investigated whether therapists are able to change their perspectives once they come to understand that their actions will be of relevance to judicial decisions. In our study, 31 undergraduate students in Health Sciences (2 men; M = 22.1 years, SD = 2.6, range: 20-33 years) were asked to read the following case vignette. "Under Dutch civil law, it is possible for citizens to change their family name. A request stating the reasons for the desired change must be addressed to the Ministry of Justice. One good reason might be that the mental well-being of the individual who is applying for the change of his or her name is at stake. Imagine that someone (Ms. Custer) approaches you with a variety of complaints including depressive symptoms, dissociative symptoms, and decreased libido. Ms. Custer (38 years) says she was abused by her parents during her childhood. As a result, her family name continually reminds her of her aversive childhood experiences. She would like you to write a psychological evaluation explaining her current distress. She intends to submit your evaluation with her request. It is obvious that Ms. Custer is suffering and that she attributes this suffering to her family name. Her parents, however, deny having ever abused her." So far, this hypothetical case resembles what psychotherapists might encounter in health care practice. From this point onwards, however, different written instructions were given to the participants. Part of the participants (n = 18) were immediately warned that this case has legal implications. The instructions to these participants were as follows. "Ms. Custer started civil proceedings against her parents, claiming financial compensation for the alleged abuse. If you decide to write a psychological evaluation stating that a change of name will be beneficial to Ms. Custer’s well-being, she will use that evaluation as supportive evidence of the alleged abuse. Furthermore, this civil lawsuit may give rise to a criminal investigation, in which the psychological report may

20 Rassin, E. and H. Merckelbach 1999 (see note 9).
21 M=Mean, SD=Standard Deviation.
22 In fact, the case vignette was based on a real case in which one of us acted as an expert-witness for the lawyers of the parents.
23 n=number.
again be presented as evidence that the abuse took place. All in all, if you
decide to grant Ms. Custer's request and write a psychological report, this
may not only have consequences for her personal well-being, but it might
also influence the outcome of the civil and criminal proceedings. Would
you, in this case, be willing to write a psychological evaluation?" Participants
had to choose by ticking a Visual Analogue Scale (VAS) ranging from
0 ("certainly not") to 100 ("certainly yes").

The remaining participants (n = 13) were not informed at the outset
about the judicial implications of the psychological evaluation. The judicial
aspect was introduced to them in three steps. They were first asked
whether they would be willing to write a psychological evaluation on the
basis of the background information described above (T1). Next, they
were given additional information about the judicial implications (cf. su-
pra) and were asked for a second time whether, under these circum-
stances, they would be willing to write an evaluation (T2). They were then
informed that Ms. Custer is taking legal actions against the parents and
that the psychological evaluation will be presented as supporting evidence
for the abuse. Participants were now asked whether they would be willing
to testify that Ms. Custer's complaints indicate that the abuse took place
and that her narrative deserves serious consideration (T3). All questions
were answered according to the same VAS-format.

Two analyses were carried out.24 First, the effect of immediate feedback
about judicial implications was tested by comparing the willingness of the
first group (participants instructed about the judicial implications) to write
an evaluation at T1, with that of the second group (participants initially
unaware of the judicial implications). There were, indeed, differences be-
tween groups. Naive participants (78.8, SD = 23.1) were more willing to
grant Ms. Custer's wish than were informed participants (61.3,
SD = 20.4): t(29) = 2.2, p = .03). Second, intra-subject changes in group
2 were tested to explore whether the willingness to help Ms. Custer de-
creased as a function of therapists becoming gradually aware of the conse-
quences of their actions outside the therapeutic context. This, indeed,
seemed to be the case. The average VAS scores on T1, T2, and T3 were
78.8 (SD = 23.1), 62.0 (SD = 28.0), and 28.4 (SD = 20.8) respectively:

24 It should be noted that these statistical analyses test whether the observed group differ-
ences in mean VAS-scores are, indeed, statistically significant, or attributable to coinci-
dence. To do so the statistical software compares the variance between groups with the
variance within groups. The latter variance is expressed in terms of standard deviation
(SD), which indicates the mean distance of individual scores to the group mean. Thus,
the analyses test whether the between-group differences can be accounted for by the
within-group variance. If so, the between-group differences are concluded to be non-
significant. The software output contains several indices. Most important is the p-value,
which indicates the probability that the group differences are merely the result of indi-
vidual differences (i.e., within-group variance). If the p-value is smaller than .05, the
between-group differences can not be explained by within-group differences. Then, the
differences are labelled statistically significant and must be attributed to an external fac-
tor (in this case the increased insight in judicial implications).
\( F_{\text{tot}} = 35.0, p < .000 \). Figure 1 nicely illustrates this dramatic drop in therapists' readiness to write a psychological evaluation as the insight that such evaluation may have external consequences increased.

Work by Oskamp in the clinical setting found that therapists tend to stick with their decisions and disregard additional information.\(^{25}\) In contrast, the present results depict a more optimistic picture, suggesting that therapists become more conservative in their judgements once they realise that their statements may have consequences that reach beyond the therapeutic interests of their patients. Although the VAS scores remained relatively high even after information about judicial consequences was provided (i.e., approximately 62; there was even a tendency to regard Ms. Custer's current problems as evidence of the alleged abuse: mean VAS score being 28.4), the significant differences between naive and informed participants seem to indicate that, in principle, therapists can be made sensitive to the far-reaching consequences of their actions.

Figure 1  \textit{Mean VAS scores indicating therapists' (n = 13) willingness to write a psychological evaluation without insight into judicial implications (T1), with increased insight (T2; the evaluation may be used as evidence in court), and with thorough insight (T3; the evaluation is interpreted as supportive evidence for legal claims)}

8 Educating forensic psychologists

Since forensic psychology is a relatively new field of expertise, there is a lack of forensic psychological expertise, at least in the Netherlands. Ger- mane to this issue is the fact that none of the Departments of Psychology in the Netherlands offers a graduate program in forensic psychology. This state of affairs may be one of the reasons why clinical psychologists often act as expert-witnesses in this country. This is an undesirable situation that can only be changed when the academic community recognises the uniqueness of forensic psychological expertise. Given the self-evident importance of expert witnessing, the absence of forensic psychology in Dutch academic programs represents a serious lacuna in psychological education. Forensic psychology courses that deal with specific forensic techniques, as well as with the forensic attitude are urgently needed. Such courses may help broaden the perspective of psychology students, providing them with a better background for the courtroom. Apart from forensic courses for undergraduate students, universities might consider offering special graduate courses designed to give psychologists an opportunity to further develop their forensic skills. Although the introduction of forensic courses may not solve acute problems with psychological expert testimony, this approach is likely to turn out to be a fruitful investment in the long run.

9 Conclusion

Judicial decision-making can benefit from scientific expertise. This is the reason why nonjudicial professionals are invited to give their expert opinion in court. Judicial reasoning follows highly specific rules and forensic experts must be familiar with these rules in order to prepare their expert opinions in a format that is compatible with that of the judicial decision-makers (i.e., judges). Differences between judicial and clinical professionals in the calibration of false positives and false negatives are easily underestimated. Especially when health care practitioners (e.g., medical or psychological therapists) act as forensic experts differences between therapeutic and forensic heuristics need to be clarified, since these two types of heuristics differ fundamentally. The expert is expected to adapt his or her contribution to judicial standards. It is not the judges’ duty to translate expert opinions into a format compatible with judicial reasoning. The idea that expert opinions have to meet certain standards is codified (e.g., in the Netherlands, in Article 343 of the Code of Criminal Procedure; in the U.K., in the Turner rule, and in the U.S., in the form of the General Acceptance, Frye, and Daubert rules).26 These standards still do not guarantee that only qualified expert witnesses will enter the courtroom. In par-

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ticular, therapists who base their expert opinion on therapeutic rather than forensic heuristics pose a serious threat to the validity of judicial decisions.

The problem of flawed psychological expert opinions may be approached in several ways. To begin with, therapists could be banned from the courtroom. This solution is drastic, but seems necessary to prevent therapists from acting as forensic experts on behalf of their own patients. Second, if a therapist's expert opinion does not concern one of the therapist's patients, this testimony may be admitted as evidence provided the therapist is truly an expert on the topic at hand. Courts should develop criteria for evaluation of claimed expertise. In addition, the therapist should be aware of the specificity of courtroom procedures and standards. This can be achieved by educating the therapist. Apart from educating and informing psychologists (including therapists) about the courtroom arena, forensic psychology needs to be recognised as a distinct field of psychology. Departments of Psychology should include forensic topics and programs in their curriculum.

It is important to note that various western judicial systems seem to differ in the scrutiny applied to (psychological and medical) expert evidence. For instance, in the U.S. demands are fairly high, while in the Netherlands they are low. Increasing the quality of expert opinions throughout western justice systems would not only benefit judicial proceedings, but would also have the fortunate side-effect of calibrating legal demands. This would smoothen the exchange of evidence between countries. Meanwhile, the importance of improving the quality of psychological expert opinion is underscored by the following two quotations. Faust and Ziskin note that unqualified expert witnessing may cause judges and juries to distrust all psychological (and medical) expert opinions: “The courts, having learned to distrust clinicians' claims, may refuse to admit testimony based on truly useful knowledge and methods despite more than adequate supportive studies”. A decade later, Shapiro emphasises a similar point: “We're starting to see a lot of cases that specify the restrictions that will be placed on psychological evidence. And the trend is rather disturbing. It looks like admissibility of psychological testimony is going to be extremely narrow”.

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27 Faust, D. and J. Ziskin, op. cit., p. 35.
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6 Interdisciplinary Forensic Work

Joan Holthuis

1 Introduction

Forensic experts of all disciplines sometimes need assistance from other forensic experts. Because of the increasing difficulty and complexity of criminal investigations, a forensic expert is often unable to investigate the object of attention (e.g. the crime scene) without help.

Several forms of co-operation are possible between forensic experts: co-operation on an occasional basis or experts acting together in a more permanent context, as member of a team or an institute.

Co-operation on an occasional basis is probably common within many different forensic disciplines. The particulars of each specific case and the insights of the responsible authorities determine which disciplines participate.

The development of rules or standard procedures for this kind of ad hoc co-operation will therefore probably not be as easy as for co-operation with a more permanent character. The latter will mostly comprise standing teams or institutes with a fixed and limited number of forensic experts. Because of the relatively well regulated status of these institutes, the rules concerning these permanent co-operation-projects are probably quite suitable for international harmonisation. For this reason we set out to study this form of permanent interdisciplinary teamwork first and foremost.

The ‘Forensic Odontology’ survey was conducted to obtain information about the co-operation of forensic experts in a permanent institute, like a Disaster Victim Identification-team (DVI-team).

2 Sources for this contribution

The ‘Forensic Odontology’ questionnaire received responses from eighteen people in 11 different countries. Four of the countries selected are not represented (France, Portugal, Slowakia and Russia) in the finding. No answers were received from these countries.

All of the respondents have worked or are currently working in the field of ‘forensic odontology’.

By forensic odontologist almost all countries understand a dental surgeon or dentist performing an investigation of dental records in the interest of

1 Austria (2), Germany (4), England (2), Italy (2), Latvia (1), Malta (1), The Netherlands (1), Poland (1), Spain (2), Sweden (1), Turkey (1).
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the law. Forensic odontological identification of unknown dead bodies, the examination of bite marks and the investigation of dental malpractice are the three most frequent types of investigations conducted.2

There seem to be no forensic odontologists in Turkey.3 We call your attention to the situation in Austria, because of the confusion the term 'forensic odontologist' might bring about.4

Since some of the responses to the questionnaire did not provide sufficient information for our research, additional questions were asked.

3 Empirical facts

3.1 Co-operation between experts

Co-operation between forensic odontologists and other forensic experts seems to be very customary. All of the respondents collaborate from time to time with another forensic expert.

As far as the forensic odontologists' 'regular' work is concerned, such as identification of an unknown body or examination of bite marks, forensic pathologists and forensic DNA-experts respectively seem to be popular experts to enlist. This form of concerted action mostly takes place on an occasional basis. The particulars of each specific case will determine which forensic disciplines are to be called in.

Co-operation between forensic odontologists and DNA-experts merits special attention. Biological and toothmark evidence, for instance, when recovered from the same crime scene, will result in parallel analyses. DNA-analysis is considered to be very reliable. Its great power of discrimination might influence the forensic odontologist who investigates the bite marks, a more subjective and therefore a less undisputed method. This implies that the odontological investigation must be absolutely independent and

2 Other forensic odontological activities mentioned by respondents are age determination and traumatology.

3 According to our Turkish respondent forensic odontology does not exist as a special discipline in Turkey. Doctors at the State Departments of Forensic Medicine take responsibility for odontological problems. The Turkish respondent has never performed a forensic odontological identification of a body, or carried out a bite mark examination.

4 In Austria, according to one of our two respondents, there are no special forensic dentists or odontologists at this moment. There are, however, forensic experts in the field of dentistry. These experts seem to act in private law cases only. In cases of crimes and identification of (disaster) victims, the police or magistrates may call in so-called 'Gerichtsmediziner'. These are doctors in medicine who have completed a special postgraduate course in forensic medicine, including a general education in odontology. In disasters a 'Gerichtsmediziner' examines the bodies. If needed, experts in the field of dentistry may be consulted. Whenever we speak of forensic odontologists performing identification-examinations or other crime-related investigations, like bite mark examinations, this includes the Austrian 'Gerichtsmediziner' instead of the forensic dentists working in the civil cases.

5 This form of examination is to be discerned from the identification in disasters. The latter will often concern several victims, whereas the 'customary' identification work involves one victim, for example an unidentified body found at a crime scene.
has to be shielded from the DNA-results until the forensic odontologist has reached a final conclusion.

According to our survey this kind of ad hoc collaboration is not the only form of co-operation occurring between forensic experts. There seem to be several (semi-) permanent joint projects, in which forensic odontologists work together with forensic pathologists and other experts.

A Disaster Victim Identification Team (DVI team) is one such project. DVI-teams are called in after a disaster, like an airplane-crash or an earthquake, when identification of victims often has to be achieved by means of dental examination. According to the responses received a DVI-team exists in Germany, Latvia, the Netherlands, Sweden and England. In Spain there are plans to create a national DVI-team. Italy has a similar team, although this team has no formal status.

DVI-teams are generally composed of experts from police departments as well as forensic experts, especially forensic odontologists and forensic pathologists. Forensic fingerprinting experts are also often represented, as are DNA-experts. DNA-analysis does not seem to be a standard part of the investigation by a DVI. Only when the regular dental investigation does not come up with useful results, DNA-analysis is used. The most important reason for not using this very reliable method very often is the costfactor. Other forensic experts assist the team from time to time.

According to the literature as well as some questionnaires, most DVI-teams are a police responsibility. The connection between the police and DVI-teams could pose a problem as far as international harmonisation is concerned. The position of the national police force(s) differs in each country. As a result, the position of the DVI-teams may also vary throughout Europe.

Forensic pathologists and odontologists apparently work together during all stages of the investigation. Both experts can be involved not only in collecting antemortem (information concerning the possible victims, like

6 In Spain regional identification teams belonging to the Guardia Civil already exist. One central DVI-team is now being developed. This Guardia Civil team is to come into action in case of a mass disaster in a rural area (freeways, roads, airports, etc.). When such a disaster takes place in a city, the other Spanish police force, the National Police, comes into action. The National Police already have a National Identification Section at their disposal. This team can however only work under supervision and with permission of a judge.

7 Other forensic experts mentioned in connection with co-operation between forensic odontologists and other forensic experts are DNA-experts, forensic anthropologists, fingerprint-experts, forensic ballistics-experts, forensic biologists, forensic entymologists, traumatologists, neurologists and even computer experts.

8 See the Introduction on Chapter V of this volume for an evaluation of the 'Organisation of the police' questionnaire.

9 The Spanish situation, for example, is very complex, as explained in footnote 6. The Spanish police forces have separate jurisdictions. Both have a sort of DVI-team under their command, so the position of the Spanish DVI-teams merely seems to vary.
Chapter II: Interdisciplinarity

dental records) and postmortem information (information obtained by the forensic odontologists after the dental examination of the victims), but in the actual comparison as well.

A good example of co-operation between various team-members is the investigation of the Dutch DVI-team in Faro (Portugal). In 1990 an airplane crashed at the Faro-airport. The DVI-team called in existed of, among others, police officers, a pathologist and an odontologist. While the pathologist examined the (remains of) bodies and cutted out the jaws, the odontologist cleaned the jaws and examined them. Afterwards photographs were taken by policemen with a special training.

A national DVI-team is usually called in when subjects of its own country are involved or if a disaster has taken place within its own area of jurisdiction. Occasionally, other countries will also be visited. When in 1985 the Harold of Free Enterprise capsized just off the Belgian coast, the Belgian authorities called in the Dutch DVI-team to help them identify the victims. In cases of this type the national DVI-team operates under the authority of a foreign government. This authorisation grants the team a legal status, since Dutch police officers - remember most DVI-teams are a part of a police force - are normally not allowed to carry out police activities in Belgium.

### 3.2 International co-operation between forensic experts

Several forms of international co-operation between forensic odontologists seem to exist.

The International Organization for Forensic Odonto-Stomatology (IOFOS) and the Worldwide Forensic Odontology Contacts (wFOC) are global organisations for forensic odontologists. Especially the latter seems to be important as far as the interdisciplinary DVI-teams are concerned. This organisation has posted a list on Internet, which can be used by DVI-teams when antemortem dental information is needed. Every DVI-team can fill out this list with the postmortem information obtained. Other odontologists visiting this Internetpage, who recognize the postmortem information, can subsequently supply the requesting DVI-team with the accompanying antemortem information. In case of mass disasters with victims of all nationalities, this international forensic odontological database can be very useful.

Another organisation that exerts a great influence on the DVI-teams is INTERPOL. In 1980 the international police organisation has established a Standing Committee on Disaster Victim Identification. This committee has been developed with the aim of establishing common procedures and solutions of identifying disaster victims throughout the world. It is composed of forensic dentists (such as forensic odontologists), forensic pathologists and (senior) police experts.

One of the main tasks of the Committee has been the establishment of the DVI-resolution and the (re-) publication of the DVI-guide. The committee has also developed standard DVI-forms to register the dental information
in order to facilitate the actual comparison. Several countries already use this form or a similar form, based on the INTERPOL-form.

The development of a computer program to match and exchange DVI information is also one of INTERPOL's future merits. The development of a DVI-training programme is now one of the Committee's priorities. Other common procedures and solutions as far as identifying disaster victims are concerned, are expected.

Interdisciplinary co-operation between forensic experts also seems to take place outside a national DVI-team context. In 1998 an international forensic team was established by order of the International Criminal Tribunal for the former Yugoslavia (ICTY). This team was set up under the auspices of the United Nations to investigate Bosnian mass graves, gather evidence to proof war-crimes and identify the bodies in Bosnia. The legal status of such DVI-teams is provided by the authorisation of the ICTY.

This international team had to empty the mass graves (which was mainly done by the archaeologists and the surveyors) and transport the bodies and bodyparts to (temporary) morgues, where the pathologists, anthropologists and odontologists had to clean and examine them. The antemortem information was usually provided by the Red Cross, who registered as much missing persons in Bosnia as possible. Information about missing relatives, who could be possible victims, also was obtained by talking to refugees.

A team of similar international composition was recently brought into action in Kosovo to examine mass graves and other war crimes. This initiative was also taken by the Standing Committee on DVI, who came up with a plan to identify Kosovarian Victims buried in mass graves. According to this plan, the ideal composition of a international DVI-team in Kosovo would be (among others): four pathologists, two odontologists, an archaeologist, a forensic anthropologist, a doctor, a nurse and a psychologist (the latter to assist the team-members with medical and psychological care).

Because of the international character of these teams, the rules, techniques, methods and equipment (such as forms to register the dental information) used by the experts, are designed for international use. The initiatives of INTERPOL play an important role in international operations of this nature.

Practice of this kind seems to create a kind of international harmonisation of interdisciplinary teamwork. The principle of co-operation exemplified by this international interdisciplinary team can be taken again in the near future.

Very recently the INTERPOL Standing Committee on DVI was the initiator of yet another proposal for identification of victims; in order to identify the thousands of people who died in the earthquake in Turkey in

10 The Dutch and English DVI-teams, among others, worked together in Kosovo.
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August 1999, the Committee offered its help. In the name of the heads of the European DVI-teams the Committee advised the Turkish Authorities how to organize the identification process and offered help in assisting them. In this proposal the Chairman of the Standing Committee stated that "the approach has to be global and multi-disciplinarian in collaboration with police, pathologists, odontologists, social workers, etc."

The initiatives of INTERPOL may lead to the development of an international standard for forensic experts who, like the DVI-teams, work in an interdisciplinary context. The DVI-resolution of the Committee recommends the member states to use the DVI-basic working tools (consisting of the DVI-resolution, the standard form, the DVI-guide and the computer-programme) and to promote the DVI-resolution as a national standard in their own country. By doing this INTERPOL seems to be one of the great initiators of international harmonisation of interdisciplinary forensic work.

References

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Roest, R., E. Korringa and A. Aeilkema, Technische recherche op internationale toer, Modus, 1999, nr. 2, pp. 32-35.

The Committee, however, strongly recommends that all member countries should also use the DVI-form in cases in which there is only one victim to be identified.
Chapter III

Forensic Expertise and Criminal Procedure
1 Introduction

The relationship between forensic expertise and criminal procedure is not a simple one. The use of forensic science in criminal procedure in continental European legal systems is a subject of recent years. There are few standards for forensic investigation.

In the United States of America (a common law system) the development of legal minimum standard rules for forensic science has resulted in a form of standardisation. This chapter gives an overview of developments within the Member States of the Council of Europe from the perspectives of the lawyer and the forensic expert.

In the light of the European Convention Petra van Kampen describes the interaction between legal norms and forensic expertise on Human Rights. Expert evidence is difficult to challenge ‘after the fact’, particularly for criminal defendants who have neither the resources nor the personnel to carry out this task. There is a certain imbalance between prosecution and defence. Against this background, a key question is whether the national rules of criminal procedure and evidence guarantee the defendants ‘a fair trial’ as required by Article 6 of the European Convention of Human Rights (ECHR) where expert evidence is concerned. What rights does the Convention contain with respect to expert evidence and what restraints does it impose? How does this affect the position of the parties in criminal proceedings, and particularly the defendant? Petra van Kampen analyses the concept of fairness in the Convention from a theoretical point of view, drawing on European Court of Human Rights case law.

A few explicitly mentioned rights in Article 6 ECHR can be seen as an aspect of a general right for counter-expertise. This theme is the subject of the contribution of Livia Jakobs and Wim Sprangers. Forensic expertise is generally found in governmental laboratories but sometimes additional forensic experts are sought outside these institutes. The problem for the defence lawyer is how to find qualified forensic expertise, how to determine the expertise needed and how to assess expertise as qualified. To solve these problems, the authors aim for a ‘double transparency’ of the European forensic expertise market; a transparency of the availability of practising qualified forensic experts in connection with transparency of available forensic investigation methods. The first steps towards this could be developing a set of standards on the necessity of an acknowledged forensic expert and introducing a register of forensic experts.

1 Daubert v. Merrell Dow Pharmaceuticals Inc. 113 S. CT 2786 (1993).
Communication and co-operation between representatives of the same sciences and disciplines should be stimulated between both lawyers and forensic experts. The creation of an electronic network for (forensic) scientific experts is also recommended. Lawyers and other people involved or interested in criminal procedures can promote the above-mentioned transparency. This network could offer both prosecution and defence the possibility of finding the forensic expert they need.

The appendix of this article reports the results of a survey made through two questionnaires dealing with the subject of counter-expertise.

Crime is constantly changing and developments in information technology have unquestionably had a great influence on criminal law. Evidence in this field requires fundamental changes in methods of analysis and has resulted in the rapid development of forensic computer science. In addition to technical measures, new legislation is required to regulate the use of new investigative methods and the gathering of evidence. Hans Henseler and Jaap Roording describe how information technology has challenged the concept underlying traditional procedure and traditional investigation, because data can now exist independent of a human being or a tangible object. The major challenge facing criminal procedure as a result of modern information technology now those borders no longer exist is internationalisation. Henseler en Roording look at developments in the Netherlands and internationally, concerning problems of criminal procedural law related to information technology. Legislators have a difficult task in that they follow on 'behind the technicians'. These national developments also show harmonisation at a national level.

That difficult task brings us to the theme of the interaction between legal rules and forensic expertise and particularly to the question of whether the methods of investigation, including forensic techniques, require a legal basis. Whether a legal basis is necessary and how this can be realised in view of Council of Europe policy, the European Convention on Human Rights and European Court case law are central questions in the contribution by Joan Holthuis. The author make some recommendations aimed at avoiding unlawfully obtained evidence.

As mentioned earlier, a form of standardisation took place in the USA with the development of minimum standard rules for forensic science. Peter van Koppen describes similar developments in the Netherlands. Recently, the Dutch Supreme Court set standards for the testimony of expert witnesses. In this case the Supreme Court ruled that the Appellate Court should have investigated (a) whether the expert was an expert in his field (shoeprints); (b) if so, which methods he used to reach his opinion; (c) why he consid-
Introduction

These guidelines may seem meagre to the Anglo-American/Australian jurists, but such comments are quite novel in the Netherlands. The author assesses the testimony of psychologists in court according to the guidelines set by the Supreme Court. A distinction is made between the diagnosis of the forensic expert and the diagnosis of the therapist. If a therapist is brought in to evaluate a statement made by the witness, empathy towards the witness is incompatible with the independent role the expert has to play, so high standards are needed for the expert psychologist. The author discusses one of the most common methods for evaluating witness statements, the Statement Validity Analysis; assessment of the validity of witness statements is practically the only field in which psychologists in the Netherlands report at the request of the public prosecutor. In most other cases psychologists are called in by the defence to investigate methods used by the police in the interrogation of witnesses and suspects and in eyewitness identification of the suspect. Case examples are given. Van Koppen concludes that the standards laid down by the Dutch Supreme Court should be expanded to strengthen the validity and reliability of investigations.

The investigation of recovered memories should also satisfy validity criteria. The investigation should be exhaustive, because unmistakable proof is needed that the memory is not false. In his contribution Willem-Albert Wagenaar systematically shows how to manage this kind of investigation. The formulation of strict methodological demands brings about an increasing quality in this kind of investigation. With this approach questionable cases could be avoided.

The guidelines suggested by van Koppen en Wagenaar for the Netherlands are good examples of national harmonisation in the field of forensic expertise. Perhaps the development of such guidelines within a European framework will strengthen the harmonisation of rules in Europe and more recommendations can be expected to follow Recommendation No R (99) 3 of the Committee of Ministers of the Council of Europe to Member States on the harmonisation of medico legal autopsy rules.

In addition, to avoid all kind of national solutions, the European Network of Forensic Institutes (ENSFI) could promote harmonisation to create a framework for the examination and certification of forensic experts.

In order to promote harmonisation, transparency in the field of forensic expertise is needed. Perhaps the so-called 'culture gap' between lawyers and forensic experts could thereby be diminished.

Sijtze Wiersma

2 Forensic Expertise and Illegally Obtained Evidence

Joan Holthuis

1 Introduction

Crime changes continually. With new forms of crime and the changing ways in which it manifests itself, the need is keenly felt for new criminalizations and methods of investigation. New forms of crime are not adequately covered by existing offence definitions. Additional legislation criminalizing these types of crime is then often necessary. Environmental crime and computer crime are examples of new forms of crime requiring legislative action. In the Netherlands, for example, this led in 1993 to the Computer Crime Act which criminalized hacking and unauthorized alteration of computer data.

Established methods of criminal investigation, including forensic techniques, often fall short when new crimes appear. New types of crime generate novel methods of criminal investigation as well. Not only do new police methods of investigation, like infiltration, appear, but methods of investigation that make use of forensic expertise are also developed to aid in the collection and examination of evidence. One such example is DNA analysis, a technique that can also be applied to criminal investigation. As a rule, additional methods of criminal investigation are developed after investigators have been confronted with “new” crimes on several occasions. The rise of forensic computer technology in the Netherlands illustrates this sequence of events.¹

New forms of crime are not the only driving force behind the development of novel methods of investigation, however. Crime laboratories unceasingly search for innovative techniques that can make solving crimes easier. DNA profiling is an example of forensic expertise that has simplified the investigation of a large number of traditional crimes. The DNA profiling technology was developed in an English laboratory in 1985.² DNA testing was used for the first time in criminal proceedings in the Netherlands in 1988³ when the defendant, suspected of a series of rapes, re-

¹ For an account of the development of this technology, see Hans Henseler/Jaap Roording in this volume.
Chapter III: Forensic Expertise and Criminal Procedure

quested DNA analysis. The findings did not match the defendant’s DNA profile and the evidence was adduced by the defence as proof of the defendant’s innocence. This method is now being used frequently worldwide to help solve crimes in which traces such as blood or sperm are left behind by the offender.

Earprint comparison is an example of a technique developed by police criminal investigation officers in practice. What once began as a police detective’s hobby is now a common investigative technique in burglary investigation.

2 A legal basis

New investigative techniques are often used even if a legal basis is lacking, especially in the beginning. A legal basis can be provided not only by law, but by jurisprudence and so-called ‘soft law’, such as guidelines or recommendations, too.

Regulation by law of DNA profiling was a fact in the Netherlands in 1994, even though the method had been utilized in criminal proceedings as early as 1988. Many countries have now introduced similar regulations. In other countries attempts to introduce such legal regulation fail to get off the ground because of the controversial privacy aspect of DNA analysis and storage of the profiles in databases in particular.

The starting point in most countries is that methods of criminal investigation, including those that make use of forensic expertise, are in conflict with constitutional law and therefore require a legal basis. In Germany, for example, an opinion of the Federal Constitutional Court in 1983 led to such a need for regulation by law of methods of investigation. The German Basic Law in combination with this Federal Constitutional Court judgment requires regulation by law of every method of investigation that reveals personal information. Because nearly all methods of investigation produce personal information, almost all of these methods, including those that make use of forensic techniques, must be anchored in law in Germany.

A law, a court opinion regarding admissibility of the new method, or policy rules incorporating the new method can all provide a legal basis for

4 The recommendations made by W.A. Wagenaar for the assessment of eyewitness identification are an example of such soft law. These recommendations do not have the force of law, but are generally accepted and used. See also W.A. Wagenaar, Identifying Ivan, a Case Study in Legal Psychology, New York: Harvester Wheatsheaf 1988.
5 See also Diana Alonso Bias in this volume.
6 Federal Constitution Court, judgment 15 December 1983, BverfGE Vol. 65
7 Frequently a law will follow an earlier judicial decision concerning the use of a new method. The sequence of events in the Netherlands with respect to DNA analysis is an example.
subsequent use of the new method.

New methods are not the only methods that have to be given a legal footing.

All methods of investigation that invade the privacy of individuals must be given a basis by "law" as well. This applies for all countries that have ratified the European Convention on Human Rights (ECHR); any breach of art. 8 of the ECHR (right to privacy), must be "in accordance with the law", that is, should have some basis in domestic law.

The European Court of Human Rights (EurCourtHR) has also specified a number of minimum safeguards that should be set out in the statute. A rule of law of this type must be "foreseeable" as regards the meaning and nature of the applicable measure and "accessible" to the person concerned, who must, moreover, be able to foresee its consequences for him, and describe "with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities". The EurCourtHR judgments in question, Kruslin and Huvig, concerned a telephone tap placed by the French authorities. The telephone tapping was not "in accordance with the law" according to the extensive explanation provided by the EurCourtHR.

I see no reason why DNA analysis in criminal investigation should not be subject to the EurCourtHR criteria as well, as this method can also intrude on the privacy of persons.

3 Illegally obtained evidence?

Practice indicates that legal rules and new methods of criminal investigation interact in two different ways.

The first way, which has already been discussed, occurs when new crimes appear. New law becomes necessary in order to make these crimes liable to punishment. Novel expertise, technologies and methods must then be developed to enforce the new laws.

The second form of interaction arises when an innovative method of investigation is developed by a laboratory or by criminal investigation officers on the job. The method is subsequently utilized in a criminal case. The judge examines the new method resulting in jurisprudence which comments on admissibility of the method. Frequently regulations govern-

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8 Law is used here as a synonym for legal basis. The interpretation of this concept by the EurCourtHR indicates that "law" means more than legislation only.

9 Kruslin and Huvig, EurCourtHR, 24 April 1990, Series A Vol. A176-Aand A176-B.

10 Views as to what constitutes an invasion of privacy differ from country to country in Europe. In England, for example, the genetic parts of DNA may be used, making it much easier to solve crimes. Genetic analysis of physical evidence (blood, semen, hair, etc.) found at the scene of a crime can determine the race and sex of the possible offender. The Schengen countries, however, forbid analysis of the those genetic regions of DNA that vary among individuals because it is believed to represent too great an invasion of the suspect's right to privacy.
ing use of the method follow, sometimes in the form of legislation, sometimes as recommendations or guidelines, but often they do not.

In addition, other methods of investigation that probably have existed for some time are used although they are not (or are no longer) legal.

Furthermore, there is a danger that the existing regulations become rapidly outdated in the face of developing methods of investigation. Because regulation via the legislative process in particular is often very slow, theory lags far behind practice. This sometimes results in the use of methods of investigation that are not or are no longer regulated.

If no legal basis for use of the method existed at the time it was applied, the defence may argue that evidence obtained with the help of this (forensic) method is 'illegally obtained evidence'. Art. 6 of the ECHR guarantees every defendant a fair trial. Use of illegally obtained evidence may very well conflict with this principle.

If the method or technique furthermore invades the privacy of the defendant, the defence can also argue that art. 8 (the right to privacy) has been violated if the method used was not "in accordance with the law".

In the remainder of this contribution I will try to describe and assess situations like this in the light of "the law" of the Council of Europe.

4 Council of Europe

The Council of Europe is an intergovernmental organization which comprises 41 countries in Europe. The protection of human rights, pluralist democracy and the rule of law are the Council's most important goals. Any European state can become a member of the Council provided it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms to everyone.

Because criminal law and forensic expertise, especially certain methods of investigation, are outstanding examples of areas which give rise to discussion about human rights and fundamental freedoms, the influence of the Council of Europe on this area is quite important. One such example is DNA profiling, an investigative technique that can invade the privacy of the suspect. It is partly for this reason that the Council has handed down its opinion on this forensic technique in the form of a recommendation.

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11 For an explanation of the 'fair trial' concept, see paragraph VI.b.
12 'The law' of the Council of Europe comprises issued guidelines, recommendations, resolutions and conventions, such as the ECHR, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, and the case law of the EurCourtHR.
13 Recommendation No R (92) 1.
4.1 The criminal policy of the Council of Europe

The Council of Europe’s work leads to European conventions and agreements. These are made by the Committee of Ministers14 (and, in a way, by the Parliamentary Assembly)15, the Council of Europe’s decision-making body. Member States sometimes amend their own domestic legislation to comply with these conventions and agreements. This is one way of bringing about a form of legislative harmonization.

Once a Member State has ratified such a convention or agreement, it is legally binding on the State. For example, The ECHR has been ratified by several Member States. All of these States are now bound by the convention, as well as by the case law of the EurCourtHR related to this convention.

An agreement has the same legal effect as a convention, but may be signed with or without a limiting condition such as ratification, acceptance or approval.

Another legal form embodying the Committee of Ministers’ decisions is a recommendation.16 Recommendations of the Council of Europe are guidelines. They are not legally binding on the Member States. States may amend their own legislation to follow the guidelines in order to achieve international harmonization of legislation in certain areas of common interest. As we saw earlier, one such recommendation has been made for DNA profiling. Finally, the Committee of Ministers also adopts declarations and resolutions on current political issues.

A resolution is a formal expression of opinion, will, or intent voted by the Council that can lead to expulsion of the Member State from the Council of Europe.17

As we have seen, the Council of Europe has at its disposal various instruments to help it achieve its aims. Not only can the Council utilize legally binding conventions and agreements, but non-binding recommendations as well. In addition, the Council may resort to declarations and resolutions to impose its will.

14 The Committee is composed of the Foreign Ministers of the 41 Member States.
15 The Parliamentary Assembly is the deliberative body of the Council of Europe. It is composed of 286 representatives appointed by the national parliaments of the 41 Member States. The 286 members are elected or appointed by national parliaments from among their own members. It deals with topics of current potential importance including problems of contemporary society and aspects of international politics. Its deliberations are important in guiding the activities of the Committee of Ministers. The Assembly meets quarterly for a week in plenary session.
16 A distinction must be made between the recommendations of the Council of Europe and those of the European Union. The latter are called “directives” and, unlike guidelines of the Council of Europe, are legally binding.
17 For instance, Turkey’s position with reference to the alleged human rights violations. The Council of Europe has threatened to suspend Turkey from membership if the death penalty imposed on Abdullah Öcalan, the leader of the Kurdish Workers’ Party (PKK) is carried out.

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4.2 European Convention on Human Rights and European Court of Human Rights

So far the Council's most significant achievement is the European Convention on Human Rights (ECHR). It sets out the inalienable rights and freedoms of each individual and obliges states to guarantee these rights to their nationals. Together with the ECHR, international enforcement machinery was created: the European Court of Human Rights (EurCourtHR).18

As we have seen above, the ECHR is binding on the Member States that have ratified it. Almost all countries in the Council of Europe have signed and ratified the ECHR since 1950. The States are also bound by the case law of the EurCourtHR related to the ECHR.

ECHR norms have been further developed by the law established by the decisions in the cases handled by the EurCourtHR. In many cases this case law has changed national legislation and practice. In recent years the case law on questions regulated by the ECHR has had extensive influence on domestic legislation in many European countries.

As a result of the above-mentioned judgments Kruslin and Huvig, every investigative method that invades the privacy of the suspect must have a legal basis. In the Netherlands, standards for various methods of criminal investigation previously not legally regulated have now been laid down in legislation as a result of this jurisprudence.

Brogan19 which led to tightening the rules governing legal periods of detention pending trial in many countries is another example of a judgment that has brought about changes in legislation.

5 The Council of Europe and illegally obtained evidence

5.1 Criminal Policy

As far as I am aware, the Committee of Ministers has not dealt with the question of illegally obtained evidence to date. I have been able to find nothing either in the conventions and agreements or in the recommendations, resolutions, or treaties that indicates that the Council of Europe has devoted attention to this question.

5.2 European Convention on Human Rights and European Court of Human Rights

One might expect that unlike the Committee of Ministers, the EurCourtHR has had occasion to consider allegations of illegally obtained evidence

18 As of 1 November 1998 there is a single permanent Court. Prior to this date the European Commission of Human Rights first examined admissibility of applications contesting violations of the ECHR. If the Commission found the complaint admissible, the case was referred to the EurCourtHR for a final decision, which is binding in the state(s) concerned. The new EurCourtHR is directly accessible to the applicant, deals with all (including the preliminary) stages of a case and sits on a permanent basis.

19 Brogan and others vs Great Britain, 29 November 1988.
and hand down an opinion concerning admissibility of the evidence in question.

The utilization of methods or techniques of investigation that have no legal basis might very well be in conflict with the fair trial concept laid down in art. 6 of the ECHR. Art. 6 specifies that:

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. (...)

There are several different interpretations of the notion “fair”. The interpretation of this notion has since been further filled in by the EurCourtHR in a number of judgments. Other “vague” notions in the article have also become clearer as a result of case law of the Court. Since Saunders, art. 6 of the ECHR can be interpreted as granting the suspect a right to silence. The Court here states, “although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6.”

The EurCourtHR has been much more reticent about illegally obtained evidence. The question whether evidence that has not been obtained in the manner prescribed by law can be classified as illegally obtained and therefore in conflict with the fair trial requirement was put to the Court in 1988. If the answer is in the affirmative, one could reason by analogy that evidence obtained in any manner not regulated by law at all, is illegally obtained and therefore also in conflict with the fair trial requirement.

It has not yet come to this. In 1988 the EurCourtHR in Schenk determined that the question of illegally obtained evidence is a matter for the national governments. The EurCourtHR can only examine the fairness of the procedure as a whole.

Schenk concerned whether the recording of telephone conversations without meeting the legal requirements is illegally obtained evidence. The applicant referred to both art. 6 (1) and 6 (2). The defence alleged viola-

20 Saunders vs the United Kingdom, 17 December 1996.
21 Schenk vs Switzerland, 12 July 1988, Series A No. 140.
tion of art. 6 (1) (fair trial), contending that the prosecution had made use of illegally/unlawfully obtained evidence: telephone conversations that had not been recorded in the manner prescribed by law.

In addition, the applicant contended that art. 6 (2) (presumption of innocence) had been violated. According to the defence, the defendant's guilt had not been proven "in accordance with the law" as required by 6 (2) because part of the evidence had been illegally obtained.

The EurCourtHR responded to the alleged violation of art. 6 (1) as follows:

"While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair." 22 The Court subsequently decided that Schenk's procedure "as a whole" had been "fair".

As for the alleged violation of art. 6 (2) of the ECHR the European Commission was of the opinion that this complaint also lay "within the scope of the concept of fair trial" and that this complaint in fact was an "erroneous interpretation" of 6 (2). The EurCourtHR thought that nothing in the case file indicated that Schenk had been treated during the trial "as if he were guilty before (...) convicted (...)". Here too the Court found no violation of Article 6 of the Convention. It is nevertheless striking that four judges delivered a dissenting opinion:

"In our view compliance with the law when taking evidence is not abstract or formalistic requirement. On the contrary, we consider that it is of the first importance for the fairness of a criminal trial. No court can (...) rely on evidence which has been obtained not only by unfair means, but above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention." Although these judges acknowledged the problem of evidence obtained without a legal basis, the EurCourtHR has thus far avoided evaluating evidence and the manner in which the evidence has been obtained.23

In a recent holding, Garcia Ruiz,24 the Court again only reiterated that art. 6 "does not lay down any rules on the admissibility of evidence or the

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22 Also of interest in the following consideration "The recording of the telephone conversation was not the only evidence on which the conviction was based. The criminal court took account of a combination of evidential elements before reaching its opinion".

23 At a later date, in Doorson, the Court again explains its position: "The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair".

way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts.  

The EurCourtHR has commented though on admissibility of a few specific types of evidence. For example, the Court held that evidence obtained with the help of anonymous witnesses is not admissible where the conviction has been based “to a decisive extent on these anonymous statements”.

The use of opinion evidence when the defence was unable to have an expert make a report has also been assessed by the Court. All other questions concerning admissibility of evidence are classified by the Court as ‘fair trial’ issues in which only the case as a whole can be assessed. The Court leaves the assessment of separate types of evidence and the manner in which they have been obtained to the national courts.

5.3 National differences
The admissibility of evidence is therefore a matter for the national legislatures and the national courts. One problem may arise as a result, although it does not necessarily have to be problematic: evidence in one European country is not necessarily lawful evidence in another country. The fact is, though, that crime has become increasingly more international in recent years. Offenders no longer respect national borders. As a result, investigative authorities will have to depend on colleagues in another country in order to obtain the necessary evidence against the suspect.

Exchange of evidence between countries with different legal regulations could very well become a problem in the future. Can evidence that has been obtained in a manner that is legal in the Netherlands, but illegal in France, be used in France? In principle, in a case like this, the Dutch judge would conclude that the defendant has received a fair trial, whereas the French judge would conclude that he has not. From the perspective of equality before the law, but also from the point of view of one Europe, this appears to me to be an undesirable development. Now that the EurCourtHR has not handed down a unanimous opinion on this question, the problem will remain for the time being. The view on whether evidence obtained in the absence of a legal basis is illegally obtained evidence will continue to differ from country to country.

6 Conclusion

A uniform regulation concerning investigative techniques with no legal basis that can contribute to investigation of an offence is urgently needed.

26 Among others, in Brandstetter vs Austria, 28 August 1991, ECHR Series A, Vol. 211 and Bönisch vs Austria, 6 May 1985, ECHR Series A, Vol. 92. For a comprehensive examination of these cases, see Livia E.M.P. Jakobs/Wim J.J.M. Sprangers and Petra van Kampen in this volume.
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Not only from the perspective of equality for the law - a defendant in France should be treated with the same degree of fairness as a defendant in the Netherlands - but also to facilitate the international exchange of evidence obtained by this method.

Formulation of such a regulation would be a good task for the Eur-CourtHR. The cue given by the four judges in their dissenting opinion in the Schenk opinion, can perhaps provide an impetus in this direction. They reached the conclusion for the first time that "compliance with the law when taking evidence (...) is of importance for the fairness of a criminal trial".

I think the Court should follow this line. By further interpretation of the notion 'fair trial' the Court could solve very simply the problem concerning investigative methods that have no legal basis. The Court could, for example, interpret the notion "fair" to include a minimal number of requirements to be met by evidence presented to convict. The requirement that the evidence has been obtained by a method of investigation that has a legal basis should be one of these requirements.

Another possibility is to bring the problem of investigative methods that have no legal basis before the decision-making body of the Council of Europe, the Committee of Ministers. The most probable procedure would be for the Committee of Ministers to appoint a Committee of Experts to conduct a thorough examination of the problem and make recommendations.

One such Committee of Experts already exists to advise on matters related to "criminal law and criminological aspects of organized crime". This Committee was created because "common criteria need to be established to obtain comparable national data on organized crime. By analysing these data, an integrated European approach could be developed, with a view to overcoming the differences in the legal systems of Member States concerning organized crime. This analysis may also result in recommendations regarding law enforcement structures and investigation methods."

Similar recommendations regarding methods of investigation with no legal basis would, in my opinion, be very welcome. A recommendation could, for instance, be made requiring a kind of general principle of legality. The recommendation could leave the individual States room to adjust their national legislation or case law, but require that investigative methods be given a legal basis in every State.

I would like to stress once again that the necessary legal basis can be provided by judicial opinions, soft law or legislation. With respect to the problem referred to earlier of theory that often lags behind rapidly developing practice, an effort must be made to avoid subjecting each new investigative method to the frequently lengthy legislative process. In these cases in particular use can be made of guidelines or policy regulations that can be drawn up much more quickly. This will enable the legislator (in the widest sense of the word) to keep up with the constantly developing new
methods of investigation, including the methods that make use of forensic expertise.

Clear regulation of the problem of methods used in criminal investigation that have no legal basis, is essential from the perspective of equality before the law within the Member States of the Council of Europe. The exchange of data obtained with the help of a method of investigation will be much simpler if a similar requirement of legality applies in all countries.

Finally, a requirement that all European countries provide a legal basis for investigative methods would have an additional advantage. Art. 8 of the ECHR states that every method of investigation that invades the right to privacy of an individual must be “in accordance with the law”. This requirement of art. 8 of the ECHR can be met straightaway by meeting the requirement for a legal basis for all investigative methods. Investigative methods which (can) amount to an invasion of privacy, like DNA profiling, will then be in agreement with both art. 6 and 8 of the ECHR.

References

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