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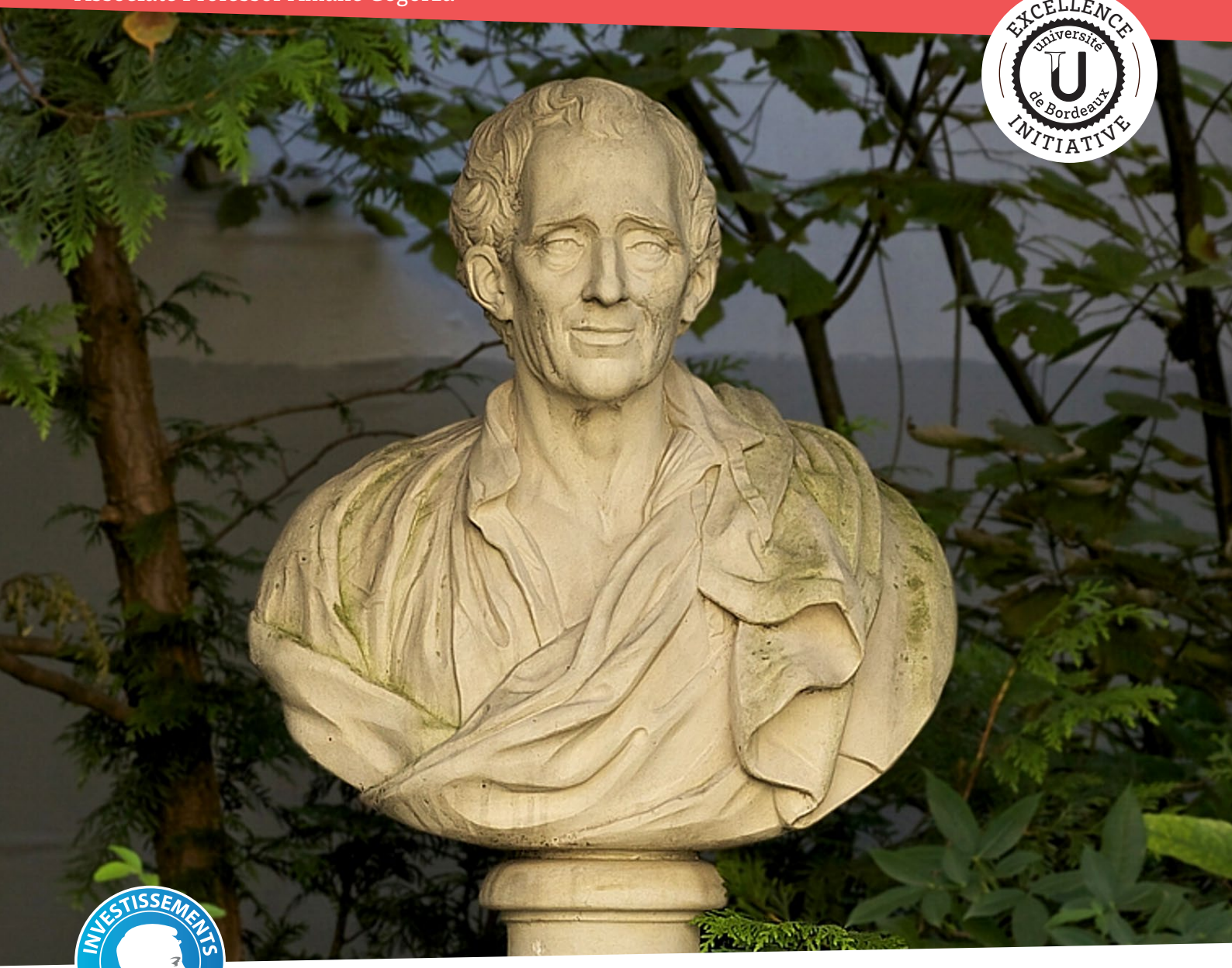

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Criminal law:

The influence and false influence of European Union law on French criminal procedure

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The Law of 27 May 2014 transposing Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

The Law of 27 May 2014 (1), transposing Directive 2012/13/EU on the right to information in criminal proceedings, which came into force for the most part on 2 June 2014 (2), was eagerly awaited. Not that the level of the European Union's requirements in this area was especially high, or that French criminal procedure would undergo any major upheavals as a result of the transposition; it was rather that, as part of a movement in French case law and legislation to enhance the rights of the defence, this Law – which had been debated since the beginning of 2014 (3) – presented an opportunity to refine and clarify the position of individuals implicated in police investigations. The Law was expected, in particular, to provide a framework for the so-called "*audition libre*" (4) – voluntary questioning or hearing without any placement in police custody – of the suspect and to reconsider the issue of access to case materials during periods of police custody. In many respects, the opportunity went begging.

The right to information in criminal proceedings – the very purpose of the Law of 27 May 2014 – responds to a more ambitious objective of guaranteeing the rights of persons implicated in police investigations, as proclaimed by the European Union. Directive 2012/13/EU – also known as Directive B, transposed by the Law discussed here – is, in effect, the second of a series of texts adopted or projected by the Union (5) implementing a road map issued by the European Council aiming to enhance the procedural rights of suspects and defendants in the context of criminal proceedings (6). It follows Directive "A" (7) on the right to interpretation and translation in criminal proceedings, which was incorporated into the body of French legislation by a Law of 5 August 2013 (8); and precedes a Directive "C" of 22 October 2013 (9), on the right of access to a lawyer, which will have to be transposed by Member States before 27 November 2016. Some of the points contained in the latter Directive, particularly those concerning the lawyer of a person interviewed "freely", have nevertheless been incorporated ahead of time into the Law of 27 May 2014 (10).

Logically enough, the right to information runs through the entire criminal process, from the police investigation stage to trial. Doubtless because the police investigation stage currently finds itself in the spotlight, the French legislature has dedicated two chapters of the Law to the issue of informing suspects, which essentially refers to the police investigation stage, and only a third chapter to defendants appearing before investigative and trial bodies. While this formal presentation says little *a priori* as to the content of the Law, the Directive's two cardinal points have naturally served as a guiding principle for the French legislature. Thus the right of a defendant to be informed of their rights and access to information useful and necessary to their defence inspire and cement the new provisions as a whole (11).

As far as it responds to the European Union's requirements in relation to the minimum set of procedural rights to be acknowledged to persons involved in criminal proceedings, the Law of 27 May 2014 indisputably contributes to an area of freedom, security and justice. Admittedly, the construction of such an area can proceed without any major problems: aside from the fact that the European Union is in no position to impose a rigid procedural blueprint on Member States (12), the rights of defendants have continued to be enhanced, especially under the influence of conventional law, to such an extent that the impact study relative to the Law of 27 May 2014 concluded that many EU Member States already have legislation that complies overall with the Directive's requirements (13). This observation naturally applies to France, where the defendant's right to information has continued to be consolidated under the influence of extra-Community sources. In this respect, and on a number of aspects, the new Law is part of what is after all a quite natural continuum of previous reforms or advances in case law, thus making the Union's involvement almost non-existent (I below). Nevertheless, the Directive is not without significance. By placing people rather than procedural actions (the names and arrangements of which vary from one country to the next) at the heart of its measures, it allows French law to rethink the police investigation stage by giving substance to a legal status that is widely ignored: that of suspects (II below) (14). And this, it would seem, is the essential contribution made by the Directive and the new Law.

I

It would undoubtedly be excessive to conclude that the transposition of the Directive has, from a technical point of view, brought nothing to French criminal procedure. First of all, the rights of persons in police custody have been supplemented. To the notification and the right to have a relative and the place of work informed of the detention order, to be examined by a doctor, to have a lawyer present, to make statements or to remain silent under the Law of 14 April 2011 (15), the following must be added, where applicable: the notification and the right to have an interpreter present, together with the right to see certain documents relating to the proceedings, whereas up until then only the lawyer had the right to do so (16). It should also be noted that there is a new right to submit observations to the magistrate responsible for deciding on the extension of police custody (17), which may be interpreted as a further step towards the adversarial process and the "jurisdictionalization" of the police investigation stage. Information on the reasons for the deprivation of liberty is also given, as the notification of the nature and the presumed date of the offence justifying the placement in police custody is replaced with the more complete information as to the classification and the presumed date and time of the offence, together with the purpose of the detention (18). Above all, the new Law provides that the rights in question shall be made known to the interested party according to specific arrangements, in a document separate from the statement, which must be given to the person, to which the Directive refers as the "Letter of Rights" (19).

As regards the pre-trial phase, the parties to the proceedings will, just like the person in police custody, have direct access to the materials of the case which are therefore no longer reserved for lawyers. More specifically, the parties will have the possibility, with exceptions (20), of being given copies of all or part of the evidence and statements on the case file (21), the Law wishing to guarantee an equal right to information between those being assisted by a lawyer and those preferring to prepare their own defence. Finally, as regards the trial phase, access to the materials of the case in criminal proceedings has also been opened up: while the person brought before the Public Prosecutor may now see said case file, be it directly or through the intermediary of their

lawyer (22), this access is guaranteed to the lawyer where the referral to the criminal court is made by summons or by notice to appear (23); the parties may also obtain copies of the same.

In spite of these new developments, one cannot help but think that European Union influence on French criminal procedure is marginal. Indeed, that influence does not take the form of an impetus for far-reaching reforms but rather that of adjustments, which serve to put the finishing touches to an earlier movement that is in some way inevitable. Worse still, in relation to the most controversial – and, in reality, the most highly anticipated – points, the Directive's technical impact remains symbolic, even non-existent, as the European legislation is neither sufficiently clear nor sufficiently precise to establish indisputable solutions.

First of all, let us consider the direct access now acknowledged at every stage of the proceedings, although subject to different arrangements. On closer examination, the acknowledgement of this direct access was not really implied by the Directive which considers, on the contrary, that the right of access to the materials of the case ought to be guaranteed alternatively either to the person arrested or detained or to their lawyer (24), without however deciding on the scenario in which the defendant chooses to defend himself. Admittedly, it may be argued, as some legal scholars have, that the effectiveness of the right to information assumes, implicitly but necessarily, that the person not assisted by a lawyer may have sight of the case file themselves (25). By linking the exercise of the right to information with the assistance of a lawyer, the legislature would effectively have limited the scope thereof, contrary to European recommendations.

It nevertheless strikes us that while that interpretation of the Directive is desirable and the most rational, it is not the only possibility. Such direct access could just as easily be refused to the suspect by making the assistance of a lawyer compulsory or, if opting for a minimal interpretation of the Directive, deciding that from the moment when the lawyer may have access to the materials of the case, the alternative has been fulfilled, at least where the State provides a satisfactory legal aid system. In such cases, the defendant would simply have to ask for free legal assistance for the right to information to be guaranteed (26). Spain's draft organic law transposing the Directive does not provide for direct access to the materials of the case for defendants or persons deprived of liberty (27).

The acknowledgement of the right of direct access to the materials of the case is instead the result of Constitutional Council case law. The latter has declared on a number of occasions that the provisions of the *Code de procédure pénale* (Criminal Procedure Code), under which disclosure of the evidence in the case was reserved for the lawyer acting for the parties – the defendant and the civil party – were incompatible with Articles 6 and 16 of the Declaration of the Rights of Man and of the Citizen, considering that such a filter was an infringement, on the one hand, of the right to a fair trial and of the right to a defence of persons not assisted or represented by a lawyer; and that, on the other hand, it contravened the principle of equality between persons wanting legal assistance from counsel and those wishing to defend themselves (28). Insofar as representation by a lawyer is not compulsory, except in exceptional cases, it is easy to understand that such discrimination may seem unjustified. The influence of the European Directive has yet to be proved on the issue of direct access to the materials of the case.

Secondly, the same applies to the right of a person in police custody to access the basic materials of the case, which right has not been acknowledged by the Law of 27 May 2014.

In 2011, the French legislature authorised lawyers acting for persons in police custody to consult certain materials or documents on the case file: the statement on the placement in police custody and the notification of rights, the medical certificate and the transcripts of interviews with the person they are assisting. This restricted access to the case file was and remains highly controversial: firstly, because the materials envisaged by the legislature do not give a complete picture of the case and the prosecution evidence (29); secondly, and as a corollary, because this limited knowledge of the materials of the case deviates from the requirements laid down in respect of fair trials by the European Court of Human Rights. Given that the ECHR considers that legal assistance must encompass "*the whole range of services specifically associated with legal assistance"* and especially *"discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention*" (30), it is difficult to see how this mission can be accomplished if the lawyer for the person in police custody cannot consult the basic materials of the case, and particularly those relating to the prosecution evidence.

The Law of 27 May 2014 naturally afforded the opportunity to reconsider the issue. This was particularly the case as Directive 2012/13/EU had given a certain amount of hope, some legal scholars considering that EU law imposed a requirement of fuller access to the materials of the case as soon as a person is placed in police custody. However, things remain unchanged, the French legislature having in some ways made the most of the ambiguities contained in the European text. In spite of appearances, the Directive remains unclear on the content of the right of access to the materials of the case. Article 7 identifies a number of scenarios. Paragraph 1 gives a person deprived of liberty the right to access any document allowing him to challenge the legality of their arrest. The following paragraph relates to suspects and defendants, independent of the deprivation of liberty; it guarantees access to all material evidence, whether for or against suspects or defendants, in order to safeguard the fairness of the trial and to prepare their defence. Finally, a third paragraph provides that "*{w}ithout prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court*". The precise meaning of the latter paragraph raises a number of difficulties.

The reference to due time to allow the effective exercise of the rights of the defence leaves a wide margin of appreciation to Member States and allows the moment when the interested party will have access to all evidence in the case to be deferred, while the possibility of defending oneself has not been initiated. However, because paragraph 3, which states the time limits for access to the full case file, is not applicable where a person is deprived of liberty (31), it must doubtless be considered that a person who is arrested or detained, a person in police custody being at the forefront, must be able to access essential documents allowing them immediately to challenge the legality of their arrest or detention – in other words, during the deprivation of liberty (32).

The reality strikes us as being far more complex. While it is right that a person under arrest ought to be made aware of certain documents, it would appear that the purpose of this is to allow them to challenge the legality of the measure involving deprivation of liberty. The problem lays in the fact that, in French law, the legality of police custody may only be challenge at the pre-trial stage, before the investigation chamber or the criminal court, *in limine litis*. It is therefore at those stages, *a priori*, that access to documents allowing the deprivation of liberty to be challenged must be guaranteed to the defendant – as French law already does – and not while the person is in

police custody, unless the new right introduced provisions in favour of persons in police custody, namely that the right to submit observations to the magistrate responsible for deciding on the extension of police custody be considered as a means of challenging the legality of the arrest. This remains to be seen. It should be noted, moreover, that in its decision of 18 November 2011, the Constitutional Council justified the limited access to evidence during police custody, in particular because at that stage, there was no question of challenging the legality of the measure involving deprivation of liberty.

II

Bearing in mind the ambiguities of the Directive transposed by the Law of 27 May 2014, the contribution made by EU law to the developments in French criminal procedure does not appear to have examined legal technique: the rights contained in the Directive already existed overall in the French legal system (not to mention many others) (33), even though the exercise of those rights or some aspects thereof may have been clarified by the Directive. Paradoxically, the latter's main impact on French criminal procedure remains theoretical. The Union's perception of criminal procedure – doubtless because it is built on the basis of different legal systems – brought to light the need to give greater visibility to the concept of suspect (in other words, to the person), rather than allegations, namely evidence or proof against an individual, which the French *Code de procédure pénale* already exploits to permit such and such a procedural act infringing individual freedoms (34). The thinking behind the right to a defence, particularly at the police investigation phase, was thus renewed. Indeed, up until now in France, people detained during the police investigation had not been recognised as having any particular legal status, unlike during the pre-trial phase. This deficiency could be explained by the fact that, the prosecution not having been instigated, the police investigation phase was generally viewed as being a unilateral investigation phase in which individuals – and particularly the suspect – were virtually non-existent. In this respect, procedural rights have traditionally been connected to pleadings, not to the status of suspect as such. Traditionally, therefore, hearings were a function of pleadings chosen by the investigating officer – police custody or not – not of the existence of allegations against a person. This situation was in contrast with that encountered at the pre-trial phase, in which defendants find themselves granted rights owing to a status related to their involvement in the facts (35), while investigative acts depend on the status of the interested parties.

Admittedly, the notion that suspects had to be recognised as having a specific legal status has caught on in recent years. Two decisions of the Constitutional Court subjugated the legality of the so-called "free" or voluntary questioning of a suspect (i.e. questioning without any placement in police custody) to the notification of certain rights: that of being informed of the allegations against them and that of leaving the offices of the judicial police at their convenience. It was in order to give substance to the status of suspect put forward by European Union law that the legal regime applicable to police questioning was supplemented by the Law of 27 May 2014 (36). Indeed, legal scholars expressed serious reservations as to the Constitutional Council's recognition of voluntary questioning, thus calling for legislation. The beginnings of a framework for a well-known police practice were praiseworthy, but the incomplete legal regime was heavily criticised. It was especially regrettable that such questioning, which no-one viewed as an act of co-operation with police, could be conducted without a lawyer present, and there were ancillary fears that it could be open to abuse, allowing police to take statements from a suspect without the latter having received assistance from counsel. It was easy to imagine, for example, that a suspect wishing to avoid police custody would agree to voluntary questioning and that the investigating

officer would place them in custody when, feeling that their statements have begun to incriminate them, the same suspect decided to leave the offices of the judicial police. There was also something slightly embarrassing about the questioning – or perhaps even interrogation – of a suspect without the completely voluntary waiver (37) of the assistance of a lawyer, because the guarantees attached to the defence must logically be attributed in relation to the necessities of that defence and, therefore, to the existence of allegations, not exclusively to the coercion of the suspect (38). An overhaul of voluntary questioning was therefore essential, either to prohibit it by making the placement of the suspect in police custody compulsory; or by proposing a better framework for it.

This has now happened, as a suspect questioned "voluntarily" has, as a result of the new Law, identical rights to those of persons placed in police custody, though the arrangements for the notification of those rights differ, in that a Letter of Rights is not required (39). Thus a suspect must be informed of the classification and the presumed date and time of the offence of which they are suspected of committing or attempting to commit; the right to leave the police offices at any time; where applicable, the right to have an interpreter present; the right to make statements, answer questions or remain silent; whether the offence for which they are being questioned is a crime or a misdemeanour punishable by a term of imprisonment; the right to be assisted, during questioning or a confrontation, by a lawyer of their choice or, at their request, designated by the President of the Bar Association; and finally, the possibility of receiving legal advice, free of charge where applicable, from a legal advisory service (40).

The right of access to a lawyer will come into force on 1 January 2015, unlike the other rights which have been effective since 2 June 2014. This delay can be explained by the fact that the measures relative to assistance from counsel anticipate the transposition of Directive C (41), the transposition of which by Member States can wait until 27 November 2016. This time management has, however, had consequences for the notification of the right, which has also been deferred in the interests of consistency (42). Once again, the French adaptation of the Directive raises the question of an incorrect transposition. The duty to notify suspects of their rights being imposed by Directive B, and therefore having to be effective before 2 June 2014, has France not failed to fulfil its legal obligation to transpose the Directive within the relevant timeframe?

Without prejudice to what the European Court of Justice's opinion may be in the event that an action is brought for failure to fulfil an obligation, such a conclusion strikes us as dubious. Indeed, while a suspect has not been arrested, Directive B does not stipulate the moment that they must be notified of their rights, simply stating that it must be done "*promptly*" (43) "*in order to allow for those rights to be exercised effectively*", "*as they apply under national law".* In reality, the moment when a suspect should be notified of their procedural rights is only made clear in a combined reading of Directives B and C. If a free suspect under interrogation must be able to have a lawyer present (Directive C) then the notification of that right must necessarily be given before the interrogation, when the possibility of voluntary questioning is offering to the suspect, without which the latter is ineffective (Directive B). All in all, the notification given to a free suspect of their right to have a lawyer present could be based on the timescales provided in Directive C. However, this is EU law at its own particular pace. As previously mentioned, it would appear that, according to the European Court of Human Rights, it is not possible for a suspect to be questioned, even before 2016, without their being notified of their right to have a lawyer present (44).

So we return to our initial considerations. European Union law often settles for setting down a general framework for recognising rights with a view,, in its own words, to creating a secure Europe serving its citizens; the proposed technical provisions are deliberately vague so as to leave a wide margin of appreciation for Member States which, in reality, find themselves bound by other sources of law well before the Union intervenes.

Notes:

(1) Law n° 2014-535, *JORF* 28 May 2014, p. 8864.

(2) This was the timeframe set for the transposition of the Directive. Some provisions will only enter into force on 1 January 2015. This is the case, in particular, for the right of a suspect questioned voluntarily (i.e. without being placed in police custody) to have a lawyer present, or the right of a victim confronting a person questioned voluntarily to be assisted by counsel. See. Article 15, Law of 27 May 2014, cited above. The recognition of rights relating to legal assistance was not implied by Directive 2013/13/EU of 22 May 2012, but by the later one of 22 October 2013 (Directive 2013/48/EU); French law therefore did not fail to comply with its transposition obligations within the time allowed.

(3) The draft law on the right to information in criminal proceedings was tabled by the Government before the Senate on 22 January 2014, following the accelerated procedure. For a full commentary of the draft, see A. Botton, *Droit à l'information dans le cadre des procédures pénales : un projet de loi contrasté,* Dalloz. 2014, p. 431.

(4) In French law, the *audition libre*, the hearing or voluntary questioning of a free suspect, conducted without coercion by an officer of the judicial police, also known as *l'audition du suspect sans placement en garde à vue* (the voluntary questioning of a suspect without placement in police custody). This has always existed, as the judicial police being under no duty to place suspects in custody. However, following two decisions of the Constitutional Council requiring that a person being voluntarily questioned be informed of the allegations against them as well as their right to leave the offices of the judicial police (Cons. Const. 18 Nov. 2011, n° 2011-191/194/195/196/197 QPC, *Garde à vue*, JO 19 Nov. 2011; Cons. Const. 18 June 2012, n° 2012/257 QPC , JO 19 June 2011), debate has raged on the conditions for the legality of such questioning. Observers have wondered whether the right to have a lawyer present should not also be recognised.

(5) On 27 November 2013, the Commission published a number of draft Directives and Recommendations of the procedural rights of vulnerable persons (COM(2013) 822 final – 2013/0408 (COD)), the presumption of innocence (COM (2013) 821 final – 2013/0407 (COD) and legal aid (COM(2013) 824 final – 2013/0409 (COD)

(6) The roadmap was adopted by a Resolution of the European Council on 30 November 2009 and was incorporated on 11 December 2009 into the Stockholm Program – An open and secure Europe serving and protecting citizens; See Directive 2012/13/EU of 22 May 2012, *OJEU*, 01/06/2012, L 142/2, § 11-14. The roadmap provides for a number of measures intended to achieve this result: the right to translation and interpretation (measure A), the right to be informed of their rights and the charges against them (measure B), the right to legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D) and the guarantees for vulnerable suspects and defendants (measure E). There was also a Green Paper on provisional detention (measure F).

(7) Directive 2010/64/EU, *OJEU* 26/10/2010, L280/1.

(8) Law n° 2013-711, JORF 6 August 2013, p. 13338.

(9) Directive 2013/48/EU, *OJEU* 6/11/2013, L. 294/1.

(10) Article 61-1 (5) of the *Code de procédure pénale* now provides that a person questioned voluntarily must be able to have a lawyer present. Nevertheless, this provision will only come into force on 1 January 2015 (Article 15 of the Law of 27 May 2014, cited above).

(11) On these two essential points, G. Taupiac-Nouvel et A. Botton, *La réforme du droit à l'information en procédure pénale*, JCP, G, 2014, n° 27, doct. 802.

(12) Under Article 82 TFEU, the European Union's competence is limited in matters of criminal procedure. The European Parliament and the Council can adopt minimum rules to facilitate the mutual recognition of judgments and judicial decisions, as well as police and judicial co-operation in criminal matters having a cross-border dimension

(13) See impact study of the Law of 27 May 2014, p. 17 and subsequent.

(14) On this point, R. Ollard, *Quel statut juridique pour le suspect*, JCP, G, 2014, n° 36, p. 1547.

(15) Law. n° 2011-392 on police custody, JORF 15 April 2011, p. 6610.

(16) CPP, Article 63-1 as amended.

(17) CPP, Article 63-1, (3).

(18) CPP, Article 63-1, (3).

(19) Art. 4.

(20) This will be the case in the event of "*risks of pressure on victims, persons charged, their lawyers, witnesses, investigators, expert witnesses or any other person involved in the proceedings*" - Article 114 (8) CPP.

(21) CPP, Article 114 (4).

(22) CPP, Article 393

(23) CPP, Article 388-4.

(24) Article 7 of the Directive indeed envisages "suspects, defendants or their lawyers".

(25) In this sense, see, A. Botton and G. Taupiac-Nouvel, cited above.

(26) The ECHR does not consider that the fact of subjugating access to the materials of the case to legal assistance is incompatible with Article 6 of the Convention and the right to a fair trial: ECHR, *Kermzow v Austria* Application n°12350/86, 21 September 1993. It is true, however, that the issue was examined from the perspective of procedural fairness, not that of equality or non-discrimination between persons assisted by a lawyer and those wishing to defend themselves.

(27) *Proyecto de ley organica del 1 de agosto 2014 por la que se modifica la ley de enjuiciamiento criminal para transponer la directive 2010/64UE, de 20 de octubre 2010, relativa al derecho a interpretacion y a traduccion en los procesos penales y la Directiva 2012/13/UE de 22 de mayo 2012 relativa al derecho a informacion en los procesos penales,* p. 11, available at http://www.mjusticia.gob.es/cs/Satellite/1292427088645?blobheader=application%2Fpdf&b

(28) See Cons. Const. 9 Sept. 2011, n° 2011-160 QPC considering that, on conclusion of a preliminary inquiry, the notification of the initiation of a prosecution to the lawyers acting for the parties only is contrary to the Constitution; Cons. Const. 23 Nov. 2012, n° 2012-284 QPC on Article 161-1 CPP. The Council censured the provision as it provided that a copy of the decision ordering that an expert report be obtained should be sent to the Public Prosecutor and the lawyers acting for the parties.

(29) Article 63-4-1 of the *Code de procédure pénale*, resulting from the Law of 14 April 2011 (cited above) provided that the lawyer may consult the statement on the placement in custody notification of rights, medical certificate and the statements made under questioning by the person they are assisting. The new law has not amended the list of documents that may be consulted. It simply added that such consultation could be direct, the person in police custody being able to access said documents themselves.

(30) ECHR, *Dayanan v Turkey*, Application n°, §32, 13 October 2009.

(31) It is stated that the time limits are established without prejudice to the provisions under Paragraph 1.

(32) Under Article 7 (1) of the Directive, "[*w*]*here a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers*".

(33) See Impact Study, cited above, p. 17 and subsequent.

(34) This remains true even if, as such, this situation is obviously not envisaged by the Directive, and even if the term "suspect" is not reiterated by the *Code de procédure pénale*, which continues to mention the person against whom there exists "*one of more plausible reasons to suspect that they have committed or attempted to commit a crime or misdemeanour*". The relevant Impact Study (cited above), page 5, is clear on this point: relative to the three Directives adopted to date, "*a true status of suspect has thus been created, generating an entitlement to standard rights within the EU*".

(35) The framework thus varies depending on whether the person is placed under judicial examination, i.e. whether there is strong or corroborative evidence of their involvement in the facts (Article 80-1 CPP); whether they are an assisted witness, i.e. they have been found guilty without the requisite amount of serious corroborative evidence (Article 113-1 & subsequent, CPP); or the person is a witness and not suspected (Article 101 & subsequent, CPP).

(36) Article 61-1 CPP.

(37) Are we truly free when it is a question of choosing between voluntary questioning without a lawyer present, or police custody with a lawyer present?

(38) ECHR, *Simons v Belgium*, Application no. 71407/10, 28 October 2012, Paras. 26-33, linking the right to a lawyer to the existence of an accusation in criminal matters and therefore to procedural fairness (Article 6 ECHR), not the deprivation of liberty (Article 5 ECHR).

(39) Article 803-6 CPP does not provide for such a document to be given to a suspect or defendant in custody.

(40) For more information, see v. Article 61-1 CPP.

(41) Article 3 (2) (a) of Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings recognises the right of access to a lawyer of suspects and defendants before they have been questioned by the police or a judicial or law enforcement.

(42) It was a matter of avoiding the notification of a virtual right; see. J.-B. Perrier, *La transposition tardive de la notification du droit du suspect libre à l'assistance d'un avocat*, Dalloz 2014 p. 1160

(43) Art. 3(1) of the Directive of 22 May 2012.

(44) ECHR, *Simons v Belgium*, cited above.