



Jaan Ginter

*Professor of Criminology
University of Tartu*



Anneli Soo

*Ph.D.,
Fulbright-Schuman Scholar
California State University, Fullerton*

The Right of the Suspect to Counsel in Pre-trial Criminal Proceedings, Its Content, and the Extent of Application

1. Introduction

In order to guarantee that the rights of a suspect are respected throughout the criminal proceedings, he or she should have the right to counsel from the very early stages of the proceedings, at least immediately upon arrest.¹ Nevertheless, as soon as this principle is recognised, several questions arise. First, should this right be interpreted in such a way that the suspect has a right to counsel not only before procedural acts that involve him or her but also during these acts? Secondly, should the right be absolute in nature? In this article, it is suggested that the answer to the first question is 'yes', and the arguments supporting this perspective are brought out. Additionally, it is discussed that this right is subject to restrictions if the suspect him- or herself agrees therewith or there are compelling reasons for this. For us to answer the two questions mentioned above, firstly, the sources of the right of suspects to counsel in pre-trial proceedings are explicated. Here legal acts and judicial practice from both Europe and the United States (US) are used as examples, the latter being a state in which the principles of the right to counsel have been well under development for a long time. Next, the advantages and disadvantages of guaranteeing the right to counsel during pre-trial proceedings without any restrictions are analysed. Finally, warranted justifications for restriction of the right to counsel in pre-trial proceedings are discussed, with mindfulness of the judicial practice of the European Court of Human Rights (ECtHR), the Constitution of the Republic of Estonia², the (draft) legislation of the European Union (EU), and the experience of the US.

¹ Green Paper from the Commission—Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (19.2.2003, COM(2003) 75 final), Sections 4.1 and 4.3 (a).

² Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; RT I, 27.4.2011, 2 (in Estonian). The Constitution of the Republic of Estonia. Unofficial translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (most recently accessed on 16.8.2012).

2. The sources of the right to counsel in pre-trial criminal proceedings

According to the judicial practice of the Estonian Supreme Court, the right to defence is one of the main procedural principles of the rule of law and gives a person the right to defend him- or herself against criminal charges with every means set forth by law.^{*3} One of the defence rights is suspects' right to counsel. The first two sentences of the Constitution of the Republic of Estonia's §21 (1) establish the following:

Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel.

The second sentence of §21 (1) of the Constitution is the only sentence in the Constitution of the Republic of Estonia that considers the right to counsel.^{*4}

The suspect's right to choose counsel and confer with him or her is also provided for by the Estonian Code of Criminal Procedure^{*5} (CCP). According to §34 (1) 3) of the CCP, the suspect enjoys the right to counsel's assistance^{*6}, and, according to the fourth clause of the same subsection, he or she has the right to confer with counsel without the presence of other persons. These rights have to be promptly explained to the suspect (first sentence of §33 (2) of CCP). Additionally, the suspect has the right to the presence of counsel when interrogated or participating in confrontation, comparison of testimony to circumstances, or presentation for identification (§34 (1) 5) of CCP). Therefore, when interpreting the Constitution and the CCP together, one could conclude that in Estonia as soon as a person acquires the status of a suspect in criminal proceedings, he or she has the right to counsel, which comprises the right to confer with that person, receive his or her assistance, and have him or her present during the procedural acts that are performed in the presence of the suspect.

The ECtHR has acknowledged suspects' right to counsel in pre-trial proceedings for quite a long time.^{*7} However, the most important judgement, in the case *Salduz v. Turkey*^{*8}, was handed down by that court very recently. Unfortunately, the Court's conclusions in this judgement are not unambiguous: there is an on-going dispute in Europe about whether the ECtHR acknowledged with this judgement suspects' right to have counsel present during interrogations, the right the ECtHR had not acknowledged before. Some scholars say that it did so, while others think that the *Salduz* judgement is not clear on this point.^{*9}

In the *Salduz* judgement, the ECtHR reassured that the right to counsel provided for in Article 6, paragraph 3 of the European Convention on Human Rights^{*10} (ECHR) as one element of the concept of a fair trial set forth in Article 6, paragraph 1 of that convention may exist already before the case is sent to trial.^{*11} Next the Court explained that, under Article 6 of the ECHR, it is required that the accused (in the context of Estonian law, the suspect) be guaranteed the assistance of counsel already 'at the initial stages of police interrogation'.^{*12} As can be seen from the wording of the judgement, the Court has not stated directly that

³ Supreme Court Criminal Chamber ruling, 3-1-1-114-02, paragraph 7.3. – RT III 2002, 34, 370 (in Estonian).

⁴ E.-J. Truuväli *et al.* (eds). *Eesti Vabariigi põhiseadus: Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia: Commented Edition), 2nd ed. Tallinn: Juura 2008, §21 (comment 6) (in Estonian).

⁵ *Kriminaalmenetluse seadustik*. – RT I 2003, 27, 166; RT I, 17.4.2012, 6 (in Estonian).

⁶ In accordance with §45 (1) of the CCP, counsel may participate in a criminal proceeding as of the moment at which a person acquires the status of a suspect in the proceedings.

⁷ *John Murray v. the United Kingdom*, application no. 18731/91, 8.2.1996; *Magee v. the United Kingdom*, application no. 28135/95, 6.6.2000; *Brennan v. the United Kingdom*, application no. 39846/98, 6.10.2001.

⁸ *Salduz v. Turkey*, application no. 36391/02, 27.11.2008.

⁹ A. Beijer. False confessions during police interrogations and measures to prevent them. – *European Journal of Crime, Criminal Law & Criminal Justice* 2010 (18), pp. 312–313; C. Brants. The reluctant Dutch response to *Salduz*. – *Edinburgh Law Review* 2011 (15), p. 302.

¹⁰ The European Convention on Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/NR/rdon-lyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/o/CONVENTION_ENG_WEB.pdf (most recently accessed on 1.3.2012).

¹¹ See Note 8, p. 50.

¹² *Ibid.*, p. 52. But not during the initial questioning when the person is not yet suspect: see *Smolik v. Ukraine*, application no. 11778/05, 19.2.2012. In 2010, this court expanded the right to counsel to those situations wherein the suspect is deprived of his or her liberty irrespective of any questioning; see *Dayanan v. Turkey*, application no. 7377/03, 13.10.2009, p. 32. Additionally, the Court has found since that the guarantees described in *Salduz* have to be applied for witnesses also, when they are in reality suspected of a crime; see *Brusco v. France*, application no. 1466/07, 14.10.2010, p. 47.

suspects enjoy a right to have counsel present during interrogations. However, in several recent cases, the ECtHR has referred to the *Salduz* judgement and concluded that violation of Article 6 took place, on the basis of a finding that counsel was not present during interrogation.^{*13} This might be a basis for concluding that, according to the judicial practice of the ECtHR, suspects have the right to have counsel present during interrogations. Even though the wording of the *Salduz* judgement may not be very clear, one thing is certain: this judgement 'sent shock waves out across Europe'^{*14} and caused a number of changes in the interrogation rules of several European countries, although one has to admit that some of these changes are based on a narrow interpretation of the *Salduz* judgement. For instance, the Supreme Court of the Netherlands has interpreted the judgement in such a way that all suspects have a right to consult with a lawyer before interrogation but only minors have a right to have counsel present during interrogation.^{*15} Additionally, in Scotland a right of the detainee to have counsel's advice prior to police interrogation^{*16} was recognised by the decision of the Supreme Court of the United Kingdom in 2010.^{*17} Although it could be said that this was a moderate stance in comparison to what the Supreme Court could have found if it had interpreted the *Salduz* judgement more broadly, the decision immediately caused displeasure among Scots, who did not like the idea of the Supreme Court of the United Kingdom dictating the development of material principles of the Scottish criminal justice system without taking into account its particular features. Additionally, it was claimed in Scotland that as long as the procedure as a whole is fair, the issue of whether suspects should have a right to counsel is of a secondary nature.^{*18} In France, the *Salduz* judgement caused more radical steps and, after several decisions by the French Constitutional Court and the final appeal court with jurisdiction over criminal matters, the French Parliament adopted rules establishing the right of detainees to have counsel present during interrogation.^{*19}

The other aspect of the *Salduz* judgement that remains unclear is the interpretation of the notion of 'police interrogation'. In *Zaichenko v. Russia*^{*20}, the ECtHR held that there is no right to counsel if a person is questioned in the course of a road check, because 'the applicant was not formally arrested or interrogated in police custody'.^{*21} It has been suggested that, given this ruling, a suspect enjoys a right to counsel only when his or her liberty has been limited in a significant way.^{*22} Nevertheless, to be able to draw extensive conclusions, one should await additional judgements from the ECtHR.

The proposal for a directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest^{*23}, which has been drafted in line with the practice of the ECtHR and which is aimed at boosting mutual trust among the Member States^{*24}, emphasises that access to a lawyer must be granted upon questioning^{*25}, deprivation of liberty, or a proce-

¹³ *Aba v. Turkey*, applications no. 7638/02 and 24146/04, 3.3.2009; *Lazarenko v. Ukraine*, application no. 22313/04, 28.10.2010; *Hüseyin Habip Taşkın v. Turkey*, application no. 5289/06, 1.2.2011; *Šebalj v. Croatia*, application no. 4429/09, 28.6.2011.

¹⁴ J.S. Hodgson. Safeguarding suspects' rights in Europe: A comparative perspective. – *New Criminal Law Review* 2011 (14), p. 657.

¹⁵ HR, 30.6.2009, no. 2411.08 J, NbSr 2009, 249.

¹⁶ But not during interrogation, as seen when one analyses paragraph 48 of the judgement. See also F. Leverick. The Supreme Court strikes back. – *Edinburgh Law Review* 2011 (15), p. 290. However, after the *Cadder* judgement, Scotland changed its procedural rules, and now every detainee has a right to consult with his or her counsel before and during questioning (but presence is not required; consultation can be done by telephone also). For more about this, see F. Leverick. The right to legal assistance during detention. – *Edinburgh Law Review* 2011 (15), p. 360.

¹⁷ *Cadder v. HM Advocate* [2010], UKSC 43 (26.10.2010).

¹⁸ P.R. Ferguson. Repercussions of the *Cadder* case: The ECHR's fair trial provisions and Scottish criminal procedure. – *Criminal Law Review* 2011 (10), p. 756: 'It is submitted that the lack of adverse inferences from silence, the short detention period and the corroboration requirement, were all safeguards against miscarriages of justice, and thus reflected a fair criminal procedure—a fairer procedure than a system which lacks these elements, but provides a right of legal advice at the police station.'

¹⁹ A. Dorange, S. Field. Reforming defence rights in French police custody: A coming together in Europe. – *International Journal of Evidence and Proof* 2012 (16), p. 154.

²⁰ *Zaichenko v. Russia*, application no. 39660/02, 18.2.2010.

²¹ *Ibid.*, p. 47.

²² T.A.H.M. Van de Laar, R.L. De Graaff. *Salduz* and *Miranda*: Is the US Supreme Court pointing the way? – *European Human Rights Law Review* 2011 (3), p. 307.

²³ Brussels, 8.6.2011, COM(2011) 326 final, 2011/0154 (COD). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF> (most recently accessed on 1.3.2012).

²⁴ *Ibid.*, explanatory memo, p. 4.

²⁵ Later on, the Presidency suggested use of the term 'official interview', explaining that it means 'the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the

dural or evidence-gathering act.^{*26} Therefore, the institutions of the EU have interpreted the *Salduz* judgement in such a way that it gives suspects the right to have counsel present during interrogations^{*27}, and, as they use the phrase ‘any questioning by the police’, they do not expect the suspect to be detained or his or her liberty to be restricted in any other way before enjoying the right to counsel. Additionally, in contrast to the judicial practice of the ECtHR, the proposal specifies the situations wherein suspects have a right to have counsel present in pre-trial proceedings: it points out not only questioning and deprivation of liberty but also any other evidence-gathering act in addition to questioning.

In the US, the right to counsel in pre-trial proceedings has historically been divided between two sources: the Fifth^{*28} and the Sixth Amendment.^{*29} In the case *Massiah v. United States*^{*30}, the US Supreme Court (USSC) held that statements deliberately elicited by authorities from the previously indicted accused in the absence of his or her counsel deprived the accused of his or her right to counsel under the Sixth Amendment and, therefore, such statements could not be used as evidence against him or her in trial.^{*31} The next case was *Miranda v. Arizona*^{*32}, in which the USSC held that the prosecution may not use statements made as a result of questioning initiated by authorities after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective for securing the Fifth-Amendment privilege against self-incrimination.^{*33} Where an interrogation is conducted without the presence of counsel and a statement is taken, the prosecution’s side has a burden of demonstrating that the defendant knowingly and intelligently waived his or her right to counsel.^{*34} Therefore, the Supreme Court concluded that if a person is held in custody and not yet indicted, the right to counsel is indispensable to the protection of the privilege against self-incrimination: the role of counsel here is to guarantee that people would not testify against themselves involuntarily.

At first, the USSC seemed to have the idea that the *Massiah* and *Miranda* rules are different, with one meant for situations wherein adversary proceedings have already begun and serving the principle of equality of arms and with the other being for the investigative stage of proceedings, wherein the privilege against self-incrimination prevails.^{*35} Nevertheless, the USSC has made a couple of decisions indicating that the *Massiah* and *Miranda* rules are not so different. For example, a statement obtained in breach of the Sixth or Fifth Amendment may be used for impeachment purposes^{*36}, and, also, its ‘fruits’ may be used as evidence during the trial^{*37}; in addition, there is no difference in the waiver rules.^{*38} This has led some authors to propose that there should be one uniform right to counsel from the very beginning of the proceedings^{*39}, which would be an approach similar to that applied in Europe.

place where it is conducted or the stage of the proceedings when it takes place’, according to the revised text of the proposal, document 7337/12, 9.3.2012, p. 14. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1729.pdf> (most recently accessed on 1.4.2012).

²⁶ See Note 23, Article 3, paragraphs 1 (a), (b), and (c).

²⁷ Paragraph 6 of the directive proposal states that the directive ‘promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR as interpreted by the European Court of Human Rights’.

²⁸ The Constitution of the United States of America. Available at <http://supreme.justia.com/constitution/> (most recently accessed on 1.3.2012). According to the Fifth Amendment of the Constitution, no person ‘shall be compelled in any criminal case to be a witness against himself’.

²⁹ *Ibid.* According to the Sixth Amendment of the Constitution, in all criminal prosecutions, the accused shall enjoy the right to ‘have the Assistance of Counsel for his defence’.

³⁰ *Massiah v. United States*, 377 U.S. 201 (1964).

³¹ *Ibid.*, pp. 205–206.

³² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³³ *Ibid.*, p. 477.

³⁴ *Ibid.*, p. 475.

³⁵ B.G. Hungate-Noland. *Texas v. Cobb: A narrow road ahead for the Sixth Amendment right to counsel*. – University of Richmond Law Review 2001–2002 (35), pp. 1205–1206.

³⁶ On the Sixth Amendment right to counsel: *Kansas v. Ventris*, 129 S. Ct. 1984, 1847 (2009). On the Fifth Amendment privilege against self-incrimination: *Harris v. New York*, 401 U.S. 222 (1971).

³⁷ On the Sixth Amendment right to counsel: *Nix v. Williams*, 467 U.S. 431 (1984). On the Fifth Amendment privilege against self-incrimination: *Oregon v. Elstad*, 470 U.S. 298, 311 (1985).

³⁸ In *Patterson v. United States*, the USSC decided that the Fifth Amendment waiver is sufficient for waiving the Sixth Amendment right to counsel (487 U.S. 285 (1988)).

³⁹ D.C. Dearborn. ‘You Have the Right to an Attorney’, But Not Right Now: Combating *Miranda*’s Failure by Advancing the Point of Attachment under Article XII of the Massachusetts Declaration of Rights. – Suffolk University Law Review 2011 (44), p. 363; Suffolk University Law School Research Paper No. 10-64, 2011 p. 363. Available at SSRN: <http://ssrn.com/>

3. To guarantee, or not to guarantee, that is the question

There are a number of arguments supporting the ECtHR's conclusion that the right to counsel should be guaranteed to suspects 'at the initial stages of police interrogation'.

Counsel provides the suspect with the technical skills to exercise his or her rights in the criminal proceedings. The suspect, who is usually a common person without expertise in substantive and procedural law, does not have full awareness of his or her rights and lacks skill in exercising them.^{*40} Here counsel contributes to the principle of equality of arms.^{*41} In the context of pre-trial proceedings, it is very difficult to exclude the right to counsel on the basis of an argument that the proceedings are not yet adversarial, as some justices of the USSC have tried to do.^{*42} As the larger body of evidence later presented in the trial is gathered during the pre-trial stage of proceedings—and if it is not presented as evidence in trial, at least the information about evidence (e.g., about witnesses) is obtained during pre-trial proceedings—it is most necessary for the suspect to have a legal professional by his or her side.^{*43} Although, for instance, according to §211 (2) of the Estonian CCP, an investigative body and a Prosecutor's Office shall ascertain in pre-trial procedure the facts both vindicating and speaking against the suspect, one can readily conclude that, because, in reality, both of these bodies have finding the guilty party as a goal, the suspect clearly needs a provider of assistance who is completely on his or her side.

Two purposes of the right to counsel in pre-trial proceedings should be mentioned separately when it comes to counsel's technical skills. First, counsel is the one who explains to the suspect his or her rights and whose assistance, therefore, serves as a 'procedural guarantee of the privilege against self-incrimination'.^{*44} Second, as counsel performs supervision of the activities of authorities, his or her presence also serves as a guarantee against ill-treatment of the suspect^{*45}, reducing its likelihood and ensuring that, if the authorities do engage in it, counsel can give testimony of this in court.^{*46} This purpose is closely related to that mentioned earlier, as authorities sometimes try to convince the suspect to waive the privilege against self-incrimination by using illicit means of coercion. It should be mentioned that the term 'illicit means of coercion' ought to be taken in a broad interpretation. At the top of the scale of these means is physical torture, highly disapproved of by many authors of law-review articles, but, in addition, means that do not fall into this category should be described here. In the US, research has shown that certain interrogation tactics (e.g., presenting misinformation about evidence connecting the suspect with the crime scene, using techniques to induce stress and discomfort in the suspect, or using multiple interrogation tactics simultaneously) sometimes coerce suspects to change their beliefs about their guilt, which may finally lead to a situation in which the suspect, while actually innocent, admits his or her guilt and even believes in it (these confessions are called internalised false confessions).^{*47} Additionally, the authorities may create a situation so stressful for the suspect (e.g., by restraining his or her access to a lawyer and interrogating him or her non-stop for a

abstract=1725546(most recently accessed on 1.3.2012). (They have preferred to have citation to the Suffolk University Law Review as well, the SSRN publishes faximile copy of the Law Review)

⁴⁰ S. Trechsel. *Human Rights in Criminal Proceedings*. Oxford: Oxford University Press 2005, p. 245; *Salduz v. Turkey* (see Note 8), p. 54.

⁴¹ *Salduz v. Turkey* (see Note 8), p. 53.

⁴² *Escobedo v. Illinois*, 378 U.S. 478 (1964), p. 494, Justice Stewart, dissenting.

⁴³ *Salduz v. Turkey* (see Note 8), p. 54. It could be claimed that the course of pre-trial proceedings determines the course of trial.

⁴⁴ *Lazarenko v. Ukraine* (see Note 13), p. 50: 'Having access to a lawyer ensures that the accused was able to make a good decision for his or her defence.' A.M. Torres Chedraui. An analysis of the exclusion of evidence obtained in violation of human rights in light of the jurisprudence of the ECtHR. – *Tilburg Law Review* 2010–2011 (15), pp. 223–224.

⁴⁵ *Salduz v. Turkey* (see Note 8), pp. 53–54.

⁴⁶ Beijer (see Note 9), p. 324.

⁴⁷ L.A. Henkel, K.J. Coffman. Memory distortions in coerced false confessions: A source monitoring framework analysis. – *Applied Cognitive Psychology* 2004 (18), pp. 569, 582. The more strongly the authorities believe that the suspect is, in fact, guilty, the more likely they are to use these techniques on him or her. However, there is not actually any reason to believe that they are able to assess correctly whether the suspect is guilty or not. On the contrary, there is considerable research concluding that interrogators are not accurate in that. M. Costanzo, E. Gerrity, M.B. Lykes. Psychologists and the use of torture in interrogations. – *Analyses of Social Issues and Public Policy* 2007 (7)/1, p. 11.

long time) that the suspect admits guilt although knowing that he or she is not guilty (these confessions are called compliant false confessions).^{*48}

One can easily see what the main objection is to providing the suspect with counsel's assistance during the pre-trial proceedings, mainly during interrogation (and any other evidence-gathering act wherein the suspect is expected to provide the police with information): counsel's advice and presence may impair authorities' chances of getting information from the suspect.^{*49} Custodial interrogation is considered to be 'the principal weapon in the investigative arsenal of the police', especially in the context of tight budgets and society's pressure to control crime.^{*50} As was discussed above, counsel as a legal professional knows the suspect's rights, including the privilege against self-incrimination, usually much better than the suspect him- or herself does and can advise him or her to exercise such a right during interrogation. Also, counsel as an observer of the lawfulness of the interrogation can intervene every time the authorities use coercive methods on the suspect. All of this may reduce the authorities' chance to obtain information from suspects. There are some situations in which the need to get the information from the suspect is especially urgent and wherein counsel's participation may, therefore, harm important legal rights in the relevant society: situations in which human lives or any other important legal values are in direct danger and the police have grounds to believe that the suspect possesses the information necessary for eliminating that danger. For the above-mentioned reasons, there is nothing surprising about the fact that there were strong objections to the *Miranda* decision in the US.^{*51} Moreover, in the US even contemporary interrogation materials emphasise that, in order to obtain a confession from the suspect, the interrogator has to be alone with him or her. Depending on the circumstances, the interrogator should try to develop a relationship in which he or she exerts dominance over the suspect, establishes a trustful connection with him or her, or convinces him or her that confession is his or her best choice. If counsel is present, it is likely that the interrogator will not have enough time to develop one of these relationships.^{*52}

There is an interesting dilemma faced by the justice system and, more specifically, the whole society, where the right to have counsel present during interrogations is concerned. It could be summarised as follows: 'The human craving for justice is evident from public reaction whenever a criminal evades capture and punishment—and whenever an innocent is wrongfully convicted and sent to prison.'^{*53} The more serious the charges the suspect faces, the more society is interested in him or her being caught and punished, which means that the best option would be to interrogate him or her without the presence of counsel, as counsel's assistance may prevent him or her from speaking. But, at the same time, the more serious the charges, the more society is interested in excluding the chance of an innocent person being convicted, which means that the assistance of counsel should be guaranteed to the suspect from the very beginning. This dilemma, which also arises with less serious crimes (although not so sharply), is a very difficult one to solve. So far, both the USSC and the ECtHR have addressed it on the basis of the specific facts of the case. In addition, the EU has tried to bring some clarity to the matter, as will be analysed in the next section of this article.

4. Situations in which counsel does not have to be present in pre-trial proceedings

According to the judicial practice of the ECtHR and the USSC, the right to counsel's presence in pre-trial proceedings may be waived by suspects. Research in the US shows that even after the *Miranda* decision, the number of waivers made in the interrogation room has been considerable. For example, R.A. Leo, who observed approx. 200 interrogations, concluded that 78% of the suspects ultimately waived their *Miranda*

⁴⁸ S.M. Kassin *et al.* Police-induced confessions: Risk factors and recommendations. – Law and Human Behavior 2010 (34)/3, pp. 14–15.

⁴⁹ Trechsel (see Note 40), p. 284.

⁵⁰ R.J. Toney. Disclosure of evidence and legal assistance at custodial interrogation: What does the European Convention on Human Rights require? – International Journal of Evidence and Proof 2001 (5), p. 40.

⁵¹ *Miranda v. Arizona* (see Note 32), p. 516, Justices Harlan, Stewart, and White, dissenting.

⁵² W.S. White. Deflecting a suspect from requesting an attorney. – University of Pittsburgh Law Review 2006–2007 (68), pp. 32–33.

⁵³ Kassin *et al.* (see Note 48), p. 49.

rights.⁵⁴ According to the *Miranda* decision, the waiver should be made ‘knowingly and intelligently’. Decisions that followed *Miranda* show that the USSC accepts waivers easily: when the suspect has waived his or her *Miranda* rights, it is presumed that the waiver is valid.⁵⁵ The police are even allowed to use trickery and deception in order to achieve waiver of the right to counsel during an interrogation⁵⁶, which has led legal theorists and practitioners to propose that the USSC should take Europe as an example in this field.⁵⁷

The ECtHR has a stricter approach to the matter, stating that ‘a waiver of the right [to counsel] must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance’.⁵⁸ A waiver has to be voluntary, knowing, and intelligent, which means that ‘it must be shown that he or she [the suspect] could reasonably have foreseen what the consequences of his conduct would be’.⁵⁹ In its judgements, the ECtHR has also stressed a need to protect vulnerable suspects and explained that here the authorities should put extra effort into guaranteeing that the person understands the right and the consequences of the waiver of it.⁶⁰ This ECtHR stance is in accordance with research done in the US concluding that a substantial proportion of adolescents and adults with mental disabilities have impaired understanding of their *Miranda* rights and even if the adolescents seem to have an adequate understanding of these rights, they do not grasp the relevance of these to their own situation.⁶¹ In Estonia, waiver of the right to counsel in pre-trial proceedings is not allowed if the suspect has not reached the age of majority or has a mental disability (§45 (2) 1) and 2) of CCP). This means that the CCP, as does the ECtHR, assumes that vulnerable suspects need special protection.

The ECtHR allows exceptions to the right to have counsel in the pre-trial stage, stating that ‘a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right’. Still it has to be made sure that these restrictions do not unduly prejudice the suspect’s right to a fair trial.⁶² Any exception should be ‘clearly circumscribed and its application strictly limited in time’, the principles that should particularly be followed in the case of serious charges.⁶³ The ECtHR has not provided us with an example of what could constitute a compelling reason. In the US, the USSC has held that the police need not give the *Miranda* warnings when doing so would pose a threat to public safety—e.g., if the suspect’s silence might prevent police from discovering a dangerous weapon.⁶⁴

The proposal for a directive provides that the right to have counsel present during interrogation may be derogated from for compelling reasons related to urgent need to avert serious adverse consequences for the life or physical integrity of one or more persons.⁶⁵ Additionally, in an evidence-gathering act, the right

⁵⁴ R.A. Leo. Inside the interrogation room. – *Journal of Criminal Law & Criminology* 1995–1996 (86), pp. 276, 301.

⁵⁵ *E.g.*, *Connecticut v. Parrett*, 479 U.S. 523 (1987).

⁵⁶ *E.g.*, the USSC has held to be valid a confession made by a suspect who thought that as long as his or her statements were not in writing they could not be used against him or her (*North Carolina v. Butler*, 441 U.S. 369 (1979)). It has also refused to exclude confessions obtained after the police falsely told a suspect that his or her colleague had already confessed to the crime (*Frazier v. Cupp*, 394 U.S. 731 (1969)) and after the police deceived a suspect’s lawyer as to when interrogation would take place (*Moran v. Burbine*, 475 U.S. 412 (1986)).

⁵⁷ See, for example, C. Slobogin. An empirically based comparison of American and European regulatory approaches to police investigation. – *Michigan Journal of International Law* 2000–2001 (423) 22, pp. 423–456. This piece raised Germany as an example for the US. According to §136a (1) of the German Code of Criminal Procedure, available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (most recently accessed on 1.3.2012), the accused’s freedom to make up his or her mind and to manifest his or her will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception, or hypnosis. In Estonia, the CCP provides that evidence shall not be collected by torturing a person or using violence against him or her in any other manner, or through means affecting a person’s memory capacity or degrading his or her human dignity (§64 (1)).

⁵⁸ *Pishchalnikov v. Russia*, application no. 7025/04, 24.9.2009, p. 77.

⁵⁹ *Ibid.* The EU acknowledges the waiver in similar conditions in Article 9 of the proposal for a directive discussed above.

⁶⁰ *Panovits v. Cyprus*, application no. 4268/04, 11.12.2008. See also *Plonka v. Poland*, wherein the suspect was an alcoholic and the Court stated that ‘[i]n the circumstances of the present case, the assertion in the form stating her rights that the applicant had been reminded of her right to remain silent or to be assisted by a lawyer [...] cannot be considered reliable’ (application no. 20310/02, 31.3.2009, p. 37).

⁶¹ *Kassin et al.* (see Note 48), p. 8.

⁶² *Salduz v. Turkey* (see Note 8), p. 55: ‘The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’

⁶³ *Ibid.*, p. 54.

⁶⁴ *New York v. Quarles*, 467 U.S. 649 (1984).

⁶⁵ Note 23, Article 8 (a).

to have counsel present should be guaranteed, unless this would prejudice the acquisition of evidence (an explanatory memorandum clarifies that this refers to situations wherein the evidence to be gathered could be altered, removed, or destroyed through the passage of time needed for the lawyer to arrive).^{*66} The Member States objected to these provisions, expressing their fear that the obligatory presence of counsel during evidence-gathering acts could lead to delays. Additionally, in their opinion, the closed list of compelling reasons is too strict, because often derogation would be necessary for investigative reasons.^{*67} Several Member States also stated that where the rules of criminal procedure are concerned, the rights of suspects are only one consideration: it also has to be taken into account that the rules of criminal procedure should enable criminal proceedings to be conducted effectively and efficiently, which is in the interest not only of the wider public who expect offenders to be investigated and prosecuted but also of suspects, ensuring that matters are to be resolved expeditiously.^{*68} This led the Presidency to propose that only the term 'compelling reasons' be provided for in the proposal, with the explanation that '[s]uch postponements could in particular be justified when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, to prevent a substantial jeopardy to ongoing criminal proceedings, or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect, e.g. in overseas territories'.^{*69} As for the evidence-gathering acts, the Presidency proposes that it should be up to Member States to determine which evidence-gathering acts the suspect has the right for counsel to attend. Nevertheless, there are some acts for which the Presidency considers participation of counsel compulsory: identity parades, confrontations, and experimental reconstruction of the crime scene.^{*70}

From the developments in the EU described above, it can be concluded that both the ECtHR and the EU have left the concept of 'compelling reasons' to be defined by the Member States in light of the special circumstances of the case. In Estonia, the Supreme Court has interpreted §21 (1) of the Constitution and stressed that this right may be restricted only for purposes of protecting another fundamental right or value arising from the Constitution.^{*71} This could be, for example, the life of another person, physical integrity, freedom, property (dealt with in §§ 16, 18, 20, and 32 of the Constitution, respectively), or public order (the Constitution explicitly allows restriction of rights provided for in its §§ 26, 33, 40, 45, and 47 in order to protect public order). Nevertheless, the restriction must always be provided for by law.^{*72} According to the second sentence of §33 (2) of the CCP, interrogation may be postponed if this is necessary for ensuring the participation of counsel. To interpret this sentence in accordance with the Constitution, one has to conclude that whenever counsel cannot be present during the interrogation but the suspect wishes him or her to be or when the presence of counsel is mandatory, the interrogation has to be postponed. Therefore, it could be argued that in Estonia any restriction of suspects' right to have counsel present during interrogations is prohibited unless the suspect him- or herself waives the right to counsel. If the legislator finds any other restriction to be necessary, it should add it to the CCP.

5. Conclusions

The right to have counsel in pre-trial proceedings is not an absolute right, as one can conclude from analysis of the legal acts of Estonia, stances taken by the EU, and the judicial practice of the ECtHR and of the USSC. First, it is a right that can be waived, at least in the majority of criminal cases. Secondly, different values must be taken into account when this right is applied, which means that in some cases it could be concluded that the suspect does not have the right to have counsel present during a specific stage of the pre-trial proceedings even if he or she demands a lawyer's presence. According to the judicial practice of the Supreme

⁶⁶ *Ibid.*, Article 3, paragraph 1 (b) and explanatory memo, p 20.

⁶⁷ General comments on the proposal, document 12643/11, 13.7.2011. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1590.pdf> (most recently accessed on 1.4.2012).

⁶⁸ Note by Belgium, France, Ireland, the Netherlands, and the United Kingdom on the proposal, document 14495/11, 22.9.2011. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1625.pdf> (most recently accessed on 1.4.2012).

⁶⁹ See Note 25, p. 21.

⁷⁰ *Ibid.*, p. 19.

⁷¹ Judgement of the Constitutional Review Chamber of the Supreme Court of 18.6.2010, case 3-4-1-5-10, paragraph 38, 43. Available at <http://www.nc.ee/?id=1176> (most recently accessed on 1.3.2012).

⁷² Truuväli *et al.* (see Note 4), §11 (comment 3.3.2).

Court of Estonia, the values that may bring about this situation are the ones that are protected by the Constitution. The viewpoint of the EU and the ECtHR is that the restriction allowed to the right to have counsel in pre-trial proceedings is any compelling reason stemming from specific facts of the case. Nevertheless, in order for the right to have counsel present in pre-trial proceedings in Estonia to be restricted, the restriction has to come from the law. The CCP provides that a suspect may waive his or her right to have counsel unless that participation is mandatory under the CCP, but it does not give any other justifications for restrictions, which means that in Estonia the right to have counsel present in pre-trial proceedings is an absolute one, unless the suspect him- or herself agrees to participate without counsel.