



# The Right to Early Access to a Lawyer in Criminal Proceedings in Europe: Standards and Practices

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Zaza Namoradze  
Open Society Justice Initiative  
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Most countries in Europe, within EU and CoE do not provide for access to legal aid in police custody. This statement is supported by findings of:

1. Effective Defense Rights in Europe (ongoing)
2. Study on Procedural Safeguards (2005)
3. Suspects in Europe
4. CPT reports
5. Pilot projects on police station duty counsel schemes: Bulgaria, Austria, Netherlands
6. Legal Aid research in Turkey, Bulgaria, Ukraine


Presented paper attempts to analyze the problems and recent developments



## Significance of Access to a Lawyer in Police Custody

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- In many cases, criminal proceedings effectively start with police arrest, which may last 24 to 72 hours. In post-inquisitorial criminal justice systems, where trial evidence is predominantly collected at the pre-trial stage, and confessions tend to have a great evidentiary value (either formally or informally), the stage of police arrest – when most confessions and other self-incriminating evidence are produced – is critical for building the case against the defendant.
- If no attorney is appointed at this stage, defendants have no opportunity to collect evidence to contest charges and grounds for arrest and argue for pretrial release. PTD – treated as indication of guilt.
- No Letter of Rights on fundamental procedural safeguards in most countries. Having a legal counsel becomes a way to know and have access to them.



## Significance of Access to a Lawyer in Police Custody cont.

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- It is universally recognized that suspects are most vulnerable to physical abuse and coercion while in police custody
- Police in many jurisdictions applies illegal techniques to obtain information from the detained person, obtain statements without cautioning the person that it may be used against him/her (*also informal talks*).
- Even though some jurisdictions have introduced rules that statements obtained without presence of a lawyer would not have evidentiary value, they arguably have limited effect – after confession has been made the person either may voluntarily admit guilt or out of fear of reprisals of for “non-cooperating” with the investigation process
- Such statements, although not formally considered as evidence, are included in the criminal case-file: prosecutor may ask police to repeat the same action; but more importantly, information obtained by police may be basis of starting criminal investigation.



## European and International Standards

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- CPT considers the right to access a lawyer for suspects under police custody as one of the “fundamental safeguards” for the prevention of torture and ill-treatment. The CPT recommended that the right of access to a lawyer was guaranteed from the *very outset of police custody*, because “the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest.”
- The UN Committee against Torture stressed in its recently adopted General Comment No.2 that the right of detainees to promptly receive independent legal assistance is one of the basic guarantees against torture and ill-treatment of persons deprived of their liberty



## European and International Standards cont.

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- the Inter-American Commission for Human Rights recommended that “all persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family or provided by the state; they shall have the right to communicate with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture and arrest, and necessarily before their first declaration before the competent authority.
- In the European Context, the European Court of Human Rights does not recognize an absolute right to access to lawyer during the police investigation stage. The European Court of Human Rights recognizes that the fair trial guarantees should extend to preliminary stages. However, it should “in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it”. (*Ibrioschia . Switzerland, 93*)



## European and International Standards cont.

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- Hence, and because the Convention does not foresee explicitly the right, the interpretation of article 6 allowing early access to lawyer sets out restrictions to the right as well. These restrictions are allowed as long as the restriction does not turn in a deprivation of fair hearing, looking at the *entirety of the criminal proceedings*.
- The reliance on the “fairness of the proceedings on the whole” principle led to Court to arrive to different conclusions in deciding whether restrictions on the right to access a lawyer during the investigative stage resulted in a violation of the Convention.



## European and International Standards cont.

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- Normally, breaches of Art. 6 were found only in such cases where the confession made to police without the lawyer present was accompanied by other serious violations of suspects' rights: e.g. in *Ocalan v. Turkey* the applicant was held incommunicado for 7 days and his access to a lawyer during the pretrial proceedings was severely impaired; in *Magee v. UK* a suspect was interrogated in a coercive atmosphere;
- In other cases, e.g. *Sarikaya v. Turkey* the Court noted that despite the fact that the applicant did not have access to a lawyer in police custody, has been interrogated by police and made self-incriminating statements, defendants rights had not been "irreparably prejudiced" and therefore there was no violation of art.6.



## Breakthrough: *Salduz v. Turkey*

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- In its recent Grand Chamber judgment *Salduz v. Turkey* from November 27, 2008, court has revised its previous approach: in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police... Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6.



## Breakthrough: *Salduz v. Turkey*, cont.

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- The ECtHR also stated that “*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.*”
- Effectively, the *Salduz* judgment calls on the Council of Europe states to introduce an evidentiary rule that the testimonies obtained from the suspect during police interrogation without the presence of a lawyer should be inadmissible as evidence of guilt, and to take measures to guarantee that each suspect benefited from access to a lawyer from the moment of first police interrogation.
- Concurring judges criticized for not going sufficiently far to establish moment of access: from the outset of police custody and not only from during the first police in interrogation



## Breakthrough: Salduz v. Turkey, cont.

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- They argued that the majority Court concentrated only on the use of evidence given to the police during interrogation at the expense of other reasons which may necessitate early access to legal assistance, such as the necessary time and facilities for the preparation of the defense
- Another case from December 11, 2008, Panovits v. Cyprus: confession constituted a decisive element of the prosecution's case against him that substantially inhibited the prospects of his defense at trial and which was not remedied by the subsequent proceedings



## Problems with the new standard

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- Only from the first interrogation?
- Global formula still valid?
- How to follow in national practices? Timing problems? No need to have a lawyer but if the detained person makes a statement that can be used as a key evidence, then a lawyer should be allowed/appointed



## EU and Procedural Safeguards

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- draft proposal for a European Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union issued in 2004 provides is Article 2 that access to legal advice for a person suspected of a crime was provided as soon as possible, and the explanatory memorandum to the proposal specifically notes that “it is important that a suspect benefits from legal advice before answering any questions in the course of which he may say something that he later regrets without understanding the legal implications.”
- The document failed to be approved in 2007 after 4 years of negotiations. 6 countries blocked it.
- Swedish presidency proposal



# National Practices

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Two categories of countries:

- Right to counsel from the moment of arrest and before the first interrogation, as well as a right to have legal counsel be present at the first interrogation is not recognized: Belgium, Netherlands, Germany, Austria, Malta...
- CPT reports; pilots in Netherlands and Austria
- Salduz decision impact: Belgian lawyers have invoked it already but the Belgian judiciary and the MoJ not willing to follow it.



## National Practices, cont.

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- Countries where such rights have been recognized: especially in new CoE and EU member states, often required for accession purposes: Bulgaria, Hungary, Turkey, Poland, Ukraine, Georgia, but also in countries which have recently reformed their criminal legislation, such as Italy, Spain
- Problem in these countries is that it rarely is implemented in practice and no national mechanism to monitor implementation:
  1. no effective scheme for emergency/police station legal aid;
  2. police manipulation of law to interpret arrest the moment the person is accused which triggers procedural safeguards;
  3. Ploys to avoid legal advice prior to interviews;
  4. poor quality representation where such schemes exist (trainee lawyers, no qualification requirements, poor pay).



# Research Findings and Pilots

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- Ukraine: study indicated widespread practice of informal questioning, or testifying as witnesses. Only in 12% of cases lawyer was involved before the first interrogation
- Hungary: report under Effective Criminal Defence Rights project found that police makes appointments but in majority of cases lawyers did not attend the first interrogation (less than 50% attended).
- Austria pilot: 3 months in 2008 – only 9 calls by police in August 2008 and 30 in September and October.
- Bulgaria: Justice Initiative pilot in a small town since October 2008 (20 police arrests per month). Now calls reach about 50%.
- Netherlands: July, pilots in Amsterdam and Rotterdam in response to parliamentary inquiry in miscarriage of justice.



## Legal Aid: cornerstone of a fair justice system and a barometer of state's commitment to ensuring fair trial and defendants' rights

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- Most criminal defendants are poor and can not afford legal counsel;
- Accused persons who can not consult with a lawyer in timely fashion are more vulnerable to serious abuse
- Absence of counsel not only endangers rights violation; it also distorts truth-seeking function, renders less reliable the outcomes of criminal proceedings and ultimately undermines trust in legal system;
- Majority of European states, including those in the European Union, are in violation of their international commitments to guarantee real and effective exercise of defence rights in which right to counsel from the moment of arrest is of particular significance.



## What is Needed

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A human rights approach that focuses on the suspect/accused

1. equality of arms
2. effective representation, and
3. effective participation

Although there is still a problem with clarity of early access standards under the ECHR, current standards support the statement that such right exists:

- The provision of legal representation should be 'real' or 'practical' and 'effective' not 'theoretical and illusory';
- The accused should be able to exercise 'effective participation' in criminal proceedings;
- To have adequate time and facilities for the preparation of his defence;
- To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free...The right to legal advice and representation is based on, and arises out of, the right of an accused person to defend themselves. Thus, the right to legal assistance is not the legal foundation of defence rights "but a *prerequisite* for the effective exercise of these rights".



## Possible directions of work

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- In order to ensure genuine compliance with the domestic legislation and international standards that require the states' authorities to ensure access to a lawyer for persons in police custody, which is crucial for the fairness of the trial, the European states must follow the example jurisdictions currently running or experimenting with police station legal advice and representation schemes.
- The first crucial step would be to clearly recognize the right to early access in the national legislation, followed by designing effective implementation mechanisms. This mechanism should ensure access, quality and assessment of the emergency/police station duty counsel schemes.



## Possible directions of work: Research

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Further research may supply additional arguments to policymakers on possible benefits of early access:

- early intervention of a lawyer may help to improve substantive justice (achieve fairer outcomes of cases) by stimulating the exclusion of illegally obtained false confessions.
- It may also improve procedural justice by creating a perception of a fairer criminal justice system by those involved in the proceedings and ensure effective enjoyment of procedural safeguards to criminal suspects and defendants.



## Possible directions of work: Research

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- early involvement of a lawyer may help to reduce the application of pre-trial detention where it is excessive, and help rationalize its use where there are irregularities in the pre-trial detention regime
- Furthermore, the presence of a lawyer at the police station may contribute to police accountability and transparency.



## Possible directions of work

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- There is also a need to improve the European and international standards on the matter.
- There is no comprehensive research to date to examine the scale and extent of impact of limitations on this right on the fairness of the proceedings in national practices which the ECtHR has been using under the “global formula” by assessing its impact on the outcome.



## From Declaration to Practice

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EC Green Paper, 2003:

Whilst all the rights that make up the concept of "fair trial rights" were important, some rights were so fundamental that they should be given priority at this stage. The first among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights.