

# **Access to a lawyer during interrogation in criminal procedures in the Netherlands and the United Kingdom;**

An analysis of the influences of international obligations on domestic protection of the right  
to access to a lawyer

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## Executive Summary

This thesis explores the development of the right to access to a lawyer in the United Kingdom and the Netherlands, and the influence that European Court of Human Rights judgments and the EU directive on the right to access to a lawyer (Directive 2013/48/EU) have played on these developments. Distinguishing between the right to have a consultation with a lawyer prior to the first interrogation and the right to have a lawyer present during interrogation, some interesting differences have been found.

These rights have developed along very different lines in the United Kingdom and in the Netherlands. Whereas the United Kingdom introduced these rights in the 1980s after internal issues with police practices, the rights were largely absent in the Netherlands until the recent ECtHR judgments and the EU Directive prompted and required the Netherlands to introduce these rights. This difference is reflected in the way these rights are regulated in both countries. Whereas the United Kingdom has had an extensive legislation that comprehensively addresses the issues – in line with their international obligations – the Netherlands has been more reluctant to implement the right to access to a lawyer.

The *Salduz* judgment of the European Court of Human Rights in 2008 was the starting point of change in the Netherlands, as the legislation until then had become unattainable. Following this judgment, the Netherlands has reluctantly started to introduce the rights in a very narrow reading of the judgments. This has meant that the guideline regulating the right to access to a lawyer in the Netherlands was arguably from its implementation too narrow. Most notably, the narrow reading of *Salduz* by the Dutch Supreme Court meant that no right to have a lawyer present during an interrogation was implemented. In light of a number of more recent ECtHR judgments, as well as the EU directive, the guideline is clearly outdated and is again unattainable. This has also been recognized by the Netherlands, that has in

February 2015 designed a draft law expanding the rights set in the guidelines in an attempt to implement these more recent changes.

However, a number of issues have not been adequately addressed in the draft law. While the lawyer is now allowed to be present during interrogation, his function has been limited to the point that he cannot play a meaningful role for the suspect. An additional concern has been identified with regards to a time limit that the Netherlands has set in which the lawyer has to be at the police station within two hours before the police may decide to proceed and interrogate a suspect without having had the possibility to discuss his case with a lawyer first. Another issue has to do with the conditions set for *free* legal aid, that are too narrow, and may lead a large group of suspects that are not eligible for free aid to choose to waive their right to a lawyer. Based on the ECtHR case law, the EU directive and the law in the United Kingdom, a number of recommendations have been made for the Netherlands to ensure compliance with their international human rights obligations.

## Table of Contents

<b>Introduction.....</b>	<b>1</b>
<b>1. The right to access to a lawyer in the ECHR and the EU .....</b>	<b>5</b>
1.1 The Right to access to a lawyer in the ECHR .....	6
1.1.1 Pre Salduz.....	7
1.1.2 The Salduz Ruling .....	10
1.1.3 Post Salduz .....	11
1.2 The Right to access to a lawyer in the European Union .....	14
1.3 A comparison between the ECHR and EU protection mechanisms .....	19
<b>2. The Right to access to a lawyer in the United Kingdom .....</b>	<b>23</b>
2.1 A Short historical overview of the criminal procedural law developments in Europe ..	23
2.2 The Right to access to a lawyer in the United Kingdom.....	25
2.2.1 Access to a lawyer in the UK and obligations flowing from the ECHR and EU ...	33
<b>3. The Right to access to a lawyer in the Netherlands .....</b>	<b>37</b>
3.1 The Right to access to a lawyer in the Netherlands .....	38
3.2 Access to a lawyer in NL and obligations flowing from the ECHR and EU .....	39
<b>4. A comparison between the United Kingdom and the Netherlands .....</b>	<b>53</b>
<b>Conclusions, limitations and discussion .....</b>	<b>57</b>
<b>Bibliography .....</b>	<b>62</b>

## Introduction

The right to legal representation in criminal trials has long been acknowledged as a procedural right that is essential for the assurance of a fair trial, as is reflected in the presence of this right in many influential human rights treaties, such as the ECHR and the ICCPR<sup>1</sup>. Both treaties include a subsection on legal representation in their provision on fair trial rights, and both provide for the obligation to provide a defendant with free legal assistance in case a defendant does not have the financial means to provide for his own legal representation<sup>2</sup>. While the ECtHR has acknowledged that most fair trial rights of the Convention also apply to the pre-trial stage, it until recently denounced the view that a lawyer should be provided prior to the first interrogation because the provision did “not specify the manner of exercising this right”<sup>3</sup>. A lot of Member States to the ECHR, such as e.g. the Netherlands and Belgium, did indeed not guarantee a right to access to a lawyer prior to the first interrogation<sup>4</sup>.

Given the importance of procedural guarantees in the criminal justice system, of which the right to access to a lawyer is a part, this is problematic. The very nature of criminal law underlines the importance of procedural guarantees to a fair trial; it is a system of punitive measures whereby the state can remand its citizens that behave contrary to what the state deems acceptable behavior<sup>5</sup>. Because of the intrusive measures a state can impose on individuals, it is important that there is a high level of certainty that the suspect actually

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<sup>1</sup> This right is provided for in ICCPR art. 14.3(d) and ECHR art 6.3(c).

<sup>2</sup> Ibid.

<sup>3</sup> *Imbrioscia v. Switzerland*, ECtHR, application no. 13972/88, 24/11/1993, Para 44. The court consequently argued that member states were free to fill in the meaning of this right as long as the trial taken as a whole was fair.

<sup>4</sup> R. Skilbeck, *Frankenstein's Monster; Creating a New International Procedure*. *Journal of International Criminal Justice* 8, 2010, p. 454.

<sup>5</sup> A. Ashworth & J. Horder. *Principles of Criminal Law*: Oxford University Press, 2013. p. 6.

committed the crime he is suspected of having committed. Procedural safeguards are essential for this, as they decrease the chance of wrongful conviction of a defendant.

A practical example as to why it is important to have a lawyer present during the interrogation of a suspect is the risk of false confessions. A confession is usually seen as “damning and compelling evidence of guilt”, and therefore carries heavy weight in comparison to other evidence, and plays an important role in a conviction<sup>6</sup>. It is essential then that adequate safeguards protect against false confessions. It was exactly because of wrongful convictions that the Miranda rights were introduced in the United States, requiring police officers to “inform all suspects in custody of their Constitutional rights to silence and to counsel”<sup>7</sup>. Similarly, both the United Kingdom and the Netherlands have seen a number of serious miscarriages of justice as the result of wrongful convictions<sup>8</sup>. To have a lawyer present during these interrogations, who knows the law and the limits of interrogations, and who can interfere in the interrogation if the police overstep these boundaries, would in that regard be an important safeguard against false confessions.

Furthermore, it is also in the interest of the state to commit to procedural fairness in criminal cases. The idea of the state that can bring punitive measures against its citizens needs to be justified in order to maintain legitimacy and trust in the state, and procedural safeguards are essential for this. As has been argued by many scholars, it is often procedural

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<sup>6</sup> R.A. Leo & R.J. Ofshe. The consequences of false confessions: deprivations of liberty and miscarriages of justice in the age of psychological interrogation, *Journal of Criminal Law and Criminology*, 88(2), 1998, p. 429.

<sup>7</sup> S.M. Kassin & R.J. Norwick. Why people waive their *Miranda* rights: The power of innocence, *Law and Human Behavior*, 28(2), 2004, p. 211. The mandatory informing of suspects by the police was introduced in the USSC decision *Miranda v. Arizona*, 384 U. S. 436 (1966).

<sup>8</sup> S.M. Kassin, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo & A.D. Redlich. Police-Induced Confessions: Risk Factors and Recommendations, *Law and Human Behavior*, 34, 2010, p. 13 make mention of the “Guilford Four” and “Birmingham Six” cases in the United Kingdom. See P.J. van Koppen. *Blundering Justice; The Schiedam park Murder*, in R.N Kocsis (ed.), *Serial murder and the psychology of violent crimes*, Humana Press: Totowa, NJ, 2008, p.207. for a description of the *Schiedam Park Murder*, where undue pressure of the police led to a false confession that was the basis for a wrongful conviction.

fairness rather than the outcome of criminal cases that are essential for the trust in the criminal justice system<sup>9</sup>. Lawrence Solum has argued that “[p]rocedure without justice sacrifices legitimacy. Law without legitimacy can only guide action through force and fear. [...] But when we regard ourselves as bound by the principles of procedural justice, we produce a very great good – we give citizens a principled reason to respect the outcomes of the civil process”<sup>10</sup>. Despite the fact that Solum focusses on civil law, I believe this statement equally applies to the criminal process.

With the importance of the procedural guarantees to a fair trial in mind, it is not hard to see why access to legal representation is important. It is not only important for guaranteeing a fair trial of a defendant, but also for the legitimacy of the criminal justice system as a whole. Providing legal representation at trial is not sufficient to guarantee the fairness of a trial. Evidence gathered prior to trials plays an important role during trial and weighs heavily – especially in countries with a civil law tradition – in the outcome of a case. Statements made by the defendant are part of this, and should thus also be protected by the right to a fair trial. The stance that the ECtHR took in *Imbrioscia v Switzerland* – that the absence of legal representation before trial can be balanced at trial – is in my view not true if a defendant incriminated himself during interrogation without having had the chance to discuss his case with legal representation, because there is no way for him to reverse the self-incrimination that took place in this phase. This position was also contested by both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the European Committee for the Prevention of Torture (CPT) early on, as both determined that the right to

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<sup>9</sup> See for example: S. Trechsel. Why must trials be fair? *Israel Law Review*, 31, 94, 1997. L. Solum, Procedural Justice. *U San Diego Law & Econ Research Paper No. 04-02*, 2004, available at: <http://ssrn.com/abstract=508282>. T. R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law. *Crime and Justice* 30, 2003.

<sup>10</sup> L. Solum, 2004, p. 126.

access to a lawyer “during police interrogation is one of the fundamental safeguards against ill-treatment of detained persons”<sup>11</sup>.

In more recent judgments however, the ECtHR has started revising their opinion. Starting with the case of *Salduz v Turkey*, the Court started setting out a path where the right to legal representation should also be seen as applying to the pre-trial stage. In the *Salduz* case, the Court argued that for this right to be “practical and effective, [...] Article 6.1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation by the police”<sup>12</sup>. This revised vision of the Court was affirmed and expanded in subsequent decisions. The new position of the Court led several Member States to revise their national codes of criminal procedure, to ensure that it is in line with the judgments of the Court. In the Netherlands, where there was no right to legal representation prior to the first interrogation, the possibility for a defendant to discuss his case prior to his first interrogation is now provided for<sup>13</sup>. Without a legal framework however, it remains unclear what exactly is entailed in the right to legal assistance. In the Netherlands this has meant that a very narrow interpretation of the *Salduz* judgment was used when updating their legislation<sup>14</sup>. This gap of having no legal framework has now been filled by the EU. The 2013 EU Directive on the right to access to a lawyer provides a set of rules and rights regarding the access to a lawyer that all EU member states are bound by. The deadline for transposition is 2016, meaning that the national law will have to be in line with the Directive by then.

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<sup>11</sup> T. Spronken. *EU Procedural Rights in Criminal Proceedings*, Maklu Publishing: Apeldoorn, NL, 2009, p.31. Spronken details that the right as provided by the ICTY stems from Article 18 para 3 of the ICTY Statute and in the ICTY Case on the defense motion to exclude evidence from the ICTY in *Zdravko Mucic* (1997) No. IT-96-21-T. As for the CPT, their position is to be found in the 2<sup>nd</sup> General Report (CPT/Inf(92)3), in the sections 36-38.

<sup>12</sup> *Salduz v. Turkey*, ECtHR, application no. 36391/02, 27/11/2008, para. 55.

<sup>13</sup> J. Hodgson, The role of lawyers during police detention and questioning: a comparative study, *Justitiële Verkenningen*, 40(1), 2014. pp. 38, 44.

<sup>14</sup> F. Kirsten, Special issue on changing approaches to authority and power in criminal justice. *Utrecht Law Review*, 7 (3), 2011. p. 2. Only a 30 minute discussion with legal representation is granted to a defendant prior to his first interrogation. There is still no right to have a lawyer present during the interrogation.



These events have led to the question whether the recent developments in the Council of Europe (more specifically: the ECtHR) and the EU will lead to a better protection of the right to access to a lawyer in the Netherlands and the United Kingdom, and whether – as a consequence – the right to a fair trial will be better guaranteed. In order to be able to compare the consequences in both countries, the developments prior to, during and after the changes in international protection will have to be identified first. In addition to comparing the countries, the possible interaction between the EU and CoE will also be analyzed and their motivations for implementing their changes will be analyzed. As the CoE and EU have very different aims, it will be interesting to explore what motivated them, and why it is that the subsequent changes were implemented within a short period of time. Was there a reason that both the ECHR and EU implemented new legislation on the topic so fast after another? After identification and comparison, recommendations could be made in case current legislation is not in line with the recent changes and changes are needed.

### **1. The right to access to a lawyer in the ECHR and EU**

This chapter will describe the developments in the ECHR and the EU with regards to the protection of the right to access to a lawyer in the pre-trial stage. As mentioned above there have been a number of important changes in both jurisdictions recently, and as will be discussed the very nature of these organization has shaped how and how well they have been able to protect this right. First an analysis of the recent changes in the ECHR will be analyzed through a number of important cases before the ECtHR. After this the protection of this right will be discussed for the EU and will mainly focus on the new Directive that specifically deals with this issue. Finally, a comparison will be made between both jurisdictions, and it will be argued that the EU has been better able to protect the right due to its legislative competence.

### 1.1 The right to access to a lawyer in the ECHR

The right to have a lawyer present during criminal proceedings is a widely recognized right that features in basically every treaty dealing with the criminal process<sup>15</sup>. In the ECHR it is set out in article 6 (3) (c), and has been in place since its entry into force in 1953. As all the fair trial rights listed in article six except for the publicity principle, it is an unqualified right. This entails that it is not allowed to derogate completely from the right because this is not envisaged in the treaty, unlike e.g. Article 8 of the Convention that specifically allows for derogation to the right to private and family life<sup>16</sup>. Rather, with regards to article 6, states have to ensure that the trial as a whole is fair. This means that while states might derogate from a provision in article 6 to some extent, they will have to counterbalance that limitation to ensure that the trial as a whole is still fair.

As it is put in paragraph 3 of the convention, the right to legal defense only applies to criminal proceedings. The provision reads:

*Everyone charged with a criminal offence has the following minimum rights: [...]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 when the interests of justice so require.*

While it has never been contested that this right applies to the trial procedure, it is nowhere specified in the Convention to which stages of the criminal procedure it applies. It has however been widely accepted that “from the perspective of suspects and defendants, fair trial guarantees may be of little value if they are restricted to the trial in the narrow sense of the court proceedings in which guilt or innocence is determined”<sup>17</sup>. In a number of cases

<sup>15</sup> E. Cape & Z. Namoradze. Effective Criminal Defense and Fair Trial. in E. Cape & Z. Namoradze, *Effective Criminal Defense in Eastern Europe*, Soros Foundation: Moldova, 2012, p. 11.

<sup>16</sup> ECHR Article 8, paragraph 2.

<sup>17</sup> Ibid. p 10.

leading up to *Salduz*, the Court started to explain and expand what exactly this provision entailed. The following paragraphs will set out the developments prior to, in and post *Salduz* so as to get a clear image of the growing importance of the right in the criminal justice procedure.

### 1.1.1 Pre *Salduz*

The Court found in *Eckle v Germany*<sup>18</sup> that article 6 is applicable from the moment that an official notice of suspicion is formulated, and additionally found in *Aleksandr Zaichenko v Russia*<sup>19</sup> that it should also apply to police questioning, as questioning implies a suspicion by the police<sup>20</sup>. This holds true for most of the rights set out in article 6 of the Convention, because the trial is one of the latest stages of the criminal procedures, and a lot of important events occur before the trial even starts. If the fair trial rights would only apply to the trial itself, then this would lead to the unacceptable situation where e.g. if someone is forced to admit guilt during a police investigation prior to the criminal trial, this would mean that there would not be a violation of the right, despite the fact that it would have grave consequences for the defendant if the evidence was to be allowed in the trial. In this case, even though the rights in article 6 might have been respected *during* the trial, the fact that they were not respected *prior to* the trial, makes that the trial would nonetheless be unfair. It has long remained unclear however if the right to access to a lawyer should also apply to the pre-trial stage, and if so, from which moment this would be and what exactly this would look like. The European Court of Human Rights has in a number of judgments clarified to what stages and to what extent the right to access to a lawyer applies.

<sup>18</sup> *Eckle v. Germany*, ECtHR, application no. 8130/78, 15 July 1982.

<sup>19</sup> *Aleksandr Zaichenko v Russia*, ECtHR, application no. 39660/02, 18 February 2010.

<sup>20</sup> D. Vitkauskas & G. Dikov. Protecting the right to a fair trial under the European Convention on Human Rights. *Council of Europe human rights handbooks*, Council of Europe: Strasbourg, 2012,p.21.

In the case of *Imbrioscia v. Switzerland*<sup>21</sup> the court for the first time had to deal with the question of whether the right to defend oneself “through legal assistance” (as provided by Article 6(3)(c) ECHR) also applies to the police interrogations prior to the trial. The applicant complained that the absence of his lawyer during his police questionings was in violation of articles 6 (1) and 6 (3) (c)<sup>22</sup>. The Court first reiterated that article 6 does not only pertain to the trial, but also to the pre-trial stage, because violations made in this stage could have consequences for the fairness of the trial. While article 6 (3) (c) does not specify the way in which the right to legal defence should be exerted, the Court argued that for the right to be effective, it should be granted from the outset of a case<sup>23</sup>. This did however not mean that the right to a assistance of a lawyer is absolute before or during police questioning. Rather, the court examined whether the trial as a whole was fair. It has been argued by phrasing the right in this way that the Court left member states a certain margin of appreciation in the way they provided for legal support<sup>24</sup>. Rather than obliging member states to grant legal support during interrogation, the Court accepted that Member States could also provide safeguards, to ensure that the trial as a whole is fair<sup>25</sup>.

In *John Murray v the United Kingdom*<sup>26</sup>, the Court returned to the same question, but broadened the scope of the right to access to a lawyer in the pre-trial stage, going beyond its reasoning in *Imbrioscia*<sup>27</sup>. The case concerned Mr. Murray, who was suspected of committing terrorist offences. For the first 48 hours of questioning he was denied access to his lawyer, and the applicant was faced with the difficult decision on whether he should talk

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<sup>21</sup> *Imbrioscia v. Switzerland*, application no. 13972/88, 24 November 1993.

<sup>22</sup> *Ibid.*, para 32.

<sup>23</sup> *Ibid.*, para 41.

<sup>24</sup> C. Fijnaut. De toelating van raadslieden tot het politieële verdachtenverhoor, een status questionis op de drempel van de eenentwintigste eeuw, in: *M. Groenhuijsen en G. Knigge(eds.), Het vooronderzoek in strafzaken. Tweede interimrapport onderzoeksproject Strafvordering*, Gouda Quint: Deventer, NL, 2001.

<sup>25</sup> *Imbrioscia v. Switzerland*, para 43.

<sup>26</sup> *John Murray v. United Kingdom*, application no. 18731/91, 8 February 1996.

<sup>27</sup> M. Helmantel. *Salduz en Panovits, nieuwe Europese toetsstenen voor het Nederlandse politieverhoor*, 2010, p. 17-20.

(where he would risk that he might incriminate himself) or should remain silent (where negative inferences could be drawn). The Court ruled that “to deny access to a lawyer for the first 48 hours of police questions, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under article 6”<sup>28</sup>. The Court found that the applicant was directly affected by the absence of his lawyer, and a violation of article 6 (1) in conjunction with article 6 (3) (c) was found<sup>29</sup>.

In this case, the Court did not – as it did in *Imbrioscia* – look at the safeguards that the domestic law might have provided. It found that, under the specific circumstances of the case, the absence of Murray’s lawyer irretrievably rendered the trial as a whole unfair. Furthermore the Court did not refer to the freedom of Member States in the way they provide for legal assistance as it did in *Imbrioscia*; rather the Court seemed to be saying that as a rule a defendant should have the right to have his lawyer present during interrogation. However, it is questionable whether this could be taken as a general rule, as the Court attributed a lot of weight to the negative interferences that could be drawn from Murray’s decision to remain silent, and the particularly complicated position this put him in.

In a number of subsequent cases, the Court ruled in a similar way as it had done in *Murray*, in which it seemed to set the following standard: As a rule, a defendant should have access to a lawyer from the first interrogation by the police, unless it can be shown that there are justified reasons to restrict this right<sup>30</sup>. Regardless of the justified reason, the trial as a whole should still be fair, i.e. if the trial as a whole was unfair, there will be an article 6

<sup>28</sup> John Murray v United Kingdom, para 66.

<sup>29</sup> Ibid., para 70.

<sup>30</sup> M. Helmantel, 2010 refers for example to the cases: Magee v. the United Kingdom, application no. 28135/95, 6 June 2000 and Öcalan v. Turkey, application no. 46221/99, 12 May 2005, as examples of where this line of reasoning was used by the Court.

violation, despite the justified reason. In arguing along these lines, the Court still left open the possibility of interrogation without a lawyer, as long as the state could justify this practice.

### 1.1.2 *The Salduz ruling.*

The Court recently crystalized what it had meant in its earlier judgments in the *Salduz v. Turkey*<sup>31</sup> ruling, and went on to give bigger protection to the right to access to a lawyer. Rather than allowing for exceptions to access to a lawyer, the Court argued that:

*as a rule, access to 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 the case that there are compelling reasons to restrict this right. 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 [...]. 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.*<sup>32</sup>

While the first part of this passage seems to be the same rule that the Court has set out on earlier occasions, it is the final part that has caused a lot of changes to member states' legislations. The Court argues here that whenever incriminating statements have been made by the defendant without a lawyer present, these statements cannot be used as evidence in court because it would be in violation of the right to a fair trial. So while in theory not further prohibiting interrogation without a lawyer present, it effectively achieves this by consequently not allowing any statement that contains incriminating evidence if there was no lawyer present when the statement was made. Because, why would interrogations be

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<sup>31</sup> *Salduz v. Turkey*, application no. 36391/02, 27 November 2008.

<sup>32</sup> *Ibid.*, para 55

conducted without the lawyer of the defendant present if this means that all statements that could be used as evidence against the defendant may not be used as evidence during the trial? And what about evidence that has been retrieved following these statements?

It seems that the ECtHR remained quiet on this. Following the *Salduz* judgment, a lot of member states amended their criminal (procedural) codes to ensure that it is in line with the standard set forth by the Court<sup>33</sup>. This alone shows that the judgment holds a significant change with the previous standard, whereas legislative changes with regards to the access to a lawyer in the pre-trial stage in earlier judgments usually were limited, or lacked altogether. Arguably, the extent to which the defendant should have access remains unclear: even though the defendant should have access from the first interrogation, the Court does not specify what this should look like. Should the defendant have access already prior to the first interrogation? Is the lawyer allowed to be present during the interrogation? What role should the lawyer play during the investigation? These are some of the questions that still remained after the *Salduz* ruling, and have only partly been answered in more recent rulings.

### 1.1.3 Post *Salduz*

In the *Panovits v. Cyprus* judgment, the ECtHR gives some insight in the role of the lawyer during the interrogation. It argued that “the lack of legal assistance during an applicant’s interrogation would constitute a restriction of his defense rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings”<sup>34</sup>. Seeing as the Court talks about assistance *during* the interrogation, it could be argued that the right envisaged by the Court is not limited to consult before the interrogation as some scholars

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<sup>33</sup> Hodgson, 2014, p 44.

<sup>34</sup> *Panovits v. Cyprus*, 2008, application no. 4268/04, para 66, 11 December, 2008.

have argued<sup>35</sup>. In subsequent cases, the Court has reiterated its stance in *Salduz* and *Panovits*, and has found that the absence or restriction of this right was in itself sufficient to find a violation of article 6 para 3, even when suspects decided to make use of their right to silence, and thus did not give the police any evidence in the absence of their lawyer<sup>36</sup>.

Moreover, in *Brusco v. France*, the Court affirmed that article 6 of the Convention indeed included the right to be assisted during interrogation, rather than the more narrow interpretation that suspects only had a right to convene with his lawyer prior to the first interrogation<sup>37</sup>. Any possible remaining doubt in this regard was resolved in *Navone v. Monaco*. The Court said that the law in Monaco – which only allowed for a consultation prior to interrogation at the beginning of a suspect's detention, and did not allow the lawyer to be present during interrogation – was in violation of the right to have assistance of a lawyer in the meaning of article 6<sup>38</sup>, thus clarifying that in addition to the possibility of convening with a lawyer prior to the first interrogation suspect should also have the right to have at least some possibility to have contact with his lawyer during the interrogation. The Court did not however clarify what exactly this would look like; can the lawyer be in the room during the interrogation? Can he actively participate? Or would it suffice for a member state to allow a suspect to request a break during the interrogation, so that he can convene with his lawyer?

<sup>35</sup> Hodgson, 2014, p. 44. Hodgson talks about the current situation in the Netherlands, where after *Salduz* a 30 minute consult prior to the first interrogation is now allowed, but generally the lawyer is not allowed to be present during the interrogation.

<sup>36</sup> See e.g. *Dayanan v. Turkey*, Application no. 7377/03, 13 October 2009; *Yesilkaya v. Turkey*, Application no. 59780/00, 8 December 2009. For a more complete overview of recent case law dealing with the right to access to a lawyer can be found on the ECtHR factsheet – Police arrest and assistance of a lawyer.

<sup>37</sup> *Brusco v. France*, Application no. 1466/07, 14 October 2010, para 54: "L'avocat n'a donc été en mesure ni de l'informer sur son droit à garder le silence et de ne pas s'auto-incriminer avant son premier interrogatoire ni de l'assister lors de cette déposition et lors de celles qui suivirent, comme l'exige l'article 6 de la Convention", *The lawyer was therefore not able to inform the suspect of his right to remain silent and not to incriminate himself prior to his first interrogation, nor to assist him during the first and following interrogations, as required by article 6 of the Convention.* (Translation by author).

<sup>38</sup> *Navone and others v. Monaco*, 62880/11, 62892/11 & 62899/11, 24 October 2013, para's 81 and 83. "La Cour relève en effet que le droit interne ne prévoyait qu'une consultation avec un avocat au début de la garde à vue ou de la prolongation de celle-ci, pendant une heure maximum, l'avocat étant en tout état de cause exclu des interrogatoires dans tous les cas" and "Par conséquent, la Cour ne peut que constater que les requérants ont été automatiquement privés de l'assistance d'un conseil au sens de l'article 6.



The Court did further clarify from what moment the right to legal assistance arises in *Shabelnik v. United Kingdom*, where it argued that it can arise even before the formal charge. Rather, it used a substantive approach, determining from which moment the suspect could have been regarded as a suspect by the police<sup>39</sup>. In this way, the Court has safeguarded against a possible practice where police officers would lay off a formal charge as long as possible in order to avoid that suspects would invoke their right to legal assistance. This does not mean that the right applies in every situation where someone comes into contact with the police. In *Aleksandr Zaichenko v. Russia*, the Court found no violation of article 6 para 3 when a man who is requested to answer questions in a traffic stop did not get the opportunity to speak to his lawyer first, because there was no reasonable suspicion<sup>40</sup>. Furthermore, the Court argued, there had to be a “significant curtailment of the applicant’s freedom of action” for the right to access to a lawyer to apply already of this stage in the proceedings<sup>41</sup>.

Additionally, in *Pishchalnikov v. Russia*, the Court set forth that any waiver to legal aid has to be “knowing, explicit and unequivocal”, and cannot “be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights”<sup>42</sup>. The Court thus asserted not only that suspects may not be unduly pressured during interrogation, but also that the decision to waive the right to legal support has to be “conscious and well thought-through”<sup>43</sup>. Moreover, it reiterated in this case that interrogation

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<sup>39</sup> *Shabelnik v. United Kingdom*, Application no. 16404/03, 19 February 2009, para 52.

<sup>40</sup> *Zaichenko v. Russia* Application, no. 39660/02, 18 February 2010. Para’s 47 – 50. The Court considered in particular that there was no reasonable suspicion against the applicant until after the questions had been posted, at which point the applicant was cautioned. Furthermore, the nature of the traffic stop was also important; as the Court noted: “[a]lthough the applicant in the present case was not free to leave [the circumstances] disclose no significant curtailment of the applicant’s freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings”.

<sup>41</sup> *Ibid.*, para 48.

<sup>42</sup> *Pishchalnikov v. Russia*, application no. 7025/04, 24 September 2009, para 79.

<sup>43</sup> T.A.H.M van der Laar & R.L. de Graaff. *Salduz and Miranda: Is the US Supreme Court Pointing the Way?*, *European Human Rights Law Review*, 3, 2011, p. 307.

may not commence until a suspect that has made known that he wishes to make use of his right to legal assistance has done so<sup>44</sup>.

Regardless of the fact that the ECtHR has been expanding the right to access to a lawyer rapidly since the *Salduz* judgment, as of now it remains unclear how exactly the Court envisages the role of a lawyer in the pre-trial stage and one could question whether the ECtHR is the best body to further stipulate what this should entail as it rules on a case-by-case basis and is thus dependent on the applications before it before it can give further clearance.

While its reach is smaller than that of the Court, the EU does have a legislative power and has recently used this to set up a directive concerning the right to access to a lawyer in the European Union<sup>45</sup>. In the next chapter, the directive will be discussed in light of the rights it grants to the defence in the pre-trial stage, and it will be discussed if the directive is likely to produce further protection to defendants than the ECtHR has done so far.

## 1.2 *The right to access to a lawyer in the European Union.*

The European Union is a relatively new actor in the field of criminal law<sup>46</sup>. Until quite recently, the idea of EU criminal law seemed unfeasible because criminal law was seen as a key aspect of state sovereignty<sup>47</sup>. However, with the ever expanding scope of the areas the EU is active in, the idea arose that EU influence over national criminal law became necessary. As Samuli Mietinnen clearly describes it:

*the European Commission increasingly viewed some criminal law harmonization as a necessary corollary of the removal of internal market barriers like border controls: if*

<sup>44</sup> Pishchalnikov v. Russia, para 79.

<sup>45</sup> As of this moment, the EU counts 28 member states as compared to the 47 member states of the Council of Europe. This means that its reach extends only to those Council of Europe member states that are also a member state of the European Union.

<sup>46</sup> E. Cape & Z. Namoradze, 2012, p. 17.

<sup>47</sup> H. Jung, Criminal Justice: a European Perspective, *Criminal Law Review*, 1993, p. 237.

*criminals moved freely within the Union, then so, too, should enforcement and enforcement measures*<sup>48</sup>.

Consequently, as the scope of EU law broadened, so did their powers in criminal law. Post Lisbon, the EU has wide and still expanding powers to legislate in the field of criminal law<sup>49</sup>. Article 67(3) of the Treaty on the Functioning of the European Union (TFEU) lists the objectives under the Area of Freedom, Security and Justice as follows:

*The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal law.*

So not only can the EU enhance cooperation through measures based on mutual recognition, it can also legislate with the aim harmonize national legislation and facilitating the mutual trust that is necessary for mutual recognition. In article 82 TFEU (2) in which fields, and with which aims, the EU can legislate in the field of criminal law. “[T]he European Parliament and Council may [...] establish minimum rules”. These rules may concern the “mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime [or] any other specific aspects of criminal procedure which the Council has identified in advance by a decision”<sup>50</sup>. Even though the rights of

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<sup>48</sup> S. Miettinen, *Criminal Law and Policy in the European Union*, Routledge: London and New York, 2012, p. 7 – 8.

<sup>49</sup> J. Hodgson, Safeguarding suspects’ rights in Europe: A comparative perspective, *New Criminal Law Review*, 14(4), 2011, p. 612.

<sup>50</sup> TFEU Art. 82 (2) under a/d.

individuals in a criminal procedure is mentioned as a ground for making EU legislation, up until recently, little or no attention has been paid to this<sup>51</sup>.

Even before criminal law became to play a role in the European Union, it was acknowledged that legal representation was of a fundamental nature, in the case of *Hoechst AG v. Commission of the European Communities*, where the European Court attributed special weight to the right of legal representation by arguing that “although certain rights of the defense relate only to the contentious proceedings which follow the delivery of the statements of objections, other rights, such as the right to legal representation [...] must be respected as from the preliminary-inquiry stage”<sup>52</sup>. Other prior attempts for harmonizing procedural safeguards for defendants are the Green Paper on *procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union*<sup>53</sup>, and the *Proposal for a Council Framework decision on certain procedural rights in criminal proceedings throughout the European Union*<sup>54</sup>. The Green paper was launched to spark discussion on the appropriateness of EU action with regards to criminal procedural rights. One of the chapters specifically deals with the right to legal assistance, which is seen as one of the key issues as suspects who receive assistance are better informed of their rights and a lawyer will ensure that these rights are also respected<sup>55</sup>. The report states that there are considerable differences throughout the Member States in the mechanisms that are in place and highlights a number as issues including the qualification of lawyers, the availability of lawyers and financial problems that might need to be addressed in light of facilitating mutual recognition<sup>56</sup>.

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<sup>51</sup> Hodgson, 2011, p. 612.

<sup>52</sup> Judgment of the Court of Hoechst AG v. Commission of the European Communities, 21-09-1989, para 16. Retrieved from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0046>.

<sup>53</sup> COM(2003) 75f.

<sup>54</sup> COM(2004) 328.

<sup>55</sup> COM(2003) 75 final, chapter 4.1, p. 20.

<sup>56</sup> Ibid., p.25.

The Proposal for the framework decision was prompted after the green paper discussed above<sup>57</sup>. The importance of mutual recognition in criminal matters was reiterated, and was the underlying aim of the proposal<sup>58</sup>. It proposed that minimum standards would be adopted with regards to, amongst other topics, access to legal advice, both prior to and during trial<sup>59</sup>. In this regard, it proposed to ensure throughout the EU the right to legal advice from the early stages of the procedure<sup>60</sup>. It identified several differences and problems in the EU that needed addressing:

*At present, some Member States impose a limit on access, have an initial period during which the suspect may not have access to a lawyer ("garde à vue") or preclude the presence of a lawyer during police questioning Some Member States do not have a formal scheme offering 24-hour access to a lawyer, so that those arrested at night or at week-ends are also denied access, at least on a temporary basis.*<sup>61</sup>.

These considerations would have led to a specific article concerning legal advice, that would oblige member states to give suspects access to legal advice as soon as possible, at least before he is subjected to interrogation<sup>62</sup>. Thus, the right that the ECtHR recognized in *Salduz*, was already discussed in the EU in 2004. *However*, following the entry into force of the Lisbon treaty, the proposal was withdrawn while it was still subject to discussion in the Council<sup>63</sup>.

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<sup>57</sup> COM(2004) 328, p. 4-5, under 16 and 17.

<sup>58</sup> Ibid., p 7-8, under 26

<sup>59</sup> Ibid., p. 7, under 24.

<sup>60</sup> Ibid., p. 9, under 32.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid., p 24-25. Article 2(1) stated: 'A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it' and article 2(2) stated: 'A suspected person has the right to receive legal advice before answering questions in relation to the charge'.

<sup>63</sup> COM(2009) 665 final Communication from the Commission to the European Parliament and the Council; Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making processes, p.3. Due to the changes in the legal framework of proposals that fell within Title VI of the TEU and now fall within Title V of the TFEU, it is impossible to continue the legislative process, and therefore had to be withdrawn.

More recently, under the Stockholm Program, procedural rights were chosen as one of the action points for the last four years (2010-2014)<sup>64</sup>. Furthermore sets out a roadmap that is to lead to better protection of procedural rights for defendants in criminal proceedings<sup>65</sup>. Measure C of this roadmap concerns legal advice and legal aid, and has consequently resulted in a directive on access to a lawyer<sup>66</sup>. The directive sets forth a set of minimum rights dealing with the right to legal representation in the interrogation stage. The rights apply from the time a person is deemed a suspect until the proceedings have been concluded, regardless of whether the person is deprived of his liberty<sup>67</sup>.

Article 3 of the Directive sets forth that defendants should have access to a lawyer in the pre-trial stage both before and during questioning by any law enforcement agency or judicial authority<sup>68</sup>. It further clarifies that the lawyer should be allowed to be present during the questioning and should also be allowed to actively participate. There are only two strict possibilities for temporarily deviating from this right in the pre-trial stage: only when “there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; [and] where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings” can Member States deviate from the aforementioned guarantees of legal representation<sup>69</sup>. Additional conditions for derogations can be found in Article 8, that require from states to always act in a way that

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<sup>64</sup> COM(2009) 292/4. Under the bullet point *A Europe that protects*, the following action point was included: “*The Union must have a legal framework on minimum procedural guarantees and must promote pilot schemes on alternatives to prison*”.

<sup>65</sup> (2009/C 295/01). Council of the European Union, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal procedures.

<sup>66</sup> Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>67</sup> *Ibid.*, Article 2 (1).

<sup>68</sup> *Ibid.*, Article 3 (3) .

<sup>69</sup> *Ibid.*, Article 3 (6).

respects proportionality and necessity, to limit the derogation in time, and to at all times ensure that the fairness of the proceedings are not jeopardized<sup>70</sup>

Additionally, the Directive provides for Confidentiality of conversations between lawyers and suspects<sup>71</sup> and sets restrictions on a waiver to the right to access to a lawyer. In this regard it is important to note that before anyone can waive the right to speak to a lawyer, the suspect has been informed in a concise and understandable manner what the consequences of waiving might be<sup>72</sup>. Furthermore, any waiver has to be “given voluntarily and unequivocally”<sup>73</sup>, and can be revoked at any time<sup>74</sup>. Finally, the directive goes into detail about the right to access to a lawyer in cases that deal with the EAW<sup>75</sup>, but these will not be discussed in detail as they are not relevant to the subject of this thesis

It thus seems that the Directive builds on and goes beyond the guidelines set out by the ECtHR. Furthermore, whereas the ECtHR has so far not elaborated on the details of what the right to legal representation should entail, the EU provides clear guidelines. As the Directive is binding on all member states, this means that every state whose criminal (procedural) code does not provide sufficient guarantees has to update it so that it will be in line with the protections set out in the Directive. Even though a lot of member states already amended their criminal (procedural) codes to comply with the line set out in *Salduz*, further amendments might be necessary in light of the Directive, since the protection it offers seems to go beyond *Salduz*.

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<sup>70</sup> Ibid., Article 8 (1).

<sup>71</sup> Ibid., Article 4.

<sup>72</sup> Ibid., Art 9 (1) a

<sup>73</sup> Ibid., Art 9 (1) b

<sup>74</sup> Ibid., Art 9 (3)

<sup>75</sup> See e.g. Art 10, that specifically deals with the European Arrest Warrant

### 1.3 A comparison between the ECHR and EU protection mechanisms.

At first sight, it seems that both the ECtHR and the EU offered similar protection to the right to access to a lawyer. Both have a provision in their human rights documents (the ECHR and the CFREU), that seemed to protect along similar lines the right to legal representation. However, seeing as these are rather general provisions, these in themselves cannot sufficiently protect the right, as it leaves open to interpretation what the right might entail. The ECtHR has through a number of judgments clarified and expanded the meaning of article 6(3)(c) of the Convention. Between 1993 and 2008, the Court has expanded the protection under this provision by moving away from its standpoint a suspect does not have the right to a lawyer in the interrogation stage if there are sufficient mitigating protections to ensure a fair trial<sup>76</sup>, to its current view that interrogation in the pre-trial stage without a lawyer can only under very strict circumstances be acceptable and that even under these circumstances any incriminating statements that were made without a lawyer present cannot be used for a conviction<sup>77</sup>. After 2008, the ECtHR has further strengthened the rights it provided in *Salduz*, by ruling that the right to access to a lawyer also applies during the interrogation<sup>78</sup>, by setting requirements on the validity of waivers<sup>79</sup>, and by clarifying further when exactly the rights arises<sup>80</sup>. Questions remain however as to what the role of this lawyer exactly entails; can he be present in the interrogation room, and if so can he assume an active role where he participates in the interrogation? Or is the suspect only allowed to speak to his lawyer prior to the first interrogation, and when he requests a break from the interrogation?

The EU has taken a different approach. It has expanded the right to access to a lawyer using its legislative competences under articles 67(3) and 82(2) TFEU to implement a

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<sup>76</sup> *Imbrioscia v Switzerland*.

<sup>77</sup> *Salduz v. Turkey*.

<sup>78</sup> *Brusco v. France, Navone v. Monaco*.

<sup>79</sup> *Pishchalnikov v. Russia*.

<sup>80</sup> *Shabelnik v. Ukraine*



directive. This directive has established that defendants of criminal procedures have to have access to a lawyer both before and during interrogation by any law enforcement agency or judicial authority<sup>81</sup>. It has furthermore been clarified that access to a lawyer should be guaranteed from the moment of suspicion until a final conviction by a Court<sup>82</sup>. While limitations are possible, they are strictly limited to the conditions prescribed in article 3(6) of the Directive that have been mentioned in chapter III. Through this directive, the EU has set forth a system that clearly defines the reach and limits to the right to access to a lawyer.

It flows from the very nature of the two bodies that the approach of the European Union seems to better protect the right to access to a lawyer. Seeing as the ECtHR has no legislative function, the only way for them to develop the rights in the convention is through its case law. While this approach can be effective and progressive, the development of the right in question has taken a long time and has still not been clearly defined. It was only after their recent Judgment of *Salduz v Turkey* that more member states have taken action to protect the right, but in some member states this has led to a very narrow reading of the judgment<sup>83</sup>. At this point, a lot of questions remain as to the exact extent and scope of the right.<sup>84</sup> It also follows from the very nature of the ECtHR that it might take a long time before the exact reach and limitations to the right to access to a lawyer will become sufficiently clear, as it is bound by the applications before it. The EU on the other hand has the benefit of having legislative competence, which it has used to clearly describe the reach and limits to the right. It has in this way also been able to better clarify what the exact role of the lawyer is prior to and during interrogations.

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<sup>81</sup> Directive 2013-48-EU. Article 3(3).

<sup>82</sup> Ibid. article 2(1)

<sup>83</sup> F. Kirsten, Special issue on changing approaches to authority and power in criminal justice. *Utrecht Law Review*, 7 (3), 2011. p. 2. Only a 30 minute discussion with legal representation is granted to a defendant prior to his first interrogation. There is still no right to have a lawyer present during the interrogation.

<sup>84</sup> It is unclear whether a defendant can have his lawyer present during interrogation or only prior to interrogation. Furthermore, even if the lawyer can be present during interrogation, it is questionable what his powers would be.

These organizational differences have become clear in the following ways. First of all, the ECHR has not defined what the role of the lawyer should be in the interrogation stage. While it is clear that there is a right to speak to a lawyer prior to the first interrogation and also during the interrogation, this does not clarify whether the lawyer is allowed to be present in the interrogation room or whether it would suffice to allow a suspect to request a break from the interrogation for discussion with his lawyer. Even if the lawyer is arguably allowed to be present in the interrogation room, it remains unclear what his rights are. Can he actively participate in the interrogation, or should he remain passive and simply observe that the interrogation is in line with the law? Seeing as many police forces see the presence of a lawyer as a nuisance that trumps the effectiveness of the investigative interrogation<sup>85</sup>, it seems that this is an important aspect to clearly define. The EU, having legal competence, was able to clearly define the role of the lawyer; it has given the lawyer an active role both before the interrogation (where s/he can talk to and advice the client in private) and during the interrogation. While the ECtHR might have implied that the right to access to a lawyer includes having a lawyer present during the interrogation, the specific rules surrounding the presence of the lawyer during interrogation are far from clear for the time being, and as shown above, opinions on this matter remain divided.

Furthermore, while the ECHR has said that only in very limited circumstances can it be justified to refrain a suspect access to a lawyer, the EU has clearly defined the situations in which this is allowed. Coming back to the aforementioned argument that police officers see lawyers as a nuisance that trump the effectiveness of the investigation, it seems all the more important to clearly regulate any limitation that can be made to the right to have a lawyer

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<sup>85</sup> S.J. Summers, *Fair trials; the European Criminal Procedural tradition and the European Court of Human Rights*, Hart Publishing: Oregon, 2007, p. XIX-XX. Summers has argued that “[t]he fairness of the trial continues to be the primary means of legitimizing the criminal process, but the trial is nevertheless heavily dependent on the under-regulated investigation to ensure the effectiveness of the system of prosecutions”.

present during interrogation. This leads to greater foreseeability and less possibility for maneuvering around by the Member States.

In spite of the fact that the ultimate aim of the EU is to enhance mutual trust, it seems that their approach is for the time being more successful at protecting the right to access to a lawyer. The standards set out in the directive seem to go beyond the standards established by the ECtHR in *Salduz*. It is therefore likely that the member states will have to adjust their national legislation again before the deadline of transposition of the Directive is due in 2016<sup>86</sup>.

## 2. The Right to access to a lawyer in the United Kingdom

While scholars are often focusing on the differences between the criminal procedures in European jurisdictions, such as e.g. the focus on the differences between the inquisitorial and adversarial systems in respectively the continental European countries and the United Kingdom, the origins of these current systems are remarkably similar, and highly influenced on one another<sup>87</sup>. It is therefore necessary to give a summary overview of the development of criminal (procedural) systems in European countries in the 19<sup>th</sup> century before addressing the protection offered in the United Kingdom and the Netherlands.

### 2.1 A short historical overview of criminal (procedural) law developments in Europe.

Most jurisdictions in Western Europe have been highly influenced by the introduction in France of the *Code d'instruction criminelle* (the criminal procedural Code) in 1808. This was the first legal document in Europe to reflect modern notions of the criminal procedure,

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<sup>86</sup> I. Anagnostopoulos. The right of access to a lawyer in Europe: A long road to travel? *Speech at the CCBE Seminar on Human Rights*, Athens, 2013. Anagnostopoulos describes that a number of member states have traditionally been negative towards accepting a right to access to a lawyer, and often give a limited interpretation to such a right. Also the legislative changes in the Netherlands that have been mentioned earlier are limited and clearly not in line with the Directive.

<sup>87</sup> S.J. Summers. *Fair trials; the European Criminal procedural tradition and the European Court of Human Rights*. Hart publishing: Oregon, 2007. P. 24-29.

such as the division of powers between the different actors and the separation of the actual trial from the pre-trial proceedings<sup>88</sup>. The pre-trial phase was consequently altered in several European jurisdictions. In fact, after the French occupation of the Netherlands in the early 19<sup>th</sup> century, the French Criminal code remained in force for most part of the 19<sup>th</sup> century. While the *Code d'instruction criminelle* had been replaced in 1838, it highly reflected the aforementioned notions that were introduced in the French criminal procedural code<sup>89</sup>.

While the pre-trial stage used to be the most important part of criminal proceedings, the rethinking of the criminal procedure highly diminished the importance of this phase. The collection and examination of evidence was to be limited to the amount of evidence necessary for the trial. The basic division of roles that we know today also stem from this period, where for the first time “a conception of the structure of the trial as involving opposing sides (the defense and the prosecution) and an impartial judge with responsibility for determining the charge was accepted [...] and became the dominant procedural model across Europe”<sup>90</sup>. The impartiality of the judge was seen as necessary to make up for the difference in strength of the opposing parties<sup>91</sup>. The fact that the defendant was one of the parties in the criminal proceedings furthermore led to the belief that they should be granted legal assistance so as to enable them to successfully assume this role<sup>92</sup>.

However, due to the diminished role of the pre-trial stage, Summers argues, access to a lawyer during this phase was not seen as necessary<sup>93</sup>. That this was problematic was noticed early on, because even in England, which due to its design of its criminal process relies less

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<sup>88</sup> Ibid. p. 24-25

<sup>89</sup> C.M. Pelsler, Criminal Legislation in the Nineteenth Century: The historic roots of Criminal Law and Non-Intervention in the Netherlands, in P. Alldridge & C. Brants (eds.), *Personal Autonomy, the Private sphere and Criminal Law: a Comparative Study*, Hart Publishing: Portland, 2001. P.186.

<sup>90</sup> S.J. Summers, 2007, p. 29.

<sup>91</sup> C.J.A. Mittermaier, *Die Gesetzgebung und Rechtsübung Über Strafverfahren nach ihrer neusten Fortbildung*, Erlangen: Ferdinand Enke, 1856. P. 286. Retrieved from: [http://archive.org/stream/diegesetzgebungu00mitt/diegesetzgebungu00mitt\\_djvu.txt](http://archive.org/stream/diegesetzgebungu00mitt/diegesetzgebungu00mitt_djvu.txt)

<sup>92</sup> S.J. Summers, 2007, p. 71

<sup>93</sup> Ibid.

on the pre-trial stage than other European countries, the pre-trial phase was in practice given a way bigger role than would be assumed<sup>94</sup>. Rather than providing for a lawyer in this stage, it was believed that giving a defendant the right to remain silent was sufficient to protect his interests, and allowing a lawyer to be present would harm the effectiveness of police investigation<sup>95</sup>. Summers has argued that this meant that the “position of the accused in the investigation stage was precarious not least because he or she was seldom allowed the assistance of counsel”<sup>96</sup>.

Thus, while the accused was granted several protection mechanisms during criminal trials, similar protection was lacking in the pre-trial stage due to the role that was attributed to it. Despite arguments made to the contrary<sup>97</sup>, the pre-trial stage was seen as rather unimportant where little harm could be done to the defendant, and thus did not warrant extensive procedural protection<sup>98</sup>. As will be discussed below, these beliefs still hold true to at least some extent in the current day criminal procedures in the Netherlands and the United Kingdom, and have shaped the right to access to a lawyer to an important extent.

## 2.2 *The right to access to a lawyer in the United Kingdom.*

As of now, the United Kingdom has a detailed law on the right to legal advice for suspects held in custody by the police. The Police and Criminal Evidence Act 1984 (PACE), that came into force in 1986, regulates with great detail the extent and limitations to this right. However, before discussing this legislation, it is important to mention that, as discussed

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<sup>94</sup> W.W. Pue, The criminal twilight zone: pre-trial procedures in the 1840s, *Alberta law review* 21, 1983, p.337.

<sup>95</sup> E. Cape & J. Luqmani, *Defending suspects at police stations; the practitioners' guide to advice and representation* (2<sup>nd</sup> ed), LAG Education and Service Trust Limited: London, 1995, p. 1; S.J. Summers, 2007, p. 83-85.

<sup>96</sup> Ibid., p.87.

<sup>97</sup> Mittermaier for example, argued that “precisely because the aim of the state was to question the accused, it was essential that right from the beginning of the investigation he or she be in a position to destroy the basis for all suspicion, but this could be achieved only with the assistance of counsel”. Retrieved from S.J. Summers, 2007, p. 87.

<sup>98</sup> J.D. Jackson & S.J. Summers, *The internationalization of Criminal Evidence: beyond the Common Law and Civil Law Traditions*, Cambridge University Press: Cambridge, 2012. P.101.

above, the United Kingdom did not always include such a right. It was the view that the role of the investigation stage was very limited, and such protection was not necessary<sup>99</sup>.

Prior to when the PACE came in force, the regulation of access to a lawyer in the pre-trial phase was regulated in common law, and was limited to the requirement of cautioning the suspect, and the requirement to police officers to stop interrogation when there was sufficient evidence to start a prosecution<sup>100</sup>. However, following concerns with how interrogations were executed by the police, the Royal Commission on Criminal Procedure was set up in 1977<sup>101</sup>. Michael Zander was one of the critics, who published an article containing a substantial list of procedural issues that required review, and that directly led to the creation of the Commission<sup>102</sup>.

It was following his article that the Commission was set up, and his views influenced the conclusions of the report that was subsequently published in 1981<sup>103</sup>. It is also at this time that the legitimacy of the police was in a decline following riots that occurred in response to a racial bias in London policing and complaints about other police abuses such as tampering with evidence, obtaining false confessions and the treatment of suspects in detention<sup>104</sup>. The report issued by the Royal Commission identified a number of deficiencies in the rights of

<sup>99</sup> E. Cape & J. Luqmani, 1995, p. 1.

<sup>100</sup> J. Sprack, *Emmins on Criminal Procedure (8th ed.)*, London: Blackstone Press Limited, 2000, p 29; J. Sprack, *A practical approach to Criminal Procedure*, Oxford University Press: Oxford, 2012 at 3.07 and 3.49.

<sup>101</sup> The Commission was in practice from 1977-1981. See:

<http://discovery.nationalarchives.gov.uk/details/r/C3028> last accessed 21-11-2015.

<sup>102</sup> M. Zander, PACE (The Police and Criminal Evidence Act 1984): Past, Present and Future, *LSE Law, Society and Economy Working Papers*, 1, 2012, p. 2. Zander talks about his publication M. Zander. The criminal process – A subject ripe for a major enquiry, *Criminal Law Review*, 1977, and how this publication led to the set up of the Royal Commission. Retrieved from: [http://www.lse.ac.uk/UnitedKingdom/collections/law/wps/WPS2012-01\\_Zander.pdf](http://www.lse.ac.uk/UnitedKingdom/collections/law/wps/WPS2012-01_Zander.pdf), last accessed 25-3-2015.

<sup>103</sup> Ibid., After his publication, he was also in charge of a seminar for the members of the Commission, as he explains in a response to a Home Office Consultation Paper that reviewed the PACE in 2007, retrieved from: <http://www.lse.ac.uk/UnitedKingdom/collections/law/staff%20publications%20full%20text/zander/PACE%20-%20MZ%20Response%20to%20CP%20May%2023%202007.pdf>, last accessed: 25-3-2015.

<sup>104</sup> M. Davies, H. Croal & J. Tyrer, *Criminal Justice (4<sup>th</sup> ed)*, Pearson Education Limited: Essex, 2010, p. 162.

defendants throughout the criminal process, and gave a number of recommendations for changes in the Criminal Procedure in the United Kingdom<sup>105</sup>.

This report led to the legislation that is still in place today; the Police and Criminal Evidence Act 1984. Part V of this Act deals with questioning and treatment by police. It has been described as a mechanism “*to protect the citizen from the abuse of police powers, and also to set out what is acceptable behavior on the part of the police, and so protect them*”<sup>106</sup> Section 58 deals specifically with access to legal advice and starts out by stating that “*a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time*”<sup>107</sup>. This request has to be granted as soon as reasonably possible, but must always be within 36 hours<sup>108</sup>.

Delaying this right is possible, but only in limited circumstances; in any case a delay can only be granted by a high-ranking police officer with regards to a person that is suspected of having committed an indictable offence<sup>109</sup>. The police officer in question may only authorize a delay in the circumstances set out in sections 58(8) and 58(8A), and the reasons have to be communicated to the suspect and also have to be recorded in his custody record<sup>110</sup>. Under these circumstances, the suspect can be interviewed without the lawyer present<sup>111</sup>. The circumstances under which a high-ranking police officer can authorize the delay of contact with a legal advisor, when he believes that contact with his/her advisor will lead to “*interference with or harm to evidence connected with an indictable offence or interference*

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<sup>105</sup> B. Milne, G. Shaw & R. Bull, investigative interviewing: the role of research, in D. Carson, B. Milne, F. Pakes, K. Shalev & A. Shawyer (eds.), *Applying psychology to criminal Justice*, John Wiley & Sons Ltd: West Sussex, 2007, p. 66.

<sup>106</sup> M. Davies, H. Croal & J. Tyrer, 2010, p. 172.

<sup>107</sup> PACE 1984, section 58(1), retrieved from [http://www.legislation.gov.uk/United\\_Kingdom/United\\_Kingdom/pga/1984/60/part/V](http://www.legislation.gov.uk/United_Kingdom/United_Kingdom/pga/1984/60/part/V)

<sup>108</sup> Ibid., section 58(4) and 58(5)

<sup>109</sup> Ibid., section 58(6).

<sup>110</sup> Ibid., section 58(9).

<sup>111</sup> PACE Code C 6.6

with or physical injury to other persons”<sup>112</sup>, “alerting of other persons suspected of having committed such an offence but not yet arrested for it”<sup>113</sup>, or if it will hinder “the recovery of any property obtained as a result of such an offence”<sup>114</sup>. Furthermore, “if the officer has reasonable grounds to believe that the suspect has [...] benefited from his criminal conduct”, and contact with his lawyer might jeopardize the “recovery of the value of the property”<sup>115</sup>. Finally, the delay has to be ceased as soon as the reason for delay is no longer valid<sup>116</sup>.

Code C, which is attached to the PACE, issues more guidance as to how the rules set out above should apply, and also gives more detail into the rights of lawyers at the police station. Defendants have to be able to speak with their lawyer, and this should be guaranteed regardless of the method of conversation, and detainees have to be informed by the police of this right<sup>117</sup>. When this right is waived, the police should explain to the suspect that this might also entail a telephone call<sup>118</sup>.

Code C also clarifies the limits of legal advice that is given free of charge. First of all, if a suspect is being questioned in relation to a non-imprisonable offence, arrested for failing to appear, arrested for drunk driving, or detained due to a failure to comply with bail conditions, the free advice will be limited to advice over the telephone by *Criminal Defence*

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<sup>112</sup> Ibid., section 58(8)(a)

<sup>113</sup> Ibid., section 58(8)(b)

<sup>114</sup> Ibid., section 58(8)(c)

<sup>115</sup> Ibid., section 58(8A)

<sup>116</sup> Ibid., section 58(11)

<sup>117</sup> PACE Code C 6.1 clarifies that it pertains both to conversation in person and by telephone. Code C 6.3 further requires that this information has to be displayed visibly in the police station, to ensure that people are familiar with this right.

<sup>118</sup> P. Darbyshire, England and Wales, in *R. Vogler & B. Huber (eds.), Criminal Procedure in Europe*, Berlin: Duncker & Humblot, 2008, p. 68-69.; D. Brown, T. Ellis & K. Larcombe. Changing code: police detention under the revised codes of practice, *HO Research Study No 129*, 1992. P 96. This is a requirement because defendants might be deterred by accepting legal advice if the lawyer has to come to the police station as this might take a lot of time.



*Service Direct*<sup>119</sup>. In other circumstances, the right to free legal advice includes having a lawyer present, who can either be their own lawyer or a duty lawyer<sup>120</sup>.

It is furthermore stated that police officers may “*say nothing with the intention of dissuading any person who is entitled to legal advice [...] from obtaining legal advice*”<sup>121</sup>, but it is questionable whether this is persuading to police officers since it will be hard to check whether this occurred<sup>122</sup>. If a suspect accepts to make use of his right to talk to a lawyer, the police officers have to wait for him/her to arrive before they can start the interview, unless it is believed that the delay might obstruct the investigation on one of the grounds mentioned above<sup>123</sup>. The police officer also may go ahead with the interview if the lawyer could not be contacted, has indicated that he does not want to be contacted, or declined to attend *and* the suspect does not wish to contact another lawyer<sup>124</sup>.

It is also clarified what a lawyer is allowed to do at the police station. It is stated that his/her only role “*is to protect and advance the legal rights of their client*”<sup>125</sup>. This might entail advising their client or intervening in the interrogation when they feel that that is necessary. It is however not allowed to answer the questions posed to the suspect, or to write down what the client should answer to the questions posed<sup>126</sup>. Finally, it is reiterated that the consultations between the lawyer and the suspect to be held in private is fundamental. Note

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<sup>119</sup> PACE Code C Note 6B. there are some exceptions where a suspect that falls within one of the mentioned groups is entitled to have legal representation at the police station.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid., 6.4

<sup>122</sup> This is suggested by M. McConville, A. Sanders & R. Leng, *The case for the prosecution: police suspects and the construction of criminality*, London: Routledge, 1991. P189-190. While it is true that police interrogations are recorded, this does not extend to conversations between police officers and police officers outside of interrogation. It has furthermore been argued that the effectiveness of recording is further limited because ‘the fear of the suspect and the attitude of the officer cannot be fully reproduced on tape’.; Also, it is clear from PACE Code C itself that they consider that this might be an issue, as Note 6ZA explicitly mentioned that police officers may not tell suspects (unless specifically asked) that the time that they will be in custody will be shorter if they don’t ask for legal advice.

<sup>123</sup> PACE Code C 6.6

<sup>124</sup> Ibid., 6.6(c)

<sup>125</sup> Ibid., Note 6D.

<sup>126</sup> Ibid.

6J warns for interference with this right, as this will mean that “the right will effectively have been denied”<sup>127</sup>. This became clear in 2005, when in *R. v. Grant* it was ruled that eavesdropping and recording private deliberations between a lawyer and a suspect were unlawful<sup>128</sup>.

It flows from the foregoing that the United Kingdom has comprehensive legislation dealing specifically with the right to access to a lawyer in the pre-trial stage. While there are a number of limitations, most suspects are granted legal advice. For people charged with minor offences this is limited to legal advice through the telephone with someone from a special service that specifies in this kind of advice. For people that are suspected of having committed an imprisonable offence, this protection includes the right to have a lawyer present during interrogations and to have private conversations with the lawyer at the police station. While there are possibilities for the police to delay this right, they have to stay within the specific circumstances that are described in PACE. The code furthermore regulates how the police should deal with this right, and explicitly states that they may not deter a suspect from using the possibility to speak with a lawyer or to have him/her present at the interrogations.

Additionally, Section 78 PACE, that was included later on in 1995, states that:

*the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it*<sup>129</sup>.

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<sup>127</sup> Ibid., note 6J.

<sup>128</sup> P. Darbyshire, 2008, p. 83.

<sup>129</sup> PACE, Section 78.

This has arguably led to more accountability of the police and their methods of obtaining evidence, because police officers will be held accountable for abuse of their powers. As explained by Davies, Croall and Tyrer, it flows from the very nature of the adversarial system that success from the point of view of the police officer “becomes whether an investigation leads to a prosecution and finding of guilt”<sup>130</sup>. This together with pressure on the police to perform may well lead to temptations to abuse their powers, as became clear after PACE was introduced.

Since the introduction of PACE, there has been a major change for police officers interrogating suspects; as McConville et al. have noted: “they no longer have exclusive control over accounts of interrogation”<sup>131</sup>. The implementation of PACE has however not been without its problems, and the version described above has gone through substantial changes from the first version that came into effect in 1986. It was actually one of the other requirements in PACE that has sparked a lot of change and research into police interviewing, namely the requirement to record all interviews by suspects<sup>132</sup>. This requirement allowed insight in and examination of the police practices in interrogations of suspects and revealed a number of weaknesses that were of a problematic nature<sup>133</sup>. These results were especially surprising because suspects were now allowed to have a lawyer present that could protect against these abuses of power.

According to Cape, the due process values at the pre-trial stage were still weak, and he argued that specification that the only role of the lawyer is to protect and advance the legal rights of their client, that was added later on<sup>134</sup>, was actually a sign of this weakness. Police

<sup>130</sup> M. Davies, H. Croall & J. Tyrer, 2010, p. 161.

<sup>131</sup> M. McConville, J. Hodgson, J. Bridges & A. Pavlovic, *Standing accused: the organization and practice of criminal defense lawyers*, Oxford University Press: Oxford, 1994, p.126.

<sup>132</sup> B. Milne, G. Shaw & R. Bull, 2007, p. 65-66

<sup>133</sup> Ibid., p. 67. Milne, Shaw and Bull talk, amongst the problems were poor technique, an assumption of guilt, undue repetitiveness and an extortion of too much psychological pressure.

<sup>134</sup> PACE Code C, Note 6D was included in 1995.

officers often had negative attitudes towards lawyers<sup>135</sup>, and lawyers often remained passive despite experiencing abuses. As McConville, Hodgson, Bridges and Pavlovic stated: “advisers who attend police stations accept uncritically the propriety and legitimacy of police action, even where what they witness themselves, what they hear from clients, and what they suspect goes on, leaves them convinced that the police break the rules and in other ways are beyond the law”<sup>136</sup>. In their view the lawyer was often of the same mindset as the police officer, namely that the suspect was there to answer questions and their belief that the suspect was probably guilty<sup>137</sup>.

Other causes for the continuing abuses were found to be time constraints following the heavily increased workload that flowed from the general rule that suspects could now have a lawyer present, financial constraints, and the expectation of assuming a passive role that was projected by police officers<sup>138</sup>. That this was highly problematic was also recognized in *R v. Paris, Abdullahi and Miller*<sup>139</sup>, where Lord Taylor heavily criticized a lawyer that was present while a confession was obtained through oppression. He condemned the inactiveness of the lawyer, saying: “although we did not hear what his instructions were, the lawyer who sat in on the interviews, seems to have done that and little else”<sup>140</sup>. It was therefore that the judge did not believe that there was a problem with PACE itself, but rather that it indicated “a combination of human errors”<sup>141</sup>.

The problems that were identified sparked a lot of changes. As mentioned earlier, additional guidelines were added to PACE that clearly established the role of the lawyers and

<sup>135</sup> D. Brown, T. Ellis, K. Larcombe, 1992, p.96.

<sup>136</sup> M. McConville, J. Hodgson, J. Bridges & A. Pavlovic, 1994, p.126.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.; J. Baldwin, The role of legal representatives at the police station, *RCCJ Research Study No. 3*, 1992, p.52.

<sup>139</sup> *R v. Paris, Abdullahi & Miller* [1993] 97 Cr App Repp 99.

<sup>140</sup> Ibid., p. 109.

<sup>141</sup> Ibid.

put forward a number of constraints on the police in their treatment of suspects<sup>142</sup>. It created a situation where police officers had to promote the use of a lawyer rather than trying to talk suspects out of this, and required police officers to accept lawyers rather than to view them as unwanted. Furthermore, guidelines were set up by scholars<sup>143</sup> and legal practitioners to provide assistance to lawyers in how they should advise clients during interrogations<sup>144</sup>, which clearly explained what was within the powers of the lawyers. While the position of the lawyer in the pre-trial stage has definitely improved over the years, concerns remain with regards to police abuses<sup>145</sup>.

### *2.2.1 Access to a lawyer in the United Kingdom and obligations flowing from the ECHR and EU*

As discussed in the previous chapter, the ECHR and EU have recently made attempts at providing further protection of the right to access to a lawyer in the pre-trial phase throughout their member states. The question that will be answered in this paragraph is to what extent the legislative changes in the United Kingdom were caused by obligations flowing from ECtHR judgments and the EU directive. To this end the national changes in legislation will be put in the timeframe of the changes brought forth by the ECtHR and the EU.

By the time that the ECHR started formulating the right to access to a lawyer in the pre-trial stage, PACE was already in effect for a number of years<sup>146</sup>. The law regulating this right in the United Kingdom furthermore seemed way more advanced than the protection that the ECtHR was willing to offer at the time. The Court was at that time not ready to take a

<sup>142</sup> M. Davies, H. Croall & J. Tyrer, 2010, p 179-180.

<sup>143</sup> E.g. E. Cape & J. Luqmani, 1995.

<sup>144</sup> N. Padfield, *Text and materials on the criminal justice process*, LexisNexis United Kingdom: London, 2003, p 252.

<sup>145</sup> M. Davies, H. Croall & J. Tyrer, 2010, p 190.

<sup>146</sup> As explained in the previous chapter, *Imbrioscia v. Switzerland* was the first case that the ECtHR had to deal with this question. This case was in 1993 while PACE came into effect in 1986.

strong position on the right to access to a lawyer in the pre-trial stage, and rather argued that as long as the trial as a whole remained fair, it was not absolutely necessary to have a lawyer present during interrogation at the police station<sup>147</sup>. It thus accepted that Member States would not have to ensure this right as long as it provided safeguards that would ensure a fair trial. The United Kingdom had at that time already set forth a general right to have a lawyer present during the investigative stage, which could only be delayed under a limited number of circumstances<sup>148</sup>.

This did not necessarily mean that the United Kingdom had regulated this right sufficiently with regards to each aspect of the criminal procedure. This became clear in *John Murray v. the United Kingdom*, where the ECtHR dealt with the question whether the right to access to a lawyer could be delayed when the suspect was faced with the problem that negative inferences could be drawn from his silence. The Court found that under these circumstances, where the suspect is faced with such an important decision, denying (or delaying) him access to a lawyer was in violation of article 6(1) in conjunction with article 6(3)(c) of the Convention, because he was directly affected by the absence of his lawyer which rendered his trial as a whole irretrievably unfair. It however took more than 10 years for the United Kingdom government to amend its legislation so as to ensure that it is in line with the ECHR. While it started implementing changes that would prevent the use of negative inferences where a suspect was denied access to his lawyer as early as 1998, these changes had no legal binding character<sup>149</sup>. The promised legislative change was still not

<sup>147</sup> *Imbrioscia v. Switzerland*, para 41.

<sup>148</sup> PACE section 58(8) and 58(8A).

<sup>149</sup> ECtHR Interim Resolution DH (2000) 26, concerning the judgment of *John Murray v. the United Kingdom* and Appendix, 2000. Retrieved from [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-55833\"\]}](http://hudoc.echr.coe.int/eng#{\) last accessed 22-11-2015. The UK made mention of guidelines that had been implemented for police officers on how to deal with these situations. They additionally informed that there was a new draft law that was pending for approval that would prohibit drawing negative “*negative inferences from silence when a suspect is being questioned at a police station or other authorized place of detention, when he or she has been denied access to legal advice*”.

brought into effect in 2006<sup>150</sup>, and it was not until 2010 that the Committee of Ministers closed the case because they were satisfied with the legal changes made in the legislation of the United Kingdom<sup>151</sup>.

Despite the slow progress, even today it seems that the protection offered by PACE in the United Kingdom mostly adequately protects the right to access to a lawyer in the pre-trial stage from the perspective of the most recent stance the ECtHR has taken on the matter. In line with the requirements of the ECtHR, access to a lawyer is generally offered to the suspect before the first interrogation by the police. Furthermore, while the ECtHR has largely remained quiet on how the right should be shaped, the United Kingdom has given a rather broad interpretation of the right, by allowing to give the suspect the possibility to speak with his lawyer prior to and during interrogation and by attributing an active role to the lawyer. The lawyer is thus attributed an active role during the interrogation, that is aimed at helping his client.

However, it is the second part of the statement in *Salduz* that might be problematic in the United Kingdom. Here, the Court specifically mentioned that “the rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”<sup>152</sup>. While PACE warns for this in Code C note 6J, where it says that interference with the right to have a lawyer present means that “the right will effectively have been denied”<sup>153</sup>, and it also states

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<sup>150</sup> S. Besson. The Reception Process in Ireland and the United Kingdom, in *H. Keller & A.S. Sweet (eds.). A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press: Oxford, 2008, p. 67. Besson mentions that the Committee on Legal Affairs and Human Rights Rapporteur considered that the changes following *John Murray v. United Kingdom* were only partially fulfilled in 2006. The ECtHR Interim Resolution ResDH(2002)85 of 2002 [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-56398\"\]}](http://hudoc.echr.coe.int/eng#{\) last accessed: 22-11-2015. The Committee of Ministers also considered the changes incomplete since the proposed law had still not been implemented.

<sup>151</sup> ECtHR Resolution CM/ResDH(2010)120 Execution of the judgment of the ECtHR in *John Murray* against the United Kingdom. Retrieved from: [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-102036\"\]}](http://hudoc.echr.coe.int/eng#{\) , last accessed: 22-11-2015.

<sup>152</sup> *Salduz v. Turkey*, Para. 55.

<sup>153</sup> Pace Code C, note 6J.

elsewhere that judges may decide to exclude evidence when it would have a very adverse effect on the fairness of the trial, it does not sufficiently guarantee the exclusion of such materials<sup>154</sup>.

The use of ‘may’ rather than must, indicates that there is a large discretion on the judges in deciding whether incriminating evidence obtained without a lawyer present should be excluded. It would be perfectly in line with this provision to include this evidence when the judges are of the opinion that it would not “have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”<sup>155</sup>. This has already been found to be happening by Davies, Croall and Tyrer, that claim that “despite safeguards, courts do convict on illegally obtained evidence, if the judge and jury are convinced that it is reliable and relevant evidence”<sup>156</sup>.

It thus seems that with the exception of the exclusion of evidence, the United Kingdom seems to be mostly in line with the protection set out by the ECtHR. However, as is partly shown already by the fact that PACE was implemented before the ECtHR started putting forth their vision, it does not seem that the ECHR has been an influence in the development of this right in the United Kingdom. Rather, the implementation of PACE was the consequence of feelings of unease and critiques on police action, which also seem to be the main reasons behind the subsequent changes that have been implemented. The inclusion of the right to access to a lawyer in the pre-trial stage thus seems to have been included as a reaction to internal tensions rather than external pressures from the ECtHR.

While the United Kingdom is a party to the European Union, they are in a special position with regards to several areas of the EU. As such, the United Kingdom is not bound

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<sup>154</sup> Pace section 78.

<sup>155</sup> Ibid.

<sup>156</sup> Davies, Croal & Tyrer, 2010, p.172.



by measures that are made in the area of freedom, security and justice unless they choose to opt-in<sup>157</sup>. The United Kingdom has not chosen to do so, and is therefore not bound by the Directive. It shows one of the major limitations of international bodies to ensure compliance with their legislation. Not only is their reach limited to member states to that body, but even member states themselves can make reservations to the body of legislation and indicate that it will not cooperate with part of the legislation. This is not only problematic because the ultimate aim of the Directive is to approximate criminal procedural guarantees with the aim of increasing mutual trust, but also because in this way the United Kingdom gets to pick and choose which measures it will be bound with.

One possibility as to why the United Kingdom might still be bound by the directive, is if the ECJ were to decide that the right to access to a lawyer in the pre-trial stage is an expression of one of the principles of Union law that was already applicable, or whether it reads this into the relevant provisions of the CFREU, which is not entirely unlikely given the 1989 *Hoechst v Commission* judgment, where the ECJ acknowledged that the right to access to a lawyer should apply early on in criminal proceedings<sup>158</sup>. However, this would only offer limited redress, as the CFREU is only applicable when the Member States apply European Union Law.

### **3. The right to access to a lawyer in the Netherlands**

This chapter discusses the laws and regulations in the Netherlands with regards to the right to access to a lawyer. It shows the developments that have taken place in this regard, and discusses the influences that the ECHR and EU have had on these developments. As will

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<sup>157</sup> Protocol (No21) to the Treaty on the Functioning of the European Union, on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. Article 1 states that: “the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union”. Article 3 states that the United Kingdom “may notify the President of the Council [...] that it wishes to take part in the adoption and application of any such proposed measure, whereupon that state shall be entitled to do so”.

<sup>158</sup> Supra footnote 52.

be shown in this chapter, both the ECHR and the EU were essential in developing new legislation dealing with this right.

### 3.1 *The right to access to a lawyer prior to Salduz*

Unlike the United Kingdom, the Netherlands did until recently not have a specific law regulating the rights of the accused with regards to having access to a lawyer prior to, or during, the first interrogation. Rather, there has been a discussion about this specific topic and the rights of the accused for over forty years that still continues today<sup>159</sup>. The positions in the debate surrounding this question can largely be divided into two opposing groups. The proponents of granting suspects the right to a lawyer stress the importance of protecting the legal position of suspects and against undue pressure from the police, whereas the opponents argue that a lawyer would interfere with the truth finding objective of the police officers, especially if they were to be allowed to be present during the interrogation<sup>160</sup>.

It appears that prior to *Salduz* the general rule was to deny suspects access to their lawyers during interrogations<sup>161</sup>. The law in the Netherlands did (and still does) provide that a suspect is allowed to be assisted by his lawyer, and should be allowed to stay connected with him/her as much as reasonably possible<sup>162</sup>. However, there is no provision in the Code of Criminal Procedure (CCP) specifically granting suspects the right to have his lawyer present during interrogations<sup>163</sup>. A further limitation to the right to a having free legal aid were that a person had to be under arrest for at least 6 hours before he was entitled to see his lawyer<sup>164</sup>. As Cape and Pronken explained the situation: “Only those who can afford to pay for a lawyer

<sup>159</sup> M.J. Borgers & L. Stevens (Netherlands Comparative Law Association). The use of illegally gathered evidence in the Dutch Criminal Trial, *Electronic Journal of Comparative Law*, vol. 14.3, 2010, p. 15.

<sup>160</sup> W.J. Verhoeven. Perspectives on changes in the right to legal assistance prior to and during police interrogation, *Erasmus Law Review*, 4, 2014, p. 171

<sup>161</sup> E. Cape & T. Spronken, Proactive policing: limiting the role of the defense lawyer, in *S. Field & C. Pelsler* (eds.), *Invading the private: state accountability and new investigative methods in Europe*, Aldershot: Dartmouth, UK, 1998, p.295.

<sup>162</sup> Article 28 (1) and (2) of the Dutch Code of Criminal Procedure

<sup>163</sup> Hodgson, 2014, p.

<sup>164</sup> Cape & Pronken, 1998, p. 314 under footnote 22.

can exercise their right to legal advice during the first 6 [...] hours, and the right cannot be exercised at any time when the suspect is being interrogated". It follows that persons that were detained would additionally have no right to have contact with a state provided lawyer prior to their first interrogation, if this interrogation took place within the first six hours after his arrest. Thus, in practice, there was no right to speak to a lawyer prior to the first interrogation.

Another limit in the law at the time was that suspects were only entitled to a state funded lawyer if and when they were placed under arrest. When a person was invited to come to the police station for a conversation, there was no obligation for the police officers to disclose whether they wanted to speak to a person in the capacity of a witness or a suspect – and thus there was no possibility to obtain free legal advice in these circumstances<sup>165</sup>. This situation was clearly not in line with the *Salduz* jurisprudence, that requires at the very least the right to speak to a lawyer prior to the first interrogation, and arguably also the right to have the lawyer present during the interrogation. Not surprisingly, it was the *Salduz* judgment that led to the consideration of possible changes to the law in order to stay in line with the ECtHR jurisprudence.

### 3.2 *The right to access to a lawyer after Salduz*

Following the *Salduz* judgment, it was clear that the Dutch legislation with regards to legal assistance was not in line with the standards set forth by the ECtHR. Concurrently, in 2009, a question was posed before the Dutch Supreme Court about what consequences *Salduz* has in the criminal procedure in the Netherlands<sup>166</sup>. While the Court stated that it would be beyond their powers to create a general guideline, they asserted that it followed from *Salduz*

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<sup>165</sup> Ibid., p. 294.

<sup>166</sup> Dutch Supreme Court, 2009, Case Number: NL:HR:2009:BH3081, Retrieved from: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BH3081> (Dutch). The same reasoning was used by the supreme court in cases: NL:HR:2009:BH3087 and NL:HR:2009:BH3084

that any suspect that has been arrested by the police should have the right to consult with a lawyer prior to the first interrogation by the police, and s/he should be informed of this by the police officer in charge<sup>167</sup>. However, the Supreme Court also reasoned that it did not follow from *Salduz* that the suspect has the right to have a lawyer present during the interrogation, unless the suspect is a minor<sup>168</sup>. If these guidelines set forth are not respected, it was added, this would be a procedural defect which would usually lead to exclusion of the evidence that was obtained during the interrogation without a lawyer present *and* evidence that was discovered as a direct result of statements made without a lawyer present<sup>169</sup>.

These considerations were shared with the Minister of Justice, who acknowledged after the *Salduz* judgment, and prior to the Dutch Supreme Court rulings, that changes will likely have to be made to the Dutch Code of Criminal Procedure<sup>170</sup>. In 2010 a policy guideline was enacted that was meant to bring the ECHR and Dutch Supreme Court rulings into practice in the Dutch legal system and set forth the manner in which it would be determined whether suspects qualify for a lawyer – the so called “Instruction legal assistance during police interrogation”(Aanwijzing rechtsbijstand politieverhoor)<sup>171</sup>. This policy rule was meant to bridge the time it would take to amend the Code of Criminal Procedure, and is therefore of a temporary nature.

The instruction differentiates between three categories of cases. The first category, category A, consists of cases of a very grave nature, punishable with a prison sentence of at

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<sup>167</sup> Ibid., para 2.5.

<sup>168</sup> Ibid., para 2.6

<sup>169</sup> Ibid., para 2.7.1 - 2.7.3

<sup>170</sup> Letter of the Minister of Justice to the second chamber of Parliament of April 15, 2009. Retrieved from: [http://www.rijksbegroting.nl/2009/kamerstUnited Kingdomken,2009/4/24/kst130227.html](http://www.rijksbegroting.nl/2009/kamerstUnited%20Kingdomken,2009/4/24/kst130227.html) (Dutch).

<sup>171</sup> “Aanwijzing rechtsbijstand politieverhoor”. Retrieved from: <https://zoek.officielebekendmakingen.nl/stcrt-2010-4003.html>.

least 12 year<sup>172</sup>; crimes for which pre-trial detention is allowed (i.e. crimes that are punishable with a prison sentence of at least four years<sup>173</sup>) and that are likely to attract wide public attention (so called sensitive cases); suspects of organized crime; crimes for which pre-trial detention is allowed and the suspect is between 12<sup>174</sup> and 15 years old; crimes for which pre-trial detention is allowed and the suspect is 16 or 17 years old and has a mental disability. Category B consists of all the crimes for which pre-trial detention is allowed, and do not fall within category A<sup>175</sup>. Finally, Category C consists of all the crimes for which pre-trial detention is not allowed. Depending on the category a suspects finds himself in, different rules apply with regards to the right to consult with a lawyer.

Regardless of the category, every suspect that has been brought in for interrogation has to be made aware by the police that he has the right to a thirty minute consult with a lawyer prior to the first interrogation<sup>176</sup>. For suspects that are in category A or B, their consult will take place in the police station, whereas suspects that are in the third category only have the right to speak to a lawyer through the phone. Furthermore, suspects of category A are obliged to make use of their right to consult a lawyer, while suspects of the other two categories are free to waive this right.<sup>177</sup> Only for category A and B are the costs of the consult covered by the state.<sup>178</sup> Suspects are free to contact a lawyer of their own choosing, or to have the police contact the Board of legal assistance (Raad van rechtsbijstand) who will then arrange a duty lawyer. The instruction stipulates that after the lawyer has been contacted,

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<sup>172</sup> Ibid. Amongst these crimes are intentional life crimes, serious sexual offenses, arson with serious consequences, hostage taking, kidnapping, and other crimes against the physical integrity of persons. For life crimes and sexual offenses a lower threshold is required.

<sup>173</sup> Article 67 of the Dutch Code of Criminal Procedure.

<sup>174</sup> Note that the age of criminal responsibility in the Netherlands is 12 years old, so children under this age cannot be prosecuted.

<sup>175</sup> Supra under 13.

<sup>176</sup> Ibid. the instruction however does not specify the manner in which this has to be conveyed to the suspect.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid. Category C suspects will have to pay for their telephonic consult.

s/he has to be at the police station within two hours, or the interrogation will usually start without the consult.<sup>179</sup>

In addition to the consult prior to the interrogation, juvenile offenders are also entitled to have a lawyer present during interrogation(s). Rather than a lawyer, minors can also choose to have a trusted person present (i.e. a parent or a legal guardian) instead of a lawyer, but it is recommended that the minor chooses for a lawyer<sup>180</sup>. The envisioned role of the lawyer is passive; s/he is expected not to interfere with the interrogation save for situations where the police is putting undue pressure on the juvenile suspect, thus recognizing to some extent the vulnerable position of juveniles in the criminal justice system<sup>181</sup>.

The guideline provides for a number of exceptional circumstances, which apply both to juvenile and adult suspects. The most notable of these will be discussed here. When there is a time pressure with regards to the safety of other persons – i.e. a hostage situation, abduction, or a life threatening situation – the police is allowed to start interrogation prior to the arrival of the lawyer when the public prosecutor permits so<sup>182</sup>. Additionally, when a suspect starts making a confession immediately after his arrest, this confession can be added as evidence, as long as the police refrain from asking follow up questions<sup>183</sup>. Furthermore, in case a suspect waived his right to a lawyer and the police find evidence that leads them to believe s/he committed other crimes as well, they will have to reiterate that s/he can still make use of this right when it concerns a crime that is not similar to the crime the suspect is being interrogated for<sup>184</sup>. Finally, a suspect does not lose the right to consultation by waiving

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<sup>179</sup> Ibid. if a lawyer arrives after two hours, the interrogation will be stopped and the suspect will have the opportunity to have his thirty minute consult before the interrogation can resume. For category A cases, after two hours the police has to contact the public prosecutor who will decide whether or not the interrogation can start.

<sup>180</sup> Ibid., p. 5.

<sup>181</sup> Ibid., p. 6.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

this right when it is offered to him; if the defendant changes his mind and decides that he does want to make use of his rights after all, he can make this known to the police officer, who will decide in what way this can be realized<sup>185</sup>.

While it is clear that the guideline provides a step in the good direction to ensure that interrogation practices in the Netherlands are in line with the ECtHR case law, there have been serious and valid criticisms in the way the Dutch Supreme Court interpreted *Salduz*, and the way it has been set forth in the guidelines<sup>186</sup>. The main criticism with the Dutch response has been the narrow interpretation given to *Salduz*, by only reading into it a right to consultation prior to the first interrogation. This interpretation has been defended by some, who agree that *Salduz* did not sufficiently clarify whether there is a right to have a lawyer present during police interrogations<sup>187</sup>. Others have however argued that this interpretation has in fact been a too narrow one, and does not actually comply with the *Salduz* doctrine – recommending a further amendment to the guidelines<sup>188</sup>.

Another important limitation in the guideline is the requirement that the police only have to wait two hours for a lawyer to show up before they can start with their interrogation. While this limitation was already questionable in light of *Salduz*, that only seemed to allow derogation from the right to a lawyer for “compelling reasons”, *Pishchalnikov* has made clear

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<sup>185</sup> Ibid., p. 7.

<sup>186</sup> See e.g. C. Brants. The reluctant Dutch response to *Salduz*, *Edinburgh Law Review*, 15, 2011; J. Blackstock. E. Cape, J. Hodgson, A. Ogorova & T. Spronken. *Inside police custody: an empirical account of suspects' rights in four jurisdictions*, Intersentia LTD: Cambridge, United Kingdom, 2014.

<sup>187</sup> See e.g. E. Cape, Z. Namoradze, R. Smith & T. Spronken. *Effective Criminal Defence in Europe*, Intersentia, Antwerp, Oxford, Portland, 2010, p. 58.

<sup>188</sup> C. Brants, 2011, p. 299, for example has argued that the manner in which the Dutch courts and criminal justice organs have dealt with *Salduz* amounts to damage control, being “primarily concerned with minimizing the effect of *Salduz* and subsequent decisions by applying the absolute minimum standard”. Blackstock et al, 2014, p. 436, have given a less nuanced view, arguing that the Netherlands should have introduced “a right to presence of the lawyer during interrogations [...] in response to ECtHR case-law”.

that in no way should an interrogation commence until the suspect has had a chance to talk to his lawyer<sup>189</sup>.

An additional weak point of the guideline is that the suspect only gets 30 minutes, through the phone or in person, to discuss everything that has to be discussed prior to the first interrogation – i.e. the reason of his arrest, the circumstances of the case, the evidence against him, his strategy during the interrogation, and so on. Seeing as no general right to have the assistance of your lawyer during the interrogation is included, this consultation needs to be comprehensive. However, to discuss all these aspects can hardly be called a “practical and effective” execution of the right to access to a lawyer, as the ECtHR has required repeatedly with regards to the Convention rights in general, but also explicitly reiterated in the *Salduz* judgment<sup>190</sup>. For these reasons, it has been argued that this time limitation, is not a sufficient execution of the ECtHR jurisprudence, and does not comply with the standards set there<sup>191</sup> - regardless of the fact that so far no noticeable have arisen so far with regards to the time constraints<sup>192</sup>.

Whereas these individual limitations and constraints already raise significant doubt as to their compliance with *Salduz*, taken together these limitations make it clear that the Dutch guideline has not provided the Netherlands with a *practical and effective* protection of article 6 para 3 of the Convention. The interpretation of the considerations in *Salduz* has been too narrow, and has led to significant and well-founded criticisms as discussed above. Moreover,

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<sup>189</sup> *Pishchalnikov v. Russia*, para 79 and 85.

<sup>190</sup> *Salduz v. Turkey*, para 55.

<sup>191</sup> J. Lelieveld & P. van Kampen. Rechtsbijstand in de voorfase van het strafproces, *Nederlands Juristenblad*, 25(37), 2013, p. 2605.

<sup>192</sup> W.J Verhoeven & L. Stevens. *Rechtsbijstand bij politieverhoor: Evaluatie van de aanwijzing rechtsbijstand politieverhoor in Amsterdam-Amstelland, Groningen, Haaglanden, Limburg-Zuid, Midden- en West-Brabant en Utrecht*. Boom Lemma uitgevers: Den Haag, Netherlands, 2013, P. 154-155. Verhoeven and Stevens found in empirical research that in none of the observed cases the maximum time of thirty minutes was utilized, and that the time used for consultation usually ranged between 10 and 20 minutes. Moreover, they found that in general there is no problem for lawyers to arrive within the two hour time period. When lawyers foresee that they will not make it within two hours, they usually call the assistant public prosecutor to discuss the possibility to delay the interrogation, or they arrange another lawyer to take over.



in light of the developments in the ECtHR case law since *Salduz*, and – perhaps even more compelling – the Directive that has been implemented at the EU level, even Dutch politicians have since agreed that the guideline is no longer sufficient<sup>193</sup>. This is showcased by a recent remark made by the Advocate General, who initially advised the Dutch Supreme Court to follow the narrow interpretation of *Salduz*, but has now requested the Supreme Court to revise the narrow interpretation that exclude the right of legal assistance during interrogation in light of the *Navone* ruling<sup>194</sup>. In light of these developments, a new and updated law that includes all these developments has been in the making.

On February 12, 2015, the proposal for an amendment to the CCP providing for access to a lawyer in criminal proceedings has been sent to the House of Commons for consideration<sup>195</sup>. This bill has been proposed in order to implement directive no. 2013/48/EU (directive on the right to access to a lawyer in criminal proceedings) into Dutch legislation<sup>196</sup>. The proposal provides that any person who is detained by the police has the right to inform at least one person about their situation, or have the assistant public prosecutor do this for him – depending on the specific situation of the suspect<sup>197</sup>. This right is meant to give defendants the opportunity to contact their lawyer and explain and discuss their situation in light of the

<sup>193</sup> C. Brants, 2011, p. 305. The Minister of Justice acknowledged in response to *Brusco* that the right to have a lawyer present during the interrogation might have to be included in Dutch law. Furthermore, the head of the Dutch prosecution service argued that it is unavoidable that the right to access to a lawyer will come to include the right to have a lawyer present.

<sup>194</sup> Bill regarding the implementation of the Directive on the right of access to a lawyer (Wetsvoorstel implementatie richtlijn Recht op toegang raadsman) , p. 28-29, under 3.2.2 Case law. Retrieved from: <https://www.rijksoverheid.nl/documenten/kamerstukken/2014/02/13/wetsvoorstel-implementatie-richtlijn-recht-op-toegang-raadsman>

<sup>195</sup> Ibid.

<sup>196</sup> Ibid., The preface to the bill makes explicit reference to the Directive as the ground for the amendment to the CCP.

<sup>197</sup> Ibid., Article 27c CCP will come to include these rights under two new subparagraphs, g and h as well as new Article 27e CCP. Article 28b provides that in investigations where the suspect is believed to have committed a crime punishable with a prison sentence of at least 12 years, the assistant public prosecutor will contact the council of legal assistance on his own behalf. If the crime is punishable with at least 4 years of prison, but less than 12 years, the suspect has to indicate he wants to make use of his right to have a lawyer present after being informed of this right by the assistant prosecutor. Any crime that is punishable with less than a 4 year prison sentence will allow the suspect to have a telephonic consultation with a lawyer. Suspects of a crime punishable with a prison sentence of at least 12 years can only waive their right to their 30 minute consultation prior to the first interrogation, after being informed by the consequences of this by a lawyer (new Article 28c subparagraph 3).

forthcoming interrogation. For juvenile suspects, the assistant prosecutor is additionally under the obligation to notify the parents or legal guardian of his/her arrest<sup>198</sup>.

The assistant public prosecutor can only delay the notification of the lawyer (and in the case of juvenile offenders the parent/legal guardian) in limited circumstances, namely; when doing so might negatively affect the life, freedom or physical integrity of another person, or; to prevent substantial damage to the investigation<sup>199</sup>. Furthermore, when the bill will be enacted, this will put police officers under the obligation to tell any person they interrogate, even when they are not being detained, whether they will be questioned in the capacity of a suspect or a witness, thus making it clear for anyone whether they should and can ask the assistance of their lawyer<sup>200</sup>.

Article 28 then provides that any suspect has the right to be assisted by a lawyer in his defense. Contrary to the existing guideline, this assistance includes the right to have a lawyer present during the interrogation. The suspect can waive this right voluntarily and unequivocally, but can only do so after he has been informed by a judge or police officer about the consequences of doing so<sup>201</sup>. Exceptionally, juveniles and suspects charged with a crime that is punishable with a prison sentence over 12 years cannot waive the right to have a consultation with a lawyer *prior to* the first interrogations, but are free to consequently deny legal assistance *during* the interrogation<sup>202</sup>. The mandatory consultation for juveniles has been included based on the idea that they might not fully foresee the consequences of their decisions, and would be more inclined not to make use of his right to consult a lawyer if that means he has to wait for the lawyer to come to the police station<sup>203</sup>. It is assumed that once

<sup>198</sup> Ibid., new article 488b, subparagraph 1.

<sup>199</sup> Ibid., new Article 27e subparagraph 3 under a and b.

<sup>200</sup> Ibid., new Article 27d CCP.

<sup>201</sup> Ibid., new article 28a.

<sup>202</sup> Ibid., new article 28c subparagraph 3 and article 488C subparagraph 4. The term juveniles includes anyone under the age of 17.

<sup>203</sup> Ibid., Explanatory memorandum, p. 68.

the juvenile has discussed his case with a lawyer prior to the first interrogation, he will be in a better position to decide whether he needs the lawyer present during the interrogation as well or whether he wishes not to make use of this right, because the lawyer will be able to provide him with advice and inform him of the possible consequences of not having a lawyer present at this point<sup>204</sup>.

However, for both adults and juveniles, in case a lawyer is not available within two hours of being notified, the assistant public prosecutor can decide whether the police can start the interrogation, or should wait for the lawyer<sup>205</sup>. In case the lawyer is available within the two hour period, the defendant has the right to have a thirty minute consultation prior to the first interrogation, and to have the lawyer present and participate during the interrogation<sup>206</sup>. Both these rights can only be denied under the same conditions as described above<sup>207</sup>. In any instance where a right to legal assistance is denied, this has to be mentioned in the case file. If an interrogation starts while a lawyer is not present, either because s/he was not available within two hours, or because s/he has been denied access, the interrogation has to be recorded<sup>208</sup>. Additionally, the suspect has the right to request an interruption during interrogation to have a private discussion with his lawyer, but this can be denied by the assistant public prosecutor if the suspect repeatedly makes this request and the assistant public prosecutor considers that this unduly disturbs the order and progress of the interrogation<sup>209</sup>.

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<sup>204</sup> Ibid. By providing for this, the bill does not accept the argument of the Council for child protective services, who has argued that assistance of a lawyer during interrogation should also be made mandatory for juveniles.

<sup>205</sup> Ibid. new article 28b sub paragraph 4.

<sup>206</sup> Ibid., new Article 28c subparagraph 1 and new Article 28d subparagraph 1.

<sup>207</sup> Ibid., new Article 28c subparagraph 2 and new Article 28d subparagraph 2 provide that these rights can only be denied if justified by the urgent necessity to prevent serious negative consequences to the life, freedom or physical integrity of another person, or to prevent substantial damage to the investigation.

<sup>208</sup> Ibid., new Article 28d, subparagraph 5.

<sup>209</sup> Ibid., new Article 28d, subparagraph 1. and new Article 28d subparagraph 3. This right applies regardless of whether the lawyer is present during the interrogation.

At a first sight the draft law seems to provide for an active role of the lawyer during the interrogation; it provides that the lawyer is allowed to be present and “participate”<sup>210</sup>. The draft law however does not provide any further clarification as to what this participation entails. The explanatory memorandum to the law reveals that there have been two opposing views; the Dutch order of Lawyers has argued for an active role of the lawyer that includes the possibility to actively participate by interfering when the police exert undue pressure and by giving his client advice and being able to give comments and make requests<sup>211</sup>. The police on the other hand have argued for a far more limited role of the lawyer; it suggests prohibiting any contact between lawyer and suspect during the interrogation and requires the lawyer to sit behind his client, away from the interrogation table<sup>212</sup>. In this sense, the lawyer has no right to actively participate and would merely act as an observer.

A proposed guideline has been added to the draft law, which, it is alleged, has taken into account both considerations, as well as the requirements flowing from the directive<sup>213</sup>. It provides that the lawyer is allowed to sit next to the suspect, but it highly limits his/her rights to participate in the interrogation. The lawyer cannot answer questions on behalf of his client, and is limited to making remarks and asking questions only at the beginning and end of the interrogation. During the investigation the lawyer can only point out that the suspect does not understand a question and ensure that the police do not exert undue pressure on his client<sup>214</sup>. This approach is justified by arguing that the interrogation is aimed at finding the truth, and it is argued that this approach is in line with the Directive, which provides that the participation of the lawyer is guided by procedures in national law<sup>215</sup>.

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid., p. 45

<sup>212</sup> Ibid., p. 46.

<sup>213</sup> Ibid., p. 49.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid., p. 50.

The appointment of a lawyer will be arranged by the council of legal assistance (raad van rechtsbijstand) after they are notified by the assistant public prosecutor<sup>216</sup>. The suspect has to right to pick a lawyer of his own choosing, but can also have the council pick a duty lawyer<sup>217</sup>. To this end, the council will create a list of duty lawyers that are on call. In case the lawyer of the suspect's choosing is not available within the two hour time period, the assistant public prosecutor will make this known to the council, which will then arrange a duty lawyer for the suspect<sup>218</sup>. If the first lawyer on the duty list is not available, it is expected that the lawyer will try to arrange another lawyer that can take over for him<sup>219</sup>. Additionally, the bill provides for a number of provisions dealing with the right to access to a lawyer in cases of extradition but these will not be discussed in this thesis as they are not directly relevant<sup>220</sup>.

It is clear from the discussion of the draft law that progress has been made since the first amendments that were made to the law following *Salduz*. While the aforementioned guideline was not without its limitations and was met with criticisms, it was a first step in the right direction. Following the realization that the guideline could no longer be considered adequate in light of the more recent developments, the Dutch government responded by designing a more comprehensive and far reaching amendment to the Dutch Code of Criminal Procedure, that is now under consideration for implementation. In several aspects, this proposed amendment is more expansive than the original guideline, and is a legitimate attempt to address the developments that have taken place since *Salduz*. At the same time however, there are a number of important limitations in the bill that are difficult to justify in light of the Directive. These considerations will be discussed below.

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<sup>216</sup> Ibid., new article 40, paragraph 1

<sup>217</sup> Ibid., new article 40, paragraphs 2 and 3

<sup>218</sup> Ibid., new article 40, paragraph 4

<sup>219</sup> Ibid., explanatory memorandum, under 3.2.3 policy, p.30.

<sup>220</sup> Ibid., see proposal from the bottom of page 6, under ARTICLE II.

First of all, the bill includes not only the right to have a consultation with a lawyer prior to the first interrogation, but also allows the defendant to have a lawyer present during the interrogation. This change in position clearly reflects the requirements set forth in the Directive and in the more recent case law of the ECtHR, i.e. the *Navone* case, that have made it clear beyond any doubt that a lawyer should be allowed to be present during the interrogation. This improves the status of the suspect in the sense that the lawyer is better suited to identify and protect against undue pressure by the police and will help the defendant in case he does not understand a posed question. Furthermore, if the defendant and the lawyer are granted a break from the interrogation to discuss the case privately, the lawyer will be in a better position to further advice the suspect.

However, there is also a serious shortcoming in the way the draft law has dealt with the role of the lawyer during the interrogation. The directive has set forth that “Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned”, and while the Dutch government is not incorrect when setting forth that this “participation shall be in accordance with procedures under national law”, the same provision in the Directive also requires that “such procedures do not prejudice the effective exercise and essence of the right concerned”<sup>221</sup>. It is this part of the provision that seems to be problematic in the draft law. To prohibit contact between the lawyer and the suspect save for some limited exceptions, and to severely limit the role of the lawyer with regards to the police officers cannot be united with the purpose of the Directive; to “allow the persons concerned to exercise their rights of defense practically and effectively”<sup>222</sup>.

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<sup>221</sup> Directive 2013/48/EU, Article 3 under paragraph 3 (b).

<sup>222</sup> Ibid., Article 3 under paragraph 1.

Much like the approach taken in the first set of guidelines that were implemented after *Salduz*, the Dutch approach again seems to narrow the interpretation of the international obligations as much as possible by putting in place as many limitations as they deem justified. Moreover in this regard they have read these obligations selectively and partly ignored them to justify putting in place undue limitations to the role of the lawyer<sup>223</sup>.

In other aspects, the draft law seems more comprehensive and in line with the international obligations flowing from the EU and ECtHR. For instance, it requires every suspect to be informed of their right to legal advice and effectively also achieves that for suspects that have not been arrested by requiring the police to notify every person that is invited for a conversation with the police whether they are invited in the capacity of a suspect or a witness. This meets the requirements flowing from the *Shabelnik* judgment of the ECtHR<sup>224</sup> and also the requirements set out in the Directive<sup>225</sup>.

Furthermore, the draft requires that any waiver to the right to access to a lawyer has to be made voluntarily and unequivocally, and a suspect can only do so after he has been informed by a judge or police officer about the consequences that might follow from his decision. This provision seems to be inspired by, and is in line with, the requirements set by the ECtHR in *Pishchalnikov* and the Directive in Article 9<sup>226</sup>. Even more so, the draft goes

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<sup>223</sup> As mentioned above, the Dutch government justified the limitations set forth in the draft law by claiming that the Directive leaves them free to design the way in which they construct the role of the lawyer. As it is read in the Directive however, there is a clear limitation to this freedom, which they have chosen to ignore. See also M. Lammers. *Recht van verdachte op toegang tot advocaat*, 2015. Accessed on: <http://www.rechtblog.nl/2015/recht-van-verdachte-op-toegang-tot-advocaat/>

<sup>224</sup> As mentioned earlier, in *Shabelnik* the ECtHR provided that the right to a lawyer emerges as soon as there is a substantive suspicion, which can arise before the formal charge.

<sup>225</sup> Directive 2013/48/EU, Article 2 paragraph 1 states that the rights in the Directive should apply from the moment that suspects/accused persons have been made aware that “they are suspected or accused or having committed a criminal offence, *and irrespective of whether they are deprived of liberty*” (emphasis added by author). It further details in article 3 paragraph 2 (a) and (b) that suspects have to have had the opportunity to speak with their lawyer before questioning, or when the investigative authorities carry out an investigative act, whichever comes first.

<sup>226</sup> For the ECtHR ruling in *Pishchalnikov*, see above. Directive 2013/48/EU Article 9 provides that Member States will ensure that “the suspect or accused person has been provided, orally or in writing, with clear and

beyond this requirement for juveniles and people suspected of very serious crimes by actually requiring them to consult a lawyer prior to the first interrogation, and only allowing for a waiver to have a lawyer present during interrogation *after* this consultation has taken place<sup>227</sup>

However, the time limit in the original guideline that allowed police officers to start interrogation after two hours even if the lawyer has not arrived by then has been maintained in the draft law. While it is true that research found that this time limit was usually not a source of problems in the current system<sup>228</sup>, this might not hold true under the new law. Under the draft law the number of people that can speak to a lawyer at the police station will vastly increase, as will the number of people that can have the lawyer present during his interrogation. Seeing as a comprehensive duty lawyer scheme has not been set up as of yet, chances increase that the one lawyer per district that is on duty will not be in the position to make it to the police station in time. If no significant increase in duty lawyers will be created, this might seriously harm the effective defense of suspects and will lead to situations contrary to the obligations under the ECHR and EU.

A final weak point of the proposal has to do with the financial aspects of introducing lawyers to suspects prior to the trial. As both the ECHR and EU Directive mention, people who cannot afford to pay for a lawyer in their criminal defense must receive one free of charge as part to the right to access to a lawyer<sup>229</sup>. The proposed legislation does not provide for this right in all criminal cases. Any person that is suspected of having committed a criminal offence that is punishable with a prison sentence of up to four years (category C in the guideline) is not entitled to free legal advice, and will have to carry the financial burden

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sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and the waiver is given voluntarily and unequivocally”.

<sup>227</sup> Ibid., Note that it is in line with the Directive to make presence or assistance by a lawyer mandatory under Article 9 paragraph 1.

<sup>228</sup> Supra under 161.

<sup>229</sup> ECHR, Article 6 (3) (c) states that: “if [the suspect] has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require” and Directive 2013/48/EU Article 11.



of a lawyer themselves<sup>230</sup>. Only in cases for which pre-trial detention is allowed will the government provide the lawyers with remuneration, namely €105,61 when assisting a client that is suspect to have committed a crime that corresponds with category B in the current guideline, and double that for category A cases<sup>231</sup>. The approach taken by the Dutch government has been criticized for being insufficient, because the amount does not consider the amount of time that the lawyer spends with his client<sup>232</sup>.

These financial regulations might further limit the effectiveness of the draft law for two reasons. First of all, the large group of the people that will fall within category C and will therefore will not receive financial aid and will have to carry the financial burden of having access to a lawyer themselves. This might make them more susceptible to decide to waive their right to a lawyer. Secondly, if lawyers are going to be payed a fixed amount, regardless on the time that they will spend assisting a client, they might be more likely to put in less time and effort in defending their client, and might decide to just come down to the police station for the initial consultation, and argue attending the interrogation(s) will not be necessary. Both situations would lead to an erosion of the right to access to a lawyer, and are arguable not “practical and effective” as required by the Convention.

#### **4. A comparison between the Netherlands and the United Kingdom**

In the previous chapters the laws of the Netherlands and the United Kingdom have been discussed with regards to the right to access to a lawyer as provided in the ECtHR. For both jurisdictions, the influence of the recent ECtHR judgments and the EU directive on their

<sup>230</sup> Bill regarding the implementation of the Directive on the right of access to a lawyer, explanatory memorandum, P. 32.

<sup>231</sup> For an explanation of the categories, see above on page 36. Remuneration is determined by the “besluit vergoedingen rechtsbijstand 2000” (Decision remuneration legal assistance 2000), which determines in Article 3 that the base fare is €105,61 per point. Category B cases are attributed one point, and category A cases are attributed two points.

<sup>232</sup> M. Lammers, 2015. Lammers calculates that a lawyer will spend an average of 20 hours on a client between the consultation and participating in interrogations during the first couple of days, which would add up to €5,28 per hour – way under the minimum wage of €8,66.

laws have been discussed. While both jurisdictions have implemented their laws under completely different circumstances, a lot of similarities can be discerned between the ways both countries have given effect to the right to access to a lawyer. In this chapter both jurisdictions will be compared, and similarities and differences will be analyzed.

While the Netherlands has only recently started implementing the right to access to a lawyer in its domestic legal system, the United Kingdom has had such a right since the 1980s. This is not surprising when one considers the different rationales both countries had behind implementing these laws. The implementation of the Police And Criminal Evidence Act in the United Kingdom in 1986 was the result of internal issues in the police organization that had caused for a decline of the legitimacy of – and trust in – the police in the eyes of the citizens in the United Kingdom. It was found that there were a number of serious issues that needed to be addressed, including the legal position of suspects in the interrogation states.

In the Netherlands on the other hand, the first changes were not implemented until 2010, following their obligations under the European Convention of Human Rights. Unlike the United Kingdom, the inclusion of a right to access to a lawyer in the Dutch legal system was thus not a direct result of a lack of legitimacy of, and mistrust, in the police. This might have explained the reluctant approach of the Dutch Government. As mentioned before, there had been a discussion on the topic for over 40 years when the *Salduz* judgment was handed down by the ECtHR in 2008, and in those 40 years there had never been sufficient political backing to implement this right. At the same time however, it cannot be disregarded that in line with other European countries, the trust in the government and the criminal justice system has been in decline the Netherlands<sup>233</sup>. These changes in society warrant the

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<sup>233</sup> M. Bovens & A. Wille. Deciphering the Dutch drop: ten explanations for decreasing political trust in the Netherlands, *International Review of Administrative Sciences*, 74(2), 2008, P. 299. Identify a drop in political trust since 2002, and argue that the change in political culture is the cause of this. See F. Pakes. The politics of

introduction of additional safeguards in the criminal justice procedure, especially because – as was mentioned in the introduction – procedural justice is essential for the legitimacy of the criminal justice system<sup>234</sup>.

With regards to the content of the PACE in the United Kingdom and the draft law in the Netherlands, a lot of similarities can be discerned. Both laws are aimed at curtailing police powers and ensuring compliance with essential human rights in the criminal procedure. Both jurisdictions provide that every suspect has the right to speak to a lawyer prior to the first interrogation and to have a lawyer present during the interrogation. Both jurisdictions also provide for exceptions and limitations to this right, but these are not the identical. While the United Kingdom allows for the exclusion of a lawyer on more grounds, it limits the duration of this exclusion to a maximum of 36 hours<sup>235</sup>. While in the Netherlands the grounds for exclusion are narrower, no specific time limit is present in the law<sup>236</sup>. Additionally to these exceptions, both jurisdictions allow the police to start the interrogation without a lawyer present when the lawyer does not show up in time. In the Netherlands an absolute waiting period has been introduced of two hours, while in the United Kingdom an interrogation can only start when a suspect's chosen lawyer cannot or will not come to the police station and the suspect does not wish to make use of a duty lawyer instead<sup>237</sup>.

Both countries provide, in line with their international obligations, that suspects have the right to be informed of their right to access to a lawyer and both countries also provide

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discontent: the emergence of a new criminal justice discourse in the Netherlands, *Howard Journal of Criminal Justice*, 43(3), 2004 for a discussion of the move to penal populism after 2002.

<sup>234</sup> Footnote 5.

<sup>235</sup> For the United Kingdom law see PACE section 58 (8), for the Netherlands law see the Draft law under new article 27e. While both jurisdictions allow for the exclusion of a lawyer in cases where the physical harm to other persons might play a role or when there is a risk to significant damage to the investigation, the United Kingdom allows for delay when allowing a lawyer would risk alerting other suspects that have not yet been arrested or hinder the recovery of property or other valuables.

<sup>236</sup> Please note that the law does provide that the exclusion is only allowed “for as long as strictly necessary”, but there is no mention of an absolute maximum like the United Kingdom provides for.

<sup>237</sup> See PACE code 6.6(c) and Draft law article 28b (4).

that a waiver has to be knowing, explicit and unequivocal. Both in the United Kingdom and in the Netherlands it is required that in case a suspect wishes to waive his right to legal advice, the police informs them of the consequences of doing so. Additionally, the United Kingdom has included a provision that explicitly prohibits police officers to dissuade suspects from making use of their rights. Both jurisdictions also provide extra protections for minors in this regard. While the Netherlands has chosen the path of making the consultation prior to the first interrogation mandatory, the United Kingdom has chosen for the approach to require a parent or legal guardian to assist the juvenile in this decision.

While both jurisdictions allow suspects to discuss their case in private with a lawyer prior to the first interrogation in a similar manner, there are some differences with regards to the role of the lawyer during interrogations. The United Kingdom has taken the position that the role of the lawyer during the interrogation should be to protect and advance the legal rights of his client<sup>238</sup>. In this capacity the lawyer has the right to advise his client during the interrogation, and to interfere in the interrogation when necessary. The position of the lawyer in the Netherlands is more constrained. The lawyer is not allowed to advise his client during the interrogation, and can only pose questions at the beginning and end of the interrogation. Furthermore, the lawyer can only interfere in the interrogation to ensure that his client understands the question posed and to ensure that no undue pressure is used by the police.

Additionally, the United Kingdom provides for *free* legal advice in more circumstances than in the Netherlands does. In principle, every suspect in the United Kingdom has the right to legal advice. For non-imprisonable offenses this is limited to a consultation on the phone, while every other suspect has the right to have a lawyer present at the police station, both for consultation and during interrogation. In the Netherlands, the right to free legal advice is more limited. For starters, no free legal advice of any kind is provided

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<sup>238</sup> Supra note 125.

for anyone who is suspected to have committed a criminal offense that is punishable with a prison sentence up to four years will have to carry the financial burden of legal advice themselves. Only persons suspected of more serious offenses will get free legal advice, but the remuneration for (duty) lawyers in these cases is limited. It is questionable of the limitations in the Dutch approach allow for a “practical and effective” protection of their right to access to a lawyer, or that these financial burdens will in practice mean that suspects choose not to be represented by a lawyer and/or demotivates lawyers to partake in the duty lawyer scheme.

It has become clear that in comparison to the United Kingdom, the Netherlands has taken a narrow approach in giving effect to their international obligations under the ECtHR case law and the EU Directive. This, as mentioned above, can partly be explained by the factors that inspired the legislative changes in both countries. Another important factor might be the experience in both jurisdictions. Whereas the United Kingdom has had 30 years to create an effective law regulating the laws regulating legal advice in the interrogation stage, the Netherlands did not have such a law until 2010. In this regard it is important to note that in those five years the legislator has been working to expand the law to include more rights for suspects and to ensure compliance with international obligations. The Netherlands still has a way to go to create a comprehensive system that effectively regulates the right to legal advice in the interrogation phase, and the United Kingdom can serve as an important example for the Netherlands on how to achieve this.

### **Conclusions, limitations and discussion**

This research has given an insight in the right to access to a lawyer in the Netherlands and the United Kingdom, and the role of international obligations in shaping national laws. Since the *Salduz* judgment in 2008 there has been a revolution in the development of this

right. Not only has the ECtHR reiterated and expanded their standpoint in *Salduz* on numerous occasions, it has finally sparked CoE member states to start amending their national laws to include these standards. But the ECtHR has not been the only actor to start these changes; the EU has played an important role in this when they implemented the Directive on the right of access to a lawyer which, in the case of the Netherlands seems to have had an even stronger influence on national law than the ECtHR has had.

It is important to keep in mind the different motives of both organizations. While the European Court of Human Right clearly has the aim to observe the human rights protection of people in the Council of Europe, the European Union had a different goal in addition to human rights protection. Rather, the Directive has been produced as a result to create more homogeneity between the criminal procedures of the EU member states. This homogeneity is necessary to facilitate mutual trust and increase and ease cooperation between the member states in Criminal matters. By creating a Directive that aims to converge specific aspects of the criminal justice procedure, the same rights will be guaranteed in all Member States, thus making it easier for them to cooperate with mechanisms that are based on mutual trust, such as i.e. the European Arrest Warrant.

While the primary aim might not have been the human rights protection of EU citizens, the EU has played an important role in urging Member States to create and adjust laws to ensure that they comply with the human rights standards that have been brought to the attention to European countries by other organizations. As has been argued earlier, because of the legislative power that the EU has, it has been able to go beyond the standard that the ECtHR has set over the past seven years, because it does not have to focus on the specific circumstances of a single case before it.

However, there are a number of important limitations to the effects of international organizations and the obligations that flow from them. First and most obviously, the obligations apply only to those states that are a party to the specific organization. This means that the ECtHR judgments apply only to the 47 member states, and EU legislation generally applies to the 28 EU member states. With regards to the field of criminal justice however, a number of EU member states have not accepted full jurisdiction of the EU. The United Kingdom for example is not bound by any legislative act that is enacted in the field of criminal law, unless they choose to be bound by it. This situation has led to the situation where the United Kingdom is not under the obligation to ensure that their legislation is in line with the Directive.

The influence of the ECtHR and EU has been different in the United Kingdom than it has been in the Netherlands. As has been discussed in the previous chapter, the United Kingdom has not been directly influenced by the judgments of the ECtHR and the EU Directive. First of all, the Police and Criminal Evidence Act predates the recent judgments of the ECtHR and is in line with the obligations that have flowed from them. With regards to the EU Directive it is important that the United Kingdom is not bound by it, because they opted out. The influence of these international actors on the Netherlands has however been paramount; without the external pressure, it is highly unlikely that the Netherlands would have implemented the guideline and drafted a law after forty years of inactivity. The international obligations flowing from the ECtHR judgments and EU directive thus were the *condicio sine qua non* for these legislative initiatives in the Netherlands.

The draft legislation that is currently under consideration in the Netherlands has been discussed and its limitations have been discussed in the previous two chapters, and will not be repeated in detail here. However, it is important to reiterate that as of now the bill is too narrow to be in line with the international obligations. While this can partly be explained by

the fact that the international obligations bring with them challenging changes to the existing criminal justice system in the Netherlands, there also seems to be an unwillingness by the Dutch government to comply with the far reaching adjustments that are necessary.

It is however recommended that the Dutch legislators reconsider the draft law, and ensure it is completely in line with both the ECtHR judgments and the EU directive. In this regard, four recommendations have been provided that should be considered by the Dutch Government.

First of all, the draft law will have to be amended to ensure that lawyers can play a more meaningful role in the interrogation room. As of now the role of the lawyer has been curtailed with limitations that make that the right is not executed “effective and practical” in the Netherlands. Rather than being a passive observer, the lawyer should be able to actively participate and at the very least be allowed to pose questions and intervene in the interrogation as he sees necessary in the defense of his client.

Secondly, the two hour time limit that has been set within which the lawyer has to be at the police station needs to be removed from the draft law. As the ECtHR has said in *Pishchalnikov*, an interrogation cannot commence until a suspect that has said he wishes to speak to a lawyer has been given the possibility to do so. From this perspective it is unattainable to have a structural limitation on the right to convene with a lawyer prior to the first interrogation, as this is – again – not an “effective and practical” execution of the ECtHR case law. While it is true that so far this limitation has not led to significant problems, this does not necessarily hold true for the future since the number of suspects that will have the right to a lawyer will increase after the draft law will come into effect.

Also, to ensure that everyone is in a position to make use of the right to a lawyer, the current distinction between who will and who will not receive free legal aid should be



removed, and every suspect should at the very least be given the opportunity to consult a lawyer free of charge prior to the first interrogation. Under the proposed law, people suspected of crimes that are punishable with up to four years imprisonment will not receive legal aid of any kind. While it cannot be denied that these legal changes will come with an extra financial burden on the Dutch state, this does not justify categorically excluding a whole group of people from basic legal aid. The Netherlands could adopt a middle-ground solution like the United Kingdom has done in less severe cases, by providing these suspects a free 30 minute telephone consult with a duty lawyer.

Finally, while delay to access to a lawyer can be justified under the EU directive, it is recommended that the Netherlands will enforce a maximum time for which the delay is allowed. As of now, the draft law does not specify an absolute maximum for the delay, and merely requires that the delay will not take longer than is necessary for the case and under the strict exceptions that have been discussed in chapter three. While this is technically not in violation of either the ECtHR case law or the EU Directive, an absolute time limit will ensure that the right to have access to a lawyer will not be denied altogether. The example of the United Kingdom has shown that such a limitation is practicable and does not unduly interfere with the police investigation.

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