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THE RIGHT OF THE ACCUSED TO ACCESS TO A LAWYER IN THE PRE-INVESTIGATION STAGE OF PROCEEDINGS - THE INFLUENCE OF THE ECHtR PRACTICE

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Abstract

The right to defense is the most important guarantee for the accused to achieve procedural equality of the parties, which gives a chance to the person against whom the indictment is directed to effectively oppose the prosecutor side in the criminal proceedings. Realization of the right to defense is particularly important from the first action, which restricts the suspect's right to personal freedom, such as arres,t or detention in pre-trial proceedings. Also, the presence of a defense attorney is of crucial importance during interrogation by the police in the pre-investigation stage of proceedings, bearing in mind the particularly vulnerable position of the accused (suspect) in that time. In this way, abuse of the suspect is also prevented. The practice of the European Court of Human Rights (hereinafter: The Court) has made significant progress in this domain, starting with the case of Salduz v. Turkey, to the cases of Beuze v. Belgium and Dvorski v. Croatia. In the paper, the author will point out the implications of the aforementioned case law for the procedural legislation of the member states of the Council of Europe, as well as for the law of the European Union.

***Keywords*:** right to defense, criminal proceedings, pre-investigation proceedings, ECtHR;

1. Introductory remarks

Respect for basic human rights is a mirror of a democratic society. It is especially important to ensure their respect when conducting court proceedings, that is, when an individual interacts with state organs, responsible for ensuring compliance with the requirements by which it regulates the behavior of individuals. The treatment of the accused during the conduct of the criminal proceedings carries with it additional weight. It is necessary to balance ius puniendi with the rights of the potential perpetrator of the crime. If we add to that the request for an efficient criminal proceedings, in order to eliminate uncertainty for the defendant, it is clear that what constitutes the phrase "fair trial" is not an easy task at all. This requirement undeniably contributes to the rule of law, legal certainty and, above all, justice. All this reflects on citizens' trust in the judiciary, and for the state it means greater credibility in front of the international community. A set of the most important standards in court proceedings constitutes the right (principle) of a fair trial, which is gradually growing into a supraprinciple of modern legal proceedings (Krapac, 2000).

The set of rights, of which a right to a fair trial consists, is enshrined in the most important international documents on human rights. First, it is contained in Article 10 of the Universal Declaration of Human Rights, then in the International Covenant on Civil and Political Rights, and finally, in Article 6 of the European Convention on Human Rights (hereinafter: Convention), which stipulates that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

2. Minimum guarantees of the right to defense

With the aim of ensuring the procedural equality of the parties in the proceedings, which undoubtedly contributes to the fairness of the proceedings, the defendant is given the right to defense (personal and professional) and some additional rights. The minimum guarantees of the right to defense, stipulated in Convention, include the right to be informed about the nature and reasons of the accusation against him (Article 6, paragraph 3a of the Convention), to have enough time to prepare the defense (Article 6, paragraph 3b of the Convention), the right to personal, professional or free legal aid (Art. 6 para. 3c of the Convention), the right to examine witnesses proposed by the prosecutor and to propose witnesses of defense (Art. 6 para. 3g of the Convention) and to receive the help of an interpreter if he does not speak the language of the trial (Article 6, paragraph 3d of the Convention). In the case of *John Murray v. The United Kingdom* the Court found that the notion of fairness of the proceedings means that the right to the defence must be presumed feom the very beggining of the proceedings (John Murray v. The United Kingdom [GC], app. 18731/91 (08/02/1996) § 66). In the case of *Salduz v. Turkey*, the Court established general principles related to the presence of defense counsel in the initial phase of criminal proceedings (Salduz v. Turkey[GC] , app. 36391/02 (27/11/2008) § 51-54). The accused must have the right to access a lawyer from the first hearing in criminal proceedings. Any limitation of this right must be adequately explained. The incriminating statement of the defendant given without the presence of lawyer cannot be the basis of a court decision. Failure to comply with these principles automatically leads to the unfairness of the entire proceedings. Although in the recent decision in the case of *Beuze v. Belgium*, the Court took the position that the questioning of a suspect in an investigation in the absence of a lawyer does not automatically lead to the unfairness of the proceedings as a whole, judges Judkivska, Vučinić, Turković and Huseyinov emphasized the importance of the *Salduz test* in their dissenting opinion (Serneels, 2018). Relativizing protection in this way does not find support either in the earlier court practice or in EU law, especially taking into account the Directive 2013/48/EU, which concerns the right of access to the defense counsel of the accused in criminal proceedings, which in itself is a confirmation of Salduz test (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings (OJ [2013] L294/1). In the case of *Imbrioscia v. Switzerland*, Judge Lopes Roja emphasized in his dissenting opinion that in the initial phase of the proceedings, the arrested person faces the criminal prosecution authorities under rather unequal conditions, and the presence of a lawyer in the subsequent stages of the procedure cannot effectively cure the earlier non-respect of the right to defense (Imbrioscia v. Switzerland, app. 13972/88 (24/11/1993). To properly understand the standards reached, it is necessary to explain the genesis of the Court's practice, starting with the case of Salduz v. Turkey.

3. Salduz test

In the case of *Salduz v. Turkey*, the applicant claimed that there was a violation of the fairness of proceedings because he was not allowed to have a lawyer present while he was in police custody. The first-instance panel of the Court found that there was no violation of Article 6, paragraph 3(c) of the Convention because the right to a defense attorney was enabled during the trial in the first-instance proceedings and during the second-instance proceedings. In addition, the applicant's testimony was not the only evidence for the conviction. The case came before the Grand Chamber. The applicant pointed out that the right to a lawyer is a fundamental right and that all the evidence against the applicant was obtained during the investigation, when he did not have the right to a lawyer, which violated the right to a fair trial. The State argued that the applicant's testimony from the investigation was not the only evidence for the conviction, that he had the right to contest the accusations in the subsequent stages of the proceedings, and that he had a lawyer after the investigation, until the end of the second-instance criminal proceedings.

The court emphasized the importance of effective exercise of the right to defense from the first police interrogation. However, that right may be limited for just cause. In that case, the Court examines whether that limitation adversely affects the fairness of the procedure as a whole. The goal of applying these principles is to protect the accused from the pressure of the proceedings authorities, to prevent errors and misconceptions of the court and to affirm the principle of equality of the parties. Bearing in mind that the defendant is in a particularly vulnerable position at the initial stage of the proceedings, this can only be compensated for with the help of a defense council. In this way, the defendant's right not to incriminate himself is also protected. The right to the presence of the lawyer of the accused, who is in custody, also protects him from abuse.

The exception to the right to the presence of a lawyer must be clearly prescribed and strictly limited in time, especially in the case of serious crimes. There is a violation of Article 6 of the Convention if the statement of the defendant, in which he admits the commission of the crime, is used as the factual basis of a court decision, if it was given without the presence of a lawyer.

In the specific case, the applicant was deprived of the presence of a lawyer during the interrogation by the police, before the public prosecutor and the investigating judge. Although the applicant had access to a lawyer in the later stages of the proceedings, the Court pointed out that his incriminating testimony was used as the main evidence for the conviction. In addition, other evidence, which was obtained on the basis of the applicant's confession, was also used as a basis for the conviction. Therefore, the Grand Chamber concluded that access to the expert assistance of a lawyer in the later stages of the procedure could not eliminate the deficiencies that arose during the investigation. The court also emphasizes the importance of the age of the applicant, who was a minor at the time of the criminal proceedings, but points out that in this particular case it is a structural error, since the Turkish procedural law prescribed a systematic restriction of the access of a lawyer during police custody for certain criminal acts. Taking into account all the facts, the Grand Chamber found a violation of paragraph 3(c) of Article 6 of the Convention.

The significance of the Grand Chamber decision in the case of *Salduz v. Turkey* is that, based on the Court's standards regarding the importance of the presence of a lawyer from the first hearing of the suspect, there was a change in the procedural legislation in many countries, and also in the court practice in the commol law system (Isobel, 2011). For example, in France, by the decision of the Constitutional Council abolished the garde á vue procedure, which provided that an arrested person could be kept in police custody for two days, without access to a lawyer and without being instructed for possibility to defend himself by remaining silent. On the other hand, the Supreme Court of the United Kingdom, reacting to the decisions of the Scottish higher courts, concluded that keeping a suspect in police custody for up to six hours without access to a lawyer is an unacceptable practice, contrary to the *Salduz* standard.

In the Salduz case, there were concuring opinions of certain judges, the first of which is the very significant position of judge Bratza, who emphasized an even more rigid position, which favors the right to defend the accused. Namely, he argued that the suspect should have the right to the presence of a defense attorney from the moment of deprivation of liberty and determination of detention, or custody, and not just from the moment of questioning. Also, the judge pointed out that it is not necessary to apply the proportionality test and examine whether the confession given in the absence of the defense attorney affected the fairness of the proceedings, but that in that case there is automatically a violation of Article 6 of the Convention. The concurring opinion of judges Zagrebelski, Kazadeval and Tirmen goes in the same direction. They pointed out that the suspects must have the right to the assistance of a lawyer from the moment of deprivation of liberty, ie. that they must have the right to a lawyer at their own will. They stated that the assistance of a lawyer is significant not only because of the attendance at the hearing, but that it includes a whole range of professional services, which are particularly related to legal aid, including discussing the case, organizing the defense, obtaining evidence in favor of the accused, preparing for the hearing, supporting the accused, checking conditions of detention, etc. The judges wanted to underline the importance of the right to the presence of a lawyer not only during the hearing, but during the entire period of detention, starting from the moment of deprivation of liberty.

The third concurring opinion was given by judges Rozakis, Spielman, Simmel and Lazarova Trajkovska. They emphasized the importance of restitution, which is more important than compensation. The judges reminded that in international law compensation for damages is subsidiary, in relation to the establishment of the status *quo ante* for the victim of rights violations. Given that the state has the discretionary power to choose the way in which it will remove the established violation of rights from the Convention, and that the Court does not have the authority to order the establishment of a specific procedure for reparation, these judges advocated that the operative provisions of the judgment include the method that the Court considers the most appropriate to eliminate the injury. In this sense, they cited examples from earlier practice where the Court ordered the retrial, as the primary way of restitution (Claes and Others v. Belgium app. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 и 49716/99, (2 /6/2005), Lungoci v. Romania app. 62710/00, (26/01/2006). Trial *de novo* is the most appropriate way to eliminate these types of violations of the rights. What is necessary in that case is the extraction of illegal evidence.

4. Consolidation of practice after the Salduz case

Considering the consequences that the *Salduz* case had on the legislation of European countries, it was to be expected that the practice of the Court would consolidate after that. However, ten years later, there was a new upheaval over the issue of the impact of the effective exercise of the right to defense on the fairness of the proceedings. This is the case of *Beuze v. Belgium* (Beuze v Belgium, app. 71409/10, (09/11/2018), in which the applicant was arrested under a European Arrest Warrant on reasonable suspicion that he had committed the murder of his partner. He was questioned in police custody, and then before the investigating judge, without the presence of a lawyer. Access to a lawyer was made possible only from the moment of detention, and until then he was questioned five times by the police, three times before the investigating judge and twice before the crown prosecutor. In addition, he could not attend other actions in the pre-investigation proceedings, including the reconstruction of events. All restrictions on the right to the presence of a lawyer were in accordance with the Law on Pretrial Detention. During the hearing in the preliminary investigation, the applicant did not admit to committing the crime. This was also the argument of the Belgian courts when they decided that the fairness of the proceedings as a whole was not violated. The first-instance court thus rejected the applicant's request to extract from the case file all the evidence, which was obtained without the presence of his defense counsel.

The Grand Chamber of the Court relied on the decision in the case of *Salduz v. Turkey*, stating that the defendant has the right to the assistance of a lawyer during detention and the entire pre-investigation phase, which includes the presence of a lawyer at the hearing, but also the of other pre-investigation actions. The Court states that this right is not absolute and is subject to certain limitations for justified reasons. These restrictions can be of a general nature, if they arise from the law, as was in the case of Salduz, or they can arise from an individual decision of state authorities, in the case of terrorism. In both cases, there must be justified and convincing reasons and restrictions must be temporary and based on an individual assessment of the circumstances of the specific case.

Further explanation represents the effort of the Grand Chamber to clarify established principles and to consolidate the practice of the Court, especially bearing in mind that in the meantime, after the Salduz case, several judgments were passed, which interpreted the content of that decision differently. It is primarily about the case of *Ibrahim and others against the United Kingdom* (Ibrahim and others v UK, app. 50541/08 50571/08 50573/08... , (13/09/2016), but also *Dayanan against Turkey* (Dayanan v Turkey, app. 7377/03 , (13/10/2009). In the first case, the Court expressed the view that the limitation of the right to the presence of a lawyer during the questioning of the suspect, even if it is without justifiable reason, does not automatically mean that there has been a violation of Article 6, paragraph 3(v) of the Convention, but that it should be examined whether the procedure as a whole was fair.

In the case of *Beuze*, the Grand Chamber agreed with this position and pointed out that in both cases, and when it comes to the general and individual limitation of the right to the presence of a lawyer, the same, two-step test must be implemented (Beuze v Belgium, §141). The first step is to determine

whether the restriction was based on justifiable reasons. The second step, which is carried out even when it is determined that there was no justified reason, is the examination of the impact of the obtained evidence on the fairness of the proceedings as a whole. Whether the proceedings were fair as a whole depends on a number of criteria, only one of which is the use of testimony given in the absence of a defense attorney. The court lists a really large number of other criteria (Beuze v Belgium, §150).

The problem with this clarification of the Grand Chamber is that after the Salduz case, and before the *Ibrahim* case, it decided in other cases, of which *Dayanan v. Turkey* is the most famous, in a different way. There, the Court found that the systematically applied general and mandatory restriction of the right to access to a lawyer led, ab initio, to a violation of the Convention. Almost ten years later, the Court departed from that standard and established a different interpretation of the *Salduz* doctrine, in the *Ibrahim* case, and then the Grand Chamber in the *Beuze* case.

Applying the aforementioned principles to a specific case, the Court established a violation of Article 6 paragraph 3(b) in connection with paragraph 1 of the Convention, in the case of *Beuze v. Belgium*, because the limitation of the right to the presence of a lawyer was not justified and there were no compelling reasons. During a strict assessment of the fairness of the procedure, the Court stated that the limitation of the right to defense was extensive. In addition, the Court emphasized the significant impact of the defendant's statements, which were given without the presence of a defense attorney, regardless of the fact that they were not self-incriminating. Also, the Jury Court did not give instructions to the jurors regarding the statements, which were obtained in the absence of a lawyer, and the Court of Cassation confirmed the first-instance decision, despite the fact that it was decisively based on those disputed statements of the defendant.

In this case as well, several judges expressed concurring opinions. Four judges, Judkivska, Vučinić, Turković and Huseyinov, although they agreed with the decision of the Grand Chamber in the specific case, considered that the Salduz test was misinterpreted. They felt that, in an attempt to consolidate practice, two completely different situations were equated. In the first, the limitation of the right to a lawyer is of a general nature, and in the second, it is individualized. The principle of automatic violation of paragraph 3(v) of Article 6 of the Convention, in the case of a general legal restriction of the right to access to counsel, is significantly weakened by the majority's view that it can be removed later during the proceedings. The judges were of the opinion that in the case of general and mandatory restrictions on the right to access to a lawyer, for which there were no justified and convincing reasons, it is not necessary to apply the proportionality test. it is already enough to establish a violation of the Convention. On the other hand, if a justified general and mandatory restriction, or an individualized restriction of access to a lawyer was applied to the defendant, regardless of whether it was justified by reasons of coercion, the two-step test of the fairness of the entire procedure should be adopted. Only in this way, according to the opinion of the four judges, can the cases of Salduz, Dayanan and Ibrahim be coherently connected.

It is interesting that the position of the Grand Chamber in the case of *Beuze v. Belgium* is contrary to the law of the European Union. Namely, after the decision in the case of *Salduz v. Turkey*, not only there was a change in the procedural legislation of numerous countries, but also the Directive on the right of access to a lawyer in criminal proceedings was adopted (OJ [2013] L294/1). Article 8 paragraph 1(d) of the Directive stipulates that deviations from the right of access to a lawyer in the pre-trial phase of criminal proceedings will be in accordance with that document only when they do not call into question the fairness of the proceedings as a whole. Given that this provision refers only to temporary and properly reasoned restrictions in an individual case, if they are based on compelling reasons, there is an interpretation that in the case of general restrictions on the right of access to counsel, which are based on the law and are not justified, there is an ab initio violation of Directive (Sernels, 2018). Therefore, it is not difficult to conclude that the correct interpretation of the judges, who highlighted the unanimous opinion in the case of *Beuze*, and that, at least when it comes to member states of the Council of Europe, which are also members of the European Union, a higher level of protection of the defendant's right to access to a lawyer is necessary, according to the *Salduz* doctrine.

5. Step forward - Dvorski against Croatia

The case of *Dvorski v. Croatia*, in which the Grand Chamber of the Court decided, is unequivocally the most important for the establishment of the principle regarding the right to choose a lawyer of one's own free will. It is about the applicant against whom criminal proceedings were conducted for the criminal offenses of murder, causing general danger and theft. In the pre-investigation procedure, the applicant was interrogated by the police, on which occasion he was assigned an ex-officio defense attorney, that is, the state claimed that on that occasion he chose a defense attorney from the list of the bar association. However, the applicant's parents hired a lawyer before that, but he was denied access to the applicant, who was in custody, and the applicant himself was not informed that he had a defense lawyer hired by close relatives, in accordance with the Criminal Procedure Code of Croatia.

Namely, the chosen defense counsel of the applicant came to the police before the hearing of the defendant began, but was prevented from accessing the room where the hearing took place, with the explanation that he did not have a written power of attorney with him. He sent a complaint to the Bar Association and the Basic Court in Rijeka. Meanwhile, during the day, the defense attorney obtained a written power of attorney from the applicant's father, after which he returned to the police station, but was again prevented from establishing contact with the applicant. During the hearing, the applicant admitted to the commission of criminal acts, and that statement was later involved in the basis of the court decision. The very next day, at the hearing before the investigating judge, he retracted his statement about the confession of committing the crime, after he established contact with his lawyer and revoked the power of attorney assigned to him.

In the application to the Court, the applicant stated that he was deprived of the right to choose a lawyer of his own free will and that he was forced to give a self-incriminating statement in the absence of the right to choose his own defense counsel. The first-instance panel of the Court decided that there was no violation of Article 6 of the Convention. The case was then referred to the Grand Chamber of the Court for consideration.

The Court first recapitulated the general principles. He recalled the principle of applying the guarantee from Article 6 of the Convention starting from the pre-investigation procedure. This was established by the earlier practice of the Court in the case of *Salduz v. Turkey*. The Court additionally emphasized the importance of applying the guarantees, which constitute the right to defense, from the first hearing in the police, considering that otherwise this basic right of the defendant would be violated, already at the initial stage of the proceedings. This position of the Court represents a recapitulation of the previous practice, where in the case of *Murray v. Great Britain*, the right to a lawyer was established, already from the arrest. The Court emphasized that the ban on communication with a lawyer 48 hours after the arrest violated the right to defense because it was at that initial stage that the defendant had to decide whether to use the right to remain silent (John Murray v United Kingdom, app. 18731/91, [GC](08/02/1996), §70.).

In the case of *Salduz v. Turkey*, the Court additionally specified that the defendant should have the assistance of a lawyer from the first questioning. This right may be limited only in exceptional cases, if there are justified reasons. Limitation of access to the assistance of a lawyer will be justified only if information can be obtained in this way to facilitate the investigation, as well as the danger of communication with other co-defendants, which would hinder the course of the investigation (Valkovic, 2016). In cases where access to communication between the defendant and the defense attorney was temporarily disabled, the Court considered the duration of that restriction (Magee v United Kingdom, app. 28135/95, (06/06/2000), §44-46, Brennan v United Kingdom, app. 39846/98, (16/10/2001), §54,55).

There is a difference between the case of *Salduz v. Turkey* where the applicant was deprived of the right to a lawyer during police interrogation while in custody, whereas in this case the applicant was deprived of the right to choose a lawyer. Therefore, in the second case, a less restrictive test is applied. The court first examines whether there were relevant and sufficient reasons for denying the right to freely choose

a defense counsel. If that criterion is not met, the Court will determine whether the denial of the right to free choice led to the unfairness of the procedure as a whole.

When examining the fairness of the procedure, the Court takes into account the nature of the procedure and the application of certain professional requirements (Meftah and others v. France, app. 32911/96 35237/97 34595/97, (26/07/2002), §44-48, Martin v United Kingdom, app. 40426/98, (24/10/2006), §90), the circumstances regarding the composition of the trial panel and the existence of the possibility of filing an appeal against the composition of the panel, the effectiveness of assistance in the defense (Croissant v. Germany, app. 13611/88 , (25/09/1992), §31, Vitan v. Romania, app. 42084/02, (25/03/2008), §58-64, Martin v United Kingdom, §90), whether the defendant's right to non-self-incrimination was respected, the defendant's age (Croissant v. Germany, §31, Martin v United Kingdom, §94,95, Klimentyev v. Russia, app. 46503/99, (16/11/2006), §117-118.) , and whether the court took into account the testimony of the defendant, which he gave on that occasion (Panovits v Cyprus, app. 4268/04, (11/12/2008), §82). In a situation where the right to an expert defense was completely absent, the defendant's right to challenge the authenticity of evidence and the use of that evidence (Panovits v Cyprus, app. 4268/04, (11/12/2008), §82), whether the defendant was in custody (Salduz v Turkey, §60) and whether that evidence had a significant impact on the passing of a conviction against the applicant, are also taken into account. and whether the judgment was based predominantly on that evidence (Salduz v Turkey, §57, Panovits v Cyprus, §76, 82). In the specific case, the Grand Chamber based its decision on several arguments. In other words, the Court answered the questions, whether the applicant was represented by a lawyer, who was chosen on the basis of informed consent, and whether there were relevant and sufficient reasons in the interest of justice to deny him access to a lawyer, who was chosen by his parents, whether the applicant waived the right to a lawyer of his choice and, finally, whether there was a derogation of the fairness of the procedure as a whole.

In contrast to the position of the first-instance panel, the Grand Panel interpreted the denial of the right to a lawyer free of choice differently. The court first noted that the applicant was not even informed that his parents had hired a defense attorney. Instead of enabling contact with the applicant, the police officers denied the lawyer access to the room where the interrogation took place. The applicant showed his desire to be represented by the chosen lawyer, which can be seen from the fact that the very next day, when he came into contact with him, he withdrew his statement admitting the commission of the criminal act. The court concluded that the applicant was denied the right to choose a lawyer, in that he was not presented with a list of the bar association, but the police officers called the lawyer themselves, at their own discretion. Based on previous practice, the Court concluded that there were no justified reasons for restricting the right to choose a lawyer. Although the applicant's incriminating statement was not decisive evidence for the conviction, the Court nevertheless found that the fairness of the proceedings was violated in that this evidence determined the further course of the criminal proceedings against the applicant. Therefore, a decision was made that there was a violation of the minimum rights of defense and, consequently, a violation of Article 6 paragraph 3(c) of the Convention.

6. Compliance of domestic legislation with the practice of the Court

Article 68 of the Criminal Procedure Code of Serbia (hereinafter: CPC) prescribes the rights of the accused. Among other rights, the defendant has the right to defend himself alone, or with the professional assistance of a lawyer (Article 68 paragraph 1 point 3 of the CPC).The defendant has the right to have a lawyer present at his interrogation (Article 68, paragraph 1, point 4 of the CPC). The procedural body is obliged to teach the defendant about these rights before the first hearing. In addition to the above-mentioned rights, the arrested person has the right to have a confidential interview with the defense attorney before the hearing. That conversation can be monitored only by watching, but not by listening (Article 69 paragraph 1 point 2 of the CPC). The legislator has foreseen several situations in which defense is mandatory. If the defendant has been detained, if detention has been ordered, or a ban on leaving the apartment, he must have a lawyer from the moment of deprivation of liberty (Article 74 paragraph 1 point 3 of the CPC).

In all situations where a mandatory defense occurs, procedural law gives preference to the chosen lawyer. This is clear from the provision from paragraph 1 of Article 76 of the CPC, which stipulates that in all cases of mandatory defense, an ex officio lawyer will be appointed to the defendant, if the defendant does not choose him beforehand. The defense attorney is appointed according to the order from the list submitted by the bar association to the authority conducting the proceedings. The list of lawyers is published on the notice board and the website of the bar association and the court.

When the police summons the suspect for questioning in the pre-investigation procedure, they will warn him in the summons that he can hire a lawyer (Article 289 paragraph 1 of the CPC). A citizen, who has been summoned by the police for the purpose of gathering information, and in the course of the informational interview meets the conditions to become a suspect, will be immediately instructed about the right to hire a defense attorney (Article 289 paragraph 2 of the CPC). Interrogation by the police will be possible only with the consent of the suspect, according to the rules on interrogation of the accused, and it is possible only in the presence of the defense attorney. If those conditions were met, the evidence will be legal and will be able to serve as evidence for a court decision. The police can arrest a person for whom one of the conditions for detention is met and, without delay, take him to the public prosecutor. The public prosecutor can listen to the arrested person, but before that, it is mandatory to teach him about his rights, and also to enable him to contact the defense attorney personally, through his parents, or a third party by phone or other means of correspondence. If necessary, the public prosecutor will help the arrested person find a lawyer (Article 293 paragraph 1 of the CPC). An arrested person can be heard without the presence of a defense attorney only if it is a question of optional defense, and the arrested person declares that he does not want to hire a lawyer, or does not engage him within 24 hours of being allowed to communicate. In the case of mandatory defense, the arrestee's statement that he does not want to hire a lawyer, or the failure to hire him within 24 hours, is irrelevant. In that case, an ex officio defense attorney will be appointed.

In the case of detaining a suspect for up to 48 hours, by decision of the public prosecutor, the suspect must have a lawyer before the decision on detention is made. Also, in this case, preference was given to the chosen defender. If the suspect does not hire a defense attorney of his own choice, within four hours of the adoption of the detention decision, the public prosecutor will appoint an ex officio defense attorney from the list of the Bar Association (Article 294 paragraph 5 of the CPC). The suspect can also be questioned in the investigation. The public prosecutor is obliged to invite the suspect's defense counsel to attend the hearing (Article 300 paragraph 1 of the CPC).

From the aforementioned provisions of the Code of Criminal Procedure, it can be clearly concluded that the presence of a lawyer is prescribed from the deprivation of liberty itself, whether it is an arrest, detention, prohibition to leave the apartment, or detention. The defense attorney must be present during the hearing of the defendant.

When it comes to mandatory defense, this obligation is absolute. In the case of an optional defense, there are exceptions. The defendant can expressly waive the presence of a lawyer at the hearing, in the case of optional defense. Also, the defendant can be heard without the presence of a lawyer if he does not choose one within 24 hours from the time he was given the opportunity to communicate by phone or in another way. Given that the defense is mandatory from the moment of deprivation of liberty, the hearing of the defendant without the presence of a lawyer is possible only in the case of optional defense and if the defendant is at liberty. Therefore, the provisions of serbian procedural law are in accordance with the practice of the Court, which requires the presence of a defense attorney during the hearing of the defendant in the case of deprivation of liberty.

The Code of Criminal Procedure gives absolute priority to the choice of the defendant when it comes to defense counsel. Even when an ex officio defense attorney is appointed, the defendant has the right to revoke the power of attorney and replace him with a lawyer of his own choice. In addition to the defendant, legal representatives, spouses, blood relatives in the direct line, adoptive parents, foster parents, brothers and sisters, as well as a person who lives in a common-law relationship with the defendant, can choose defense counsel on his behalf and on his behalf and authorize him with a power of attorney. or to

some other more permanent community of life (Article 75 paragraph 1 of the CPC). The choice of a lawyer on behalf and on behalf of the defendant is not possible only if he expressly opposes it. In this regard, the procedural legislation is also in accordance with the achieved standards of the right to defense from the practice of the Court. The only provision, which in our opinion is unnecessary and which can potentially cause abuse, is from Article 293 paragraph 1 of the CPC, which imposes an obligation on the public prosecutor to help the arrested suspect find a lawyer. Although the legislator clearly had good intentions, assistance in choosing a lawyer can lead to the suggestion of lawyers who are "loyal", and due to the former practice of appointing only lawyers close to the police or the public prosecution, a list was introduced from which lawyers are called.

7. Conclusions

The jurisprudence of the Court has developed the position that the unfairness of the procedure will lead not only to the direct use of illegally obtained evidence, but also if the decision of the domestic court is based on evidence, which is indirectly illegal, because it comes from illegally obtained primary evidence. We believe that the decisions of the Court were correct, precisely in order to create a precedent, which would emphasize the importance of affirmation and the creation of an environment for the effective use of all the benefits of the right to defense already from the pre-investigation procedure, especially bearing in mind that at that stage the procedure is still not partisan. therefore equality of arms is not so easy to achieve. In addition, it should be recalled that the factual and legal basis of any meritorious court decision should be made up of decisive facts, which were determined by the evidence presented at the trial. Finally, special attention should be paid to the doctrine of the fruit of the poisonous tree, especially if one of the key pieces of evidence used in the preliminary investigation procedure is the defendant's confession, which often has a decisive influence on the further assembly of the mosaic of evidence, which the authorized prosecutor will use during the indictment and later when representing the prosecution at the trial. The domestic regulation in Serbia is mostly in line with the standards achieved by the practice of the Court. Nevertheless, the problem of implementing the above standards in practice remains, since it is no secret that there are cases of imposing lawyers "loyal to the police" on the defendants in the pre-investigation procedure, which they accept precisely out of fear of repression.

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