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PRACTICES OF CASE PROCEEDINGS BY THE SUPREME COURT OF FINLAND, SUSPECT'S RIGHT TO DEFENCE BY MEANS OF LEGAL ASSISTANCE.

Abstract:

The right to protection of the suspect or accused of a criminal offense established by the Council of Europe, the UN General Assembly and the European Court of Human Rights, is one of the basic constitutional guarantees, designed primarily to provide reliable protection of human rights in criminal proceedings. The practices of the European Court (the case-law of the European Court) should be a defining aspect in the interpretation of national provisions of the Convention.

This article is dedicated to a problematic issue of protecting the rights of detained suspects and defendants in criminal proceedings of the national courts of Finland and the implementation of jurisprudence of the European Court of Human Rights, supported by the principles and standards of the International Covenant on Civil and Political Rights as well as the decisions of the UN Committee on Human Rights. The article analyses norms of international law, judicial precedent of the European Court of Human Rights in the decisions of the Supreme Court of Finland and the review of applications to rescind prior court decision on the basis of a ruling by the European Court of Human Rights.

Keywords:

European Convention, international law, national law, the right to the protection of the suspect, a fair trial, the Supreme Court of Finland.

JEL Classification: K33, K14, K10

In most countries of the European Union, persons suspected of committing crimes are unaware of a full and unrestricted access to legal assistance during the initial stages of a criminal investigation. The article considers the normative failure in standards for the protection of the rights of the detained suspects and defendants in criminal proceedings in the national courts of Finland and the implementation of jurisprudence of the European Court of Human Rights, supported by the principles and standards of the International Covenant on Civil and Political Rights as well as the decisions of the UN Committee on Human Rights. The suspects in criminal cases have the right to request legal assistance after an arrest, detention, or when a position is under significant influence of the circumstances, which they find themselves in. This is clearly and consistently defined in the jurisprudence of the ECHR, with examples of judgments and exerted influence on decisions made by the national courts of Finland, being one of the focal points of this article.

The European Convention is recognised by all participating States, which undertake to ensure that every person within their jurisdiction has the rights and freedoms defined in Section I of the European Convention and the obligation to ensure compliance by the Finnish national legislation with the norms set by the Convention. Consequently, the jurisprudence of the European Court (the case-law of the European Court) should be a defining aspect in the interpretation of national provisions of the Convention, where conflicts between the Convention's interpretation by the European Court and national legislation occurs, the last word should be with the Convention rather than a national legislation.

Based on 231 reviews of the judgements made between 1993-2014 by ECHR and subsequent identification of 82 violations of Article 6 of the Convention by Finland, an issue with aligning the Finnish legislation with the Convention, as well as remedy to the violation of the rights of the applicant, has been brought to light. In formulating the problem multiple studies were conducted into judgments made during a period from 1995 to 2014 of 155 decisions of the Supreme Court of Finland to rescind prior court ruling, it was noted that not every ECHR set violation of human rights was a cause for the overturning of the judgment. The Supreme Court reviews cases in the event that procedural violations cast doubt on the result of a case (for example, the court refused to interrogate important witness), or the applicant continues to suffer from the adverse effects of a judicial act (for example, has been in prison) and compensation paid by the ECHR has not provided a remedy to the violation of rights. It was concluded that despite the numerous references cited to the case law of the ECHR, the Supreme Court rules based on national legislation, in particular the Procedural Law and the Preliminary Investigation Law of Finland. Despite the fact that maiden attempts were made to implement judicial precedent as a source of law in a form of the ECHR judgment and commitment of their decisions into the legal system of Finland, the mechanism of the application and operation of judicial precedent requires improvement and amendment to legislation. The author proposes an amendment to the Procedural Law of Finland Article 31 of the Act and Criminal Proceedings Law in particular, which defines only the request for an appointment of a legal defence counsel. This chapter should be brought in line with article 6 of the Convention, adding, "The right to the protection of the suspect through means his own choosing."

Monographs by former judge of Finland to the ECHR in the period of 1990-1999 Matti Pellonpää (Euroopan ihmisoikeussopimus) ¹, Markku Fredman (Rikosasianajajan

¹ Matti Pellonpää, Monica Gullans, Pasi Pölönen, Antti Tapanila. Euroopan ihmisoikeussopimus. Talentum. 2012.

käsikirja, 2013)², Hirvelä Päivi -Heikkilä Satu (Ihmisoikeudet)³ and Finnish doctoral dissertations⁴ and⁵, are all dedicated to a research into this problem, describing use of judicial precedent of ECHR in criminal cases handled by the Finnish Supreme Court, decisions to rescind prior rulings on the basis of the ECHR judgment and identified violations of Article 6 of the Convention.

For the first time a suspect's right to legal counsel was implemented at a constitutional level in the 6th Amendment to the US Constitution of 1787. Main content of this right in most countries is reduced to the right to request the legal assistance during the court proceedings, especially criminal, as well as in the event of a threat of criminal prosecution. Furthermore, the constitutions and the law generally recognizes the right of the underprivileged and financially vulnerable to receive legal assistance free of charge.

The Council of Europe, the UN General Assembly and the European Court of Human Rights have established the right to protection of a suspect or accused of a criminal offense. All these international instruments lay down the right of the accused of a crime to a legal assistance.

The right to qualified legal assistance, in any democratic state, is one of the fundamental human rights enshrined in Article 6 of the European Convention on Human Rights and is one of the basic constitutional guarantees, designed primarily to provide reliable protection of human rights in criminal proceedings. The Convention confirmed the position that everyone charged with a criminal offense has the right to defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be provided it free of charge when the interests of justice so require (p.3 Article 6).

The International Covenant on Civil and Political Rights likewise determines the right to qualified legal assistance. The presence or absence of legal assistance often determines whether a person can access the relevant proceedings or participate in them in a meaningful way. Although paragraph 3 d) of Article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings, the state should provide free legal aid in other cases, to persons who do not have sufficient means to pay for it.⁶

The right to protection of the suspect or accused of a criminal offense is provided for by various international standards.

Article 48 of the Charter of Fundamental Rights of the European Union states:

"... 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

² Markku Fredman, Rikosasianajan käsikirja. Talentum, 2013 . Helsinki. s.945.

³ Hirvelä Päivi- Heikkilä Satu. Ihmisoikeudet . Edita Publishing Oy. Porvoo.2013. 943.s

⁴ Leino-Sandberg Päivi. The Politics of Human Rights in the European Union. University of Helsinki. 2005 . Doctor of Laws. <https://helda.helsinki.fi/bitstream/handle/10138/18333/particul.pdf?sequence=2>

⁵ Kari Uoti. Euroopan ihmisoikeustuomioistuim - lainkäyttäjän oikeuden tekijänä. University of Helsinki. 2004 . Doctor of Laws. <http://ethesis.helsinki.fi/julkaisut/oik/julki/vk/uoti/euroopan.pdf>

⁶ International Covenant on Civil and Political Rights. The Human Rights Committee , 90 session, Geneva, 9-27 July 2007, General Comment 32. Article 10 . <https://www1.umn.edu/humanrts/russian/gencomm/Rhrcom32.html>

Paragraph 3 of Article 52 of the Charter states that the rights guaranteed by Article 48 of the Charter, are included in the law, have the same meaning and application as the rights guaranteed by the European Convention on Human Rights.⁷

Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners⁸, as well as Resolution (73) 5 of the Committee of Ministers of the Council of Europe states⁹:

«For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official . »

The wording of the International Covenant on Civil and Political Rights of International Covenant on Civil and Political Rights (hereinafter ICCPR) and the European Convention on Human Rights concerning the right to legal assistance in criminal proceedings somewhat differ but practical approaches of the Committee on Human Rights and the European Court of Human Rights to this issue are nearly identical. In the ICCPR the right to legal assistance in criminal proceedings mentioned in two contexts: first, in paragraph 3 (b) of Article 14 as the right to choose a legal defence counsel and to communicate with him in order to prepare defence; and secondly, in paragraph 3 (d) of Article 14 as the right to defend himself in person or through legal assistance of his own choosing. The consequences of these provisions is that a person who is charged with a crime, should have the right to use the services of a legal assistant in the preparation of his defence and for the duration of the court proceedings. With regard to the European Convention on Human Rights, the right to legal assistance is mentioned only once, in paragraph 3 (c) of Article 6, as the right to defend himself in person or through legal assistance of his own choosing. European Court of Human Rights considered item 3 (b) and 3(c), Article 6 together implying the right to services of a legal assistant during preliminary phase of a trial.¹⁰

The Body of Principles was approved by UN General Assembly resolution 43/173 of 9 December 1988 for the Protection of All Persons under detention or imprisonment in any form. In accordance with the principle 17 of the Code, if the detainee does not have a lawyer of their choice, it is in all cases where the interests of justice so require, shall have the right to have one appointed for him by a judicial or other authority, without fees, if that person does not have sufficient funds.

The constitutions of many countries provide the right for legal assistance. In all circumstances, the accused shall have the assistance of a competent legal defence counsel; in the case where the accused is not able to do so himself, a legal assistant is appointed by the state¹¹. Just as no one can be detained or subjected to imprisonment, if he is not immediately charged and given the right to contact a lawyer. Likewise, no one can be detained without due reason that, with the appropriate requirements present, shall be communicated immediately to the open court session

⁷ Charter of Fundamental Rights of the European Union. Charter of Fundamental Rights. Art. . 48.

⁸ Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules for the Treatment of Prisoners).

Rule 93 . 30.08.1955 . http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁹ Resolution (73) 5 of the Committee of Ministers of the Council of Europe . minimum Rules for the Treatment of Prisoners. 19/01/1973 . <http://www1.umn.edu/humanrts/russian/euro/Rres&recomm.html>

¹⁰ European Convention on Human Rights, as amended by Protocols 11 and 14 .

¹¹ The Constitution of Japan . Art. 37, p.3 . <http://anime.dvdspecial.ru/Japan/constitution.shtml>

in the presence of the detainee and his legal assistant. According to the Constitution of Finland, public authorities are obliged to ensure the implementation of fundamental and human rights ¹².

October 7, 2013, the EU Council of Justice and Home Affairs approved the Directive (PE -CONS 40/13) on the right to legal assistance. ¹³ Directive has established a minimum set of pan-European requirements on access to a lawyer during criminal investigations. These requirements, in particular provide for the right of suspects to legal assistance, the principle of confidentiality of communication between the suspect and the lawyer, the right of a suspect to inform third parties of his arrest, a suspect's right to communicate with third parties and representatives of the Consulate of the country. Directive on the right to legal assistance became a part of the "road map" for the introduction of pan-European minimum rights for suspects in criminal cases.

Recommendation R (year 2000) of the 21st Committee of Ministers of the Council of Europe "On freedom of exercise of the profession of legal defence counsel" (adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, in 727th meeting at the level of deputy ministers) ¹⁴ has established a number of fundamental general principles: States - members of the Council of Europe should take all measures to ensure that legal assistants can exercise their profession without discrimination and without obstacles, both from the public and the authorities. In its activities, a legal aide must enjoy freedom of speech, movement and association, should not be subjected to pressure, when they act in accordance with their professional standards. Legal assistants should be guaranteed access to their clients, as well as access to court and to the relevant documents relating to the actions of defence. "

The right to defend himself in person or through legal assistance of his own choosing.

Paragraph 3 c of Article 6 entitles the accused 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 require. Paragraph 3c consists of four articulate components, namely: 1) the right to defend himself in person (Foucher v. France. 18/3/1997), 2), under certain circumstances, through legal assistance of his own choosing (Campbell and Fell v. The United Kingdom, 28/6/1884), 3) if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (Murray v. the United Kingdom, 28/10/1994) and finally, 4) the right to practical and full legal assistance (Bogumil v. Portugal, 7/10/2008).

The right to choose their own legal assistance is a privilege of those applicants who have the means to pay for it (Campbell and Fell v. The United Kingdom). The applicant receiving free legal assistance does not have the right to choose his own lawyer (Krempovskij v. Lithuania.). If a free lawyer explicitly fails in their responsibilities, authorities have a positive obligation to replace them (Artico v. Italy).

¹² The Constitution of Japan . Art . 34. <http://anime.dvdspecial.ru/Japan/constitution.shtml>

¹³ Council of the European Union. Luxembourg, 7 October 2013 , 14440/13 (OR.en) Presse 398 . [Http://www.echr.coe.int/Pages/home.aspx?p=home](http://www.echr.coe.int/Pages/home.aspx?p=home)

¹⁴ (2000) 21 Recommendation of the Committee of Ministers to the members States on the freedom exercise of the profession of lawyer. 25.10.2000 .

The right to choose a legal assistant is not absolute: a use of restrictions is possible for the purposes of proper administration of justice to the number of lawyers, their qualifications and rules of conduct when speaking in court (Ensslin and others v. Germany, 1978).

The accused, which is being tried in absentia, has to be represented by the legal representative of their choice (Karatas and Sari v. France), May 16, 2002, pp. 52-62).

The decision whether to allow or not to allow access to a legal assistant (free or paid) shall be under the control of the court and should not be taken by the executive authority, at its discretion (Ezeh and Connors v. The United Kingdom).

For the first time the value of a lawyer in the court hearing was assessed by European Court of Human Rights during the case review of Golder v. The United Kingdom (21.2.1975)¹⁵, Airey v. Ireland (9.10.1979)¹⁶ and Artico v. Italy (13.5.1980)¹⁷.

Applicant Golder appealed to the European Commission on Human Rights in April 1970 with a complaint in which he claimed that the refusal to allow him to consult a legal assistant is a violation of Article 6 paragraph 1, which guarantees the right to access of justice for the determination of civil rights and obligations. He also insisted that there had been a violation of Article 8, expressed in the fact that he was denied the correspondence, which is an integral part of keeping contact with a lawyer.

The applicant Airey tried to get a court order for separation, which is made by the High Court. Free legal assistance in cases of this kind is not available, and Mrs. Airey did not have sufficient funds to pay the cost of the trial. Article 6 para. 3 "c" applies only to criminal proceedings. However, despite the absence of such rules for disputes in civil cases, Article 6 para. 1 may in some cases can compel the state to provide assistance of legal aid when it is necessary to ensure effective access to justice or because of the fact that for certain categories of cases, legal representation is required under the domestic law of some countries - participants, or because of the complexity of the process.

To file a complaint in the Court of Cassation applicant Artico had been granted legal aid. However, officially appointed counsel informed the applicant that he was not able to carry on his work because of other commitments. After which the applicant Artico repeatedly appealed to the Court of Cassation and the prosecutor of the court to appoint another lawyer instead, arguing that it violated the right to protection. However, an alternative lawyer was never appointed and no steps were taken to make initial court-appointed lawyer fulfil his obligations. The Court recalled that the Convention is intended to guarantee not theoretical or illusory rights, but their practical and effective implementation; This is particularly true for the right to defence, which occupies a prominent place in a democratic society, as well as the very right to a fair trial, from which it follows (judgment of 9 October Airy 1979, Series A, t. 32, p. 12 - 13, p. 24). As rightly stressed by representatives of the Commission, Article 6 paragraph 3 "c" refers to "assistance" and not the "appointment of legal representative." The appointment itself does not ensure effective assistance since appointed lawyer may

¹⁵ Case of Golder (Golder) against the Pound , Strasbourg, 21 February 1975 .
<http://www.echr.coe.int/Pages/home.aspx?p=home>

¹⁶ Case of Airey (Airey) against Ireland . (Strasbourg, October 9, 1979).
<http://echr.ketse.com/doc/34720.97-en-19990921/view/>

¹⁷ Case of Artico v. Italy (Artico v. Italy): Judgment of the European Court of Human Rights on May 13, 1980 (Application N 6694/74). <http://www.echr.coe.int/Pages/home.aspx?p=home>

die, become seriously ill for a long period, be deprived of the opportunity to act or shirk the responsibilities. Authorities, if they are notified of the arisen situation, must either replace him or force to perform his duties. Government's restrictive interpretation of this subparagraph leads to results that are not reasonable and do not correspond to the meaning of subparagraph "c", and Article 6 as a whole, because in many cases, free legal aid may be futile.

The European Court concluded that the opportunity to appear in person before the Court did not provide the applicant an effective right of access, and therefore does not constitute an appropriate means to protection of violated rights.

Decision-making practice of the ECHR in criminal cases in the Supreme Court of Finland

The Supreme Court in a case of Finland 2012: 45 on charges of aggravated narcotic crime, charges of negligent homicide and unintentional mutilation, considered the general rules and principles of appeals and the importance of the testimony during the preliminary investigation. After the detention of a foreign national on 11.12.2009, the suspect was appointed a legal assistant, who was not present at the interrogation. On the 12-12-2009 questioning was conducted in English, but the protocol made in Finnish, which the suspect did not understand. 15.12.2009 saw the suspect being appointed a new legal assistant, who was not present on the continuation of the interrogation. According to the protocol prior to questioning, the suspect was informed of the right to legal assistance, but he was not informed of the right to remain silent and not to testify against himself. The police knew that the suspect did not meet with an appointed lawyer prior to questioning ¹⁸.

According to the Law on the preliminary investigation 10 § 1 Parties involved in the process have the right to use a services of a legal assistant during the preliminary investigation. Criminal suspects, arrested or detained shall immediately be notified of their right to an attorney. According to 29 § 2 of the Preliminary Investigation Law, the suspect, prior to questioning, has to be made aware of the right to use a lawyer during the preliminary investigation and when it is possible to assign a defence counsel. According to § 31 of the Preliminary Investigation Law, the legal assistant of the suspect has the right to be present at the interrogation, if the head of the investigation, for a good reason, does not prohibit it. In a criminal trial in accordance with Chapter 2, paragraph 1, §2, subparagraph 2, the suspect at their request must be appointed a legal assistant if he had been arrested or detained. The Supreme Court also referred to Article 6, paragraph 3 c) of the Convention, according to which each of the suspect has the right 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 it is required in the interests of justice. In practice, the ECHR decision to be the right for a defence counsel is considered necessary when the issue is a serious crime which constitutes a punishment by means of imprisonment or when a difficult legal or factual issue is present (for example in the *Benham v. The United Kingdom* 10.6.1996, p. 60 - 64, *Katrtsch v. Ranska*, 4.11.2010, p. 31).

The Supreme Court of Finland referred to the practical application of Article 6 paragraph 3 of the Convention, which emphasises the right of a suspect of a crime to legal counsel prior to the pre-trial investigation. (*Salduz v. Turkey* 27.11.2008, pp 54 - 55 also. *Pishchalnikov v. Russia*, 24.9.2009, pp 69 - 70, *Leonid Lazarenko v. Ukraina*,

¹⁸ The Supreme Court of Finland. KKO 2012:45. R2011/704, 9.5.2012. www.finlex.fi

28.10.2010, p. 50, Stojkovic v. Belgia, 27.10.2011, pp 50 - 53 ja Trymbach v. Ukraina, 12.1.2012, p. 60).

The Criminal Procedure Code of Finland, Chapter 2, § 6 states that the legal defence assistant must act in accordance with the rules of professional conduct for legal assistants to follow the interests of their customers and complying with the law. According to § 7 of the same chapter a legal assistant must immediately hold talks with his client and start preparing for his defence and to take such measures, which require compliance with defendant's rights.

The suspect took a stance that he has informed the police that the interrogations were to be conducted through an interpreter. The suspect believed that he and the police did not understand each other, and for this reason, the protocols did not match his testimony.

In accordance with Chapter 17, paragraph 32 § 2, of the Procedural Law, previously given testimony of witness to the court, prosecutor or police authorities, can be read out during the interrogation of a witness only when he, in his witness statement, eliminates what was previously said, or when the witness explained that he can not or does not want to say anything on the case. In judicial practice in criminal cases, in accordance with the law, Chapter 6, § 7, paragraph 2, in questioning of case participant, in order to adhere to the appropriate parts of the evidence, the above previously mentioned provisions for the examination of witnesses. In accordance with chapter 17 § 2 of the Procedural Law must be "free to decide" what is considered to be true.

The Procedural Law of the Chapter 17 §32, or in the Judicial Practice Law in criminal cases Chapter 6 §7 is not regulated, can an appeal to the testimony of a suspect in the preliminary investigation be interfered with in certain situations.

The Supreme Court also referred to the application of Article 6 3 c in KKO: 2013: 25.

For example, in its decision, the Supreme Court (KKO: 2011: 91)¹⁹ stated that in the current legislation there is no general provision prohibiting the use of evidence or the so-called ban disposal. Only the fact that the evidence or the information contained in the proof, obtained through illegal or otherwise invalid method does not necessarily mean that such evidence cannot be used in court proceedings. If the preparation of the information contained in the proof point to serious violation of the law, the question may arise about banning the use of evidence in a particular case. At the end of the scale is, on the one hand, the seriousness of the offense and on the other hand, the interest in the investigation of the crime (§8 and §9). When use of this evidence is allowed, the hearing shall determine in accordance with the principle of "free decision", did the illegal means or improper application method of procuring information affect the reliability of the evidence (§17). It has long been considered to be clear that, for example, a statement obtained under torture can not be used as evidence at the hearing, despite the fact that the prohibitions on such evidence, the law is not settled (see. Example Presentation to the Government 36/1989 vp, p. 4).

The starting point in the jurisprudence of the court sessions on Human Rights considered being such that the evidence and issues relating to the admissibility of evidence are determined by national law (Al-Khawaja and Tahery v. United Kingdom, 15.11.2011, paragraph 118). The use of illegally obtained evidence material as part of

¹⁹ The Supreme Court of Finland. KKO 2011:91. R2010/419, 2.11.2011. www.finlex.fi

the overall evidence is not contrary to Article 6 of the Convention, if the process as a whole fulfils the requirements of a fair trial ((Allan v. United Kingdom, 5.11.2002, paragraphs 42-43 and Gafgen v. Germany, 30.6. 2008). In determining whether the proceedings as a whole were fair value, it is considered to be vital that the quality of evidence, which are the basis for a criminal conviction, does not pose a threat to the reliability of evidence under the circumstances of their procurement (Lutsenko v.Ukraine, Violation of protection against self-incrimination of the suspect, during the procedure for obtaining evidence, can be a debilitating factor to its reliability).

The Supreme Court of Finland ruled that during the case proceedings the evidence presented on all three charges was not based on evidence obtained during the preliminary investigation, overturning the ruling made by the Court of Appeal regarding all three parts of the accusations and subsequently has returned the case back to the Court of Appeal for a re-trial.

At the appeal hearing for the case KKO:2013:25²⁰, the Supreme Court of Finland considered the question of the right of the accused to a legal defence assistant and examination of witnesses during the preliminary investigation. According to paragraph 10 § 1 of the Preliminary Investigation Law, the suspect has the right to access legal assistance during the preliminary investigation. Detained, arrested and jailed suspect, accused in the crime, should be immediately notified of his right to use a legal assistant. The Court referred to the application of the law in *Salduz v. Turkki*. After a case of *Salduz*, ECHR issued more than 100 decisions that constitute a clear and consistent line of jurisprudence on the use of evidence obtained from a suspect during interrogation or other investigative steps, when the suspect does not have the required legal assistance, is a violation of Article 6 of the ECHR. In this series of decisions contains a detailed explanation to when a person has the right to access legal assistance and when this right may be denied.

According to paragraph 2 § 29 of Preliminary Investigation Law, prior to the interrogation, the suspect needs to be made aware of the right to use legal assistance during the preliminary investigation and then, when he may be provided with a legal defence assistant. According to paragraph 2 § 30 of the Preliminary Investigation Law at the request of the suspect a witness must be present during the interrogation process, in accordance with § 43 of Chapter 17 of the Procedural Law, prior to the interrogation a suspect needs to be informed of his right to invite a witness to the questioning. Procedural Law, Chapter 2, § 1, Part 2, subparagraph 2, states that at the request of the suspect he must be provided with legal assistance if he had been arrested or detained.

The European Convention on Human Rights in Chapter 6, paragraph 3, subparagraph C, refers to the right of a suspect in a crime to legal assistance, according to which the accused has the right to defend themselves or through a legal assistance of his own choosing. And if he is unable to pay for the legal aid, it is available, on request, free of charge. A similar regulation exists in the Covenant on Civil and Political Rights of International Covenant on Civil and Political Rights, article 14, part 3, D.

As defined above in paragraph 9 of the Supreme Court decision KKO:2012:45, the European Court of Human Rights, 6 article, paragraph 3, subparagraph C, stressed the legal right to a legal assistance by a suspect, who was remanded in custody on suspicion of a crime, immediately at the start of the preliminary investigation. For

²⁰ The Supreme Court of Finland. KKO 2013:25. R2012/340, 10.4.2013. www.finlex.fi

example in the case of *Salduz v. Turkey*, 27/11/2008 the Court underlines, that: the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

Thus, from the above-mentioned decision of the Supreme Court, further conclusions are drawn, that according to the court hearing on Human Rights, Article 6 of the Convention on Human Rights does not prevent a suspect from not to exercise his right to a legal assistance. Refusal can only be considered effective if it is made voluntary and unequivocally, and if it has a value, taking into account the comparable minimum guarantee of success in the case of *Panovits v. Cyprus*, 11/12/2008. The Court reiterates that a waiver of a right guaranteed by the Convention - in so far as it is permissible - must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance. Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom (dec.)*, no. 30900/02, 9 September 2003).

In the case of *Yoldaş v. Turkey* 23/02/2010 the absence of a lawyer during the applicant's time in police custody had not resulted from systematic application of the relevant legal provisions. A law enacted in July 2003 had lifted the restriction on the accused's right to be assisted by a lawyer in proceedings before the National Security Courts. Hence, the applicant had been entitled in principle to request the assistance of a lawyer. Voluntarily not exercising a right to legal assistance suggests that the suspect was informed of his right to counsel, the right to remain silent and not to contribute to self-incrimination.

In case KKO:2012:45 it was undetermined, whether the suspect was aware of the content of the suspicion of a crime. In fact there was no reference to the fact whether the suspect was fully aware of the consequences to the refusal of legal defence counsel and witness during the interrogation, or was forced, inclined or otherwise made to state circumstances unfavourable to him.

Based on the above facts, the Supreme Court ruled that in this case there are no grounds to suspect that during the preliminary investigation the suspect's rights had been violated in such a way that his testimony could not be used as evidence against him. The Supreme Court decided that in this situation there are no obstacles for the use of the suspect's testimony, procured during the preliminary investigation, as evidence in the case.

The Supreme Court of Finland ruling on 2011:109 is rather significant, where a criminal case of Jippii Group Oyj was twice returned for a re-trial to the Helsinki Court of Appeal²¹. The case was heard in the Helsinki Court of Appeal on 15.4.2011, with a reference to the European Convention Article 6 of the Human Rights, which guarantees everyone the right to a fair trial.

This trial culminated in 21.12.2012, when the Helsinki Court of Appeal found all the defendants not guilty and ordered the state to pay the defendants approximately 4 million euros in legal costs. The Court referred to the case of Xheraj v Albania 29.07.2008. The European Court of Human Rights has stated that the principle of legal certainty is a cornerstone of the rule of law and it is integral that the final judgment of court did not cast a shadow of doubt. However the prerequisites for legal certainty not need be absolute.

According to §4 of the Protocol 7 to the Convention does not prevent the reopening of the case in accordance with the law and penal - procedural rules of the State concerned, if there is evidence of new or newly discovered facts, or if in the previous proceedings have had a fundamental defect that affected the outcome of the case.

On the other hand, the ECHR ruled that the continuation of the trial could be at odds with the requirements set by Article 6, in a particular case, depending on the circumstances. The trial examined the principle of legal certainty and, in particular, Butusina V Romania 08.02.2011 and Xheraj V Albania. In determining the penalty and consequences of imprisonment the Court of Appeal relied on the abolition of the principle of *reformatio in peius* in the decision and dismissed the prosecutor without consideration to the extent that the trial court before the sentence was cancelled in whole or in part.

Upon reviewing an appeal, the Supreme Court pointed out that the ECHR referred to the principle of *reformatio in peius* only in some rulings. Even when a judicial review by the Court of Appeal violated the national law based on the principle of the abolition of *reformatio in peius*, such as in the judgment of the ECHR (Chervonenko v. Russia from 01.29.2009 p. 36), which noted that "the sentencing and the definition of the cassation instance dated 31 August 1999 contradicted the principle of legal certainty that follows from Article 6 § 1 of the Convention, which, in the circumstances of this case required accounting by lower instance court for quashing of the final, implemented judgment and consideration of new limits, set by a higher court. Failing to comply with instructions of a superior court, these courts also neglected the requirements of national law, which prohibits the deterioration of the position for a convicted person, to which the applicant was entitled, as the issue of the appeal is to his advantage. In addition, the failure led to a second review of the case by way of supervision that resulted in the abolition of another judicial acts that have entered into force. Furthermore the Supreme Court referred to § 21 of the Finnish Constitution and article 6 of the Convention on independent and impartial tribunal, including the right to a fair trial.

By the decision of the Supreme Court the ruling of the Court of Appeal was overturned and the case remanded for re-examination.

²¹ The Supreme Court of Finland. KKO 2011:109. R2011/544, 29.12.2011. www.finlex.fi

Case proceedings by Helsinki Court of Appeal required 24 trials and their decision of 21.12.2012, taking into account the earlier ruling of the ECHR in violation of Article 6 of the Convention (Foucher v. France. 18.3.1997; Kahraman v. Turkey, 31.10.2006 ; Vv Finland, 24.4.2007), was to dismiss all previously made accusations²² .

In the case of Foucher v. France²³ court has noted, that the defendant had no opportunity to familiarise themselves with the documentation of an investigation and make copies of them, so he did not have sufficient opportunity to prepare his defence and hence was not on level ground with other stakeholders.

Furthermore, Directive 98/5 / EC of the European Parliament and of the Council of the European Union of 16 February 1998 and the practice of European Court of Justice with respect to this Directive should be taken into account, which stipulates that to ensure the continued functioning of the justice system Contracting States may establish special rules for access to the higher courts of the States, such as the involvement of a specialised lawyer.

The Supreme Court also referred to the decision of the ECHR 24.07.2007 V. v. Finland²⁴, in which the Court ruled that the principle adversity and equality of Parties were integral elements of a fair trial in criminal cases, and also referred to the above decision of the Supreme Court KKO:2012:45, recognising that the suspect's right not to incriminate oneself are generally recognised principles of a fair trial, which are included in the international human rights. Helsinki Court of Appeal acquitted all 11 previously convicted and the two companies. The state has paid compensation, to the accused that received acquittals, in a region of 4 million euros. All the participating judges have made decision unanimously.

Conclusion

The right to professional, qualified legal assistance of a lawyer is an integral part of the rule of law, which is enshrined in the constitutions of many countries. The right to protection of the suspect or accused of a criminal offense is established by the Council of Europe, the UN General Assembly and the European Court of Human Rights and is one of the basic constitutional guarantees, designed primarily to provide reliable protection of human rights in criminal proceedings. The Constitution of Finland has no standalone article on the right to access a legal assistance of a lawyer. Results of the study enabled the author to offer principle improvements to the enforcement and improvement of legislation to bring it in line with the European Convention and the jurisprudence of the ECHR.

In accordance with the case law, any person should have access to legal assistance when he / she is taken into custody or when his / her position is significantly influenced the circumstances that can arise even prior to a formal arrest. In particular, a person cannot be interrogated or asked to participate in an investigation or proceedings without providing the right to legal assistance.

²² Helsinki Court of Appeal decision . R 10/2714 . 21.12.2012 . www.finlex.fi

²³ Case of Foucher v. France. Application no 22209/93 . 18 March 1997 .
<http://www.echr.coe.int/Pages/home.aspx?p=home>

²⁴ Case of V.v. Finland. (Application no. 34806 / 04). 19/11/2012 .
<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-111938>

In order to remedy the situation and ensuring an effective implementation of the rights of suspects and accused to legal assistance the author proposes a number of amendments and additions to the Constitution of Finland and the Police Act as follows:

1. Everyone shall be guaranteed the right to qualified legal assistance. In cases, stipulated by law, legal assistance is provided free of charge.
2. Every person detained, taken into custody or accused of a crime has the right to legal assistance (legal defender) from the moment of arrest, detention or indictment.

As an example a positive influence should be noted on the decisions made by the national courts of Finland by the norms of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, supported by the principles and standards of the International Covenant on Civil and Political Rights. In its decisions, the Supreme Court is increasingly referring to the judgments of the European Court of Human Rights, which led to the amendment of the law in Finland. For example, after the entry into force on 31.01.2013 the amendments to the Bankruptcy Law of Finland have been applied to practice of cancellation of judgments made by the Supreme Court, which provides for the actual right of the accused to refuse testimony. However, the law does not establish a clear definition of the waiver of statements, originally obtained from persons in the status of the witness and only later reclassified as the accused, as well as the use of "secondary" physical evidence obtained on the basis of evidence obtained in violation of the law.

After the entry into force of the article "Protection against self-incrimination" § 5 a (31.1.2013 / 86) 2013 of the Bankruptcy Act" the police of Finland, prior to the interrogation must read all suspects their rights and responsibilities, including the right to remain silent, not to testify against themselves and their immediate family members, and before the start of the criminal proceedings the judge declares the right of the accused to testify. In this case, the charge will be based on evidence, witness testimony and the earlier testimonies made at a preliminary investigation stage.

The author especially notes the decision of the Supreme Court of Finland (2009: 80)²⁵, to cancel the earlier conviction in a criminal case, as its effect on the adjudication from 21.12.2012 by Helsinki Court of Appeal in the case of Jippi, which also saw an earlier decision in a criminal case overturned. After the decision of the High Court, on the basis of the ECHR judgment *Marttinen v. Finland* 21.07.2009²⁶, the Ministry of Justice of Finland in 2010 appointed a working group to amend the Bankruptcy Law and revamp the 17th chapter of the Legal Proceedings Law. A new article was introduced to the Bankruptcy Law "Protection against self-incrimination" 5 a § (31.1.2013 / 86), which entered into force on 31.01.2013.

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²⁵ The Supreme Court of Finland. KKO 2009:80, H2009/89, 20.10.2009. www.finlex.fi

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