



An analysis of “vulnerability” in light of the involvement of minors in criminal proceedings

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I. An increased European legal attention for a suspect's vulnerability

■ ECtHR case law

- Salduz and subsequent case law: particular vulnerable position of a suspect because of being involved in a criminal procedure
- Minors
- Detained persons (also in police custody)
- Particular vulnerable suspects
 - Alcohol abuse
 - Mental disorder (ADHD)
 - Physical condition
 - Age and mental capacities (Ibrahim case)

■ EU instruments

- Sideways attention in multiple directives following the roadmap on procedural safeguards
- Recommendation 27/11/2013 on vulnerable persons suspected or accused
 - Individual factors hampering the understanding and participation in criminal proceedings: age, mental or physical conditions

II. Legal attention for a suspect's vulnerability in Belgium

- Influenced by the European developments regarding access to a lawyer
- Three big evolutions, but with a rather reserved attitude
- Period 2008 – 2012
 - No legally guaranteed access to a lawyer prior to and during police interview
 - Minimalistic interpretation by the Court of Cassation
- 2012: first legislation on access to a lawyer following ECtHR case law
 - Circular of the Board of Procurators General
 - Minors and “mentally weak persons”: application of regulations for minors
 - Court of Cassation: still minimalistic interpretation
- 2016: legislative change following Directive 2013/48/EU
 - Legal provision in Code of Criminal Procedure: *“the language used by the police to inform a person about his rights should be adapted to the person’s age or potential vulnerability which hampers his ability to understand these rights”*
 - Circular of the Board of Procurators General: also language and hearing disabilities as a vulnerability

III. Academic research on a suspect's vulnerability

- Predominantly research on false confessions
- Risk factors associated with vulnerability
 - Individual factors
 - Being a minor
 - Mental disorders
 - Personality traits
 - Situational factors
 - Interview techniques
 - Isolation from family and friends
 - Interview duration
 - Fatigue
 - Innocence

IV. The lack of an unequivocal and comprehensive definition

- Both broad and strict interpretations of vulnerability
 - Police interview vs. investigative stage vs. entire proceedings
 - Involvement in a criminal procedure as such vs. “extra vulnerable”
- Vulnerable to what?
 - Understanding and exercise of legal rights and participation in criminal proceedings
 - False confession – merely innocent suspects?
- “Vulnerable suspect” = strictly personal/psychological?
 - Perspective taken in EU legal instruments
 - vs. *Salduz* and subsequent case law of the ECtHR (but Ibrahim)
 - Different approaches within academic literature
 - Inconsistent results (e.g. Gay et al. 2015; Horselenberg et al., 2003; Pirelli et al., 2011)
 - Anecdotal/case studies/retrospective testing (e.g. Gudjonsson, 2003)
- No specific interpretation in the Belgian legislation

V. Towards a conceptual framework of a suspect's vulnerability (1)

- The (in)ability to exercise procedural rights as common denominator
 - Throughout the entire pre-trial investigation
 - Both innocent and guilty suspects
- Three necessary conditions
 - Information about and knowledge of the procedural rights
 - Understanding of the procedural rights
 - Rational decision-making about the exercise of the procedural rights
- Relevant cognitive abilities instead of fixed “labels” (e.g. mental disorders)
 - Language skills
 - Attention and concentration abilities
 - Reasoning abilities
 - Memory capacities
 - Physical condition and substance use

V. Towards a conceptual framework of a suspect's vulnerability (2)

- Interactive and dynamic process
 - Dependent on the specific moment and situation
 - Prior to and during police interviews
 - During other investigative acts (e.g. reconstruction, confrontation)
 - Dependent on the relationship between the persons involved
 - The attitude of the police and judicial authorities
 - The conduct of the defence lawyer
 - Variable ability to exercise the procedural rights across moments and situations
- Also determined by the context wherein the procedural rights are exercised
 - The type of case and offence
 - The complexity of the proceedings
 - The evidence available
 - The potential detention
 - Multiculturalism

VI. The importance of identifying a suspect's vulnerability

- The risks of a hampered exercise of the procedural rights
 - Breach of the right to a fair trial
 - Providing an unvoluntary (or even false) statement
 - Miscarriages of justice
- Increased responsibility for the defence lawyer:
 - ECtHR *Salduz* case law: *“In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer [...]”*.
 - Belgian *Salduz*-code of conduct: *“the defence checks whether his client is physically and/or mentally capable of being interviewed [...]”*.
 - Increased role:
 - More often and more active assistance by a lawyer allowed
 - Minors cannot waive their right of assistance by a lawyer
 - Fits within the role of the defence lawyer

VII. Challenges in identifying vulnerability

- Complex task
 - Not easy to discern: not readily observable and no definite markers
 - Persons might malingering or try to hide certain problems
 - Lack of knowledge, time pressure, not primary task (but primary actor)
 - Risk of labelling and underestimation or exaggeration
- Tools
 - Specific, primarily psychological oriented tools (e.g. ID-screener)
 - Not readily applicable in practice (e.g. GSS, GCS (Gudjonsson, 1984; 1989))
 - Only a minority aimed for defence lawyers (e.g. TAG)
 - Existing tools emerged from practice – not validated
 - Non-existent in Belgium (but SUPRALAT for defence lawyers)

VIII. Some Belgian legal and empirical results

- Legal possibilities for the identification of a suspect's vulnerability in Belgium
 - Phone call with detained suspect prior to a waiver of legal assistance, but no longer mandatory
 - Confidential consultation prior to the first police interview or during custody
 - Legal assistance during all police interviews of suspects (facilitated if detained)
 - Legal assistance during an identity parade, confrontation or reconstruction
 - Consultation of the case file
- Results of interviews with Flemish criminal defence lawyers (focus on adult suspects)
 - Vulnerability as a “subconscious” aspect of providing legal assistance
 - Very divergent perspectives on a suspect's vulnerability
 - The identification of a suspect's vulnerability
 - Face-to-face consultation prior to a police interview and the interview itself as key moments
 - Little attention paid to situational factors during police interviews
 - Attitude, behaviour and manner of speech as main indicators
 - Experience and human knowledge as “tools” for identifying a suspect's vulnerability
 - No standardized or targeted methods or questions
 - Lack of knowledge and training

IX. To conclude...

- Importance of a shared responsibility and vigilance
 - *Better safe than sorry*
- Being sensitive to vulnerability can be beneficial to the truth finding process and the procedure
 - Do not set the bar for vulnerability too high
- Attention needed for the interactive and dynamic nature of vulnerability
 - Vulnerability cannot be preserved for certain groups or “labels”
 - Professionals involved should also reflect on their own behaviour
- The need for more training

Thank you for your
attention!

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