Making custodial legal advice more effective in France

Jacqueline Hodgson explores the challenges in accessing a lawyer when in police custody

In *Salduz v Turkey* (27 November 2008, No. 36391/02), the Grand Chamber of the European Court of Human Rights (ECtHR) stated:

> *...in order for the right to a fair trial to remain sufficiently 'practical and effective'… Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right…The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.*

Like many other jurisdictions, France was reluctant to consider this ruling applicable to its own criminal procedure, given the regime of safeguards in place, most notably judicial supervision. However, after defence lawyers litigated successfully in the criminal and appeal courts, as well as the constitutional council (*Conseil constitutionnel*), in 2011 France was finally obliged to make provision, for the first time, for lawyers to be present during police interrogation of suspects. This is a significant change in the pre-trial investigation regime. The public prosecutor's responsibility to oversee the police detention and interrogation of suspects is no longer regarded as justification for the exclusion of defence lawyers from this phase of the investigation (see Hodgson, 2005 for an account of prosecutorial supervision in practice). *Salduz* and the cases that have followed it have cut across procedural differences between European states. They have established a core universal defence function that cannot be traded off against other safeguards, nor negotiated away as part of the margin of appreciation. The key issue for France is whether the lawyer can operate beyond the prosecutor's shadow.

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The right to custodial legal advice in France

The right to custodial legal advice was first introduced in 1993; the suspect was allowed a 30 minute meeting with her lawyer, 20 hours after the start of police detention (*garde à vue*, GAV). In 2000, this consultation was permitted at the start of detention and again after 24 hours, but still only for 30 minutes. The lawyer was not permitted to be present during the police interrogation of the suspect, interrogations were not tape-recorded and other than for a brief period between 2000 and 2003, the suspect was not informed of her right to silence. For 18 years, the suspect's right to custodial legal advice consisted of a 30 minute consultation prior to interrogation. Yet, even this was seen as controversial and required the Minister of Justice to issue reassurances that the reform was not part of a move towards an adversarial procedure: the role of the public prosecutor (*procureur*) remained paramount. (For a comparative discussion of these provisions, see Hodgson, 2004)

It is important to bear in mind that at the time of the *Conseil*'s ruling (and eighteen months after the *Salduz* decision) legislation was being prepared that would have extended the role of the lawyer, but only to a very modest extent: the government proposed allowing the suspect a second 30 minute consultation after twelve hours, at which point the lawyer would also be allowed to see any statement made by the suspect. Only if detention extended beyond 24 hours, would the lawyer be permitted to be present during the police interrogation of the suspect.

The decision of the *Conseil constitutionnel*

Using a new procedure (see Hodgson, 2010), lawyers argued before the *Conseil* that the very limited right to custodial legal advice failed to respect adequately the rights of the defence: legal advice should be effective from the start of the detention period, the lawyer should be allowed access to the dossier (the case file of evidence and procedural documents) and to be present throughout the GAV, especially during the police interrogation of the suspect.

In its decision (Decision No. 2010-14/22 QPC of 30 July 2010), the *Conseil* noted the existing safeguards of judicial supervision in place for suspects held in GAV: the requirement to inform the *procureur* when a person is detained; the *procureur*'s ability to have the suspect brought before her at any time, or released; the need for the *procureur*'s authority in order to extend detention for a second 24 hour period; and the additional safeguard of a different judge (the *juge des libertés et de la détention*)

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authorising any further extension of detention.

Despite these protections, the *Conseil* ruled that the French code of criminal procedure did not include safeguards appropriate to the ways in which the GAV was currently being used, and in particular, the suspect was not provided with the effective assistance of a lawyer, notably during police interrogation. In an unacknowledged echo of *Salduz*, the *Conseil* drew attention to the fact that this restriction was not justified by any particular circumstances such as the need to gather specific evidence or to protect any individual, but was of a general nature. In addition, the suspect was not told of her right to silence.

It concluded that there was no longer a fair balance between the need to prevent and to investigate crime on the one hand, and the proper exercise of constitutionally guaranteed rights on the other. The provisions were therefore declared contrary to the Constitution. Recognising that this would require major legislative intervention, the *Conseil* gave the government one year to implement the necessary reforms – the provisions could not be challenged on constitutional grounds before 1 July 2011.

Although the decision was widely fêted, it concerned only detention in ordinary cases. Provisions permitting the delay of custodial legal advice for 48 hours in cases of organised crime and 72 hours for drugs trafficking and terrorism remained unchanged. The ECtHR, however, had made it clear that the right could be delayed only with compelling reasons, in an individual case – not through a systematic procedure based on case category.

The decision of the *Cour de Cassation*

The ordinary criminal appeal courts were less shy than the *Conseil* to acknowledge the impact of the jurisprudence of the ECtHR and the serious implications it had for French criminal justice. In *Brusco v France* (1466/07, 14 October 2010), France was condemned by the ECtHR on a number of counts, including the failure of the police to tell the suspect (who had been questioned as a witness) of his right to silence and the failure to allow him a lawyer from the outset of detention and during his interrogation by the police. This was immediately followed by a decision of the *Cour de cassation*, affirming the jurisprudence of the ECtHR, holding that systematic delay of access to a lawyer breached the accused's right to a fair trial. On 15 April 2011, the Court went even further. Sitting in its most authoritative form as the full court, the *Cour de cassation* ruled that the principles in *Brusco* should be relied upon directly – there was no need to wait for legislative intervention as this would place France in breach of the ECHR. Suspects should be allowed access to a lawyer throughout their GAV, including during their interrogation by the police.

The challenge of custodial legal advice

Reports of request rates for legal assistance suggest that they vary between 28 per cent and 50 per cent since this series of decisions. Requests are channelled through the local bar and rotas of duty lawyers have been established to attend police stations and *gendarmeries* in the local area – though 'local' can cover a distance of up to 100km. Research in the early years following the introduction of the suspect's right to custodial legal advice in England and Wales demonstrated that police station advice work was often delegated routinely to untrained, unqualified and often inexperienced staff (McConville and Hodgson, 1993; McConville et al., 1994). This resulted in the development of an accreditation scheme for police station legal advisers and recognition that professional training was required to enable advisers to play a properly adversarial and effective role. Like many other countries that have implemented reforms post *Salduz* (e.g. the Netherlands and Scotland) there has been no centrally organised training in France for lawyers providing custodial legal advice, nor a requirement that only those with sufficient expertise be signed up to the duty rota. The quality and effectiveness of legal advice is likely, therefore, to vary.

Although the presence of the lawyer during the GAV is a significant improvement to defence rights, there are still concerns that access to the lawyer can be delayed by the *procureur* at the request of the police; that the police sometimes begin interrogations before the lawyer has arrived and need not wait more than two hours in any event; that lawyers are given almost no information about the allegation, making it difficult to advise their client; and that lawyers are not permitted to intervene or pose questions until the close of interrogation. The fears of police and prosecutors have (predictably) not been realised. The number of GAV has fallen (as the government intended) but not the clear-up rate; nor are investigations paralysed by silent suspects. But perhaps the greatest concern is the extent to which lawyers can provide effective assistance, when they are not permitted to intervene during interrogations, but must remain passive. They can engage with neither the police investigation, nor the *procureur*, who will determine bail and prosecution charges. Presence alone is not enough. ■

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