

The right of access to a lawyer in Europe: A long road to travel?

by

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I. The right to legal assistance in criminal proceedings as a fundamental right

The right to legal assistance in criminal proceedings is enshrined as a fundamental right and a basic feature of a fair trial in the most important European and international legal instruments.

Article 6 (3c) of the ECHR entitles *“everyone charged with a criminal offence ... to defend himself in person or through legal assistance of his own choosing ...”*.

The same wording is to be found in article 14 (3d) of the ICCPR, in which the right of the individual *“not to be compelled to testify against himself or to confess guilt”* (article 14[3g]) is also expressly recognised.

Article 47 of the Charter of Fundamental Rights of the EU, which entered into force with the Lisbon Treaty, provides that *“everyone shall have the possibility of being advised, defended and represented”*, while article 48 (2) guarantees the *“respect for the rights of the defence of anyone who has been charged”*.

The right of all persons *“to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings”* is mentioned among the Basic

Principles on the Role of Lawyers adopted by the UN in Havana in 1990 (at 1).

Indeed, it is the right to legal assistance that guarantees the effective exercise of all other procedural rights in criminal proceedings.

II. Divergence of national legal systems regarding the “details” of the right to legal assistance

The right to legal assistance in criminal proceedings is firmly established in national legal systems. However, the “details” of this right, in other words *when and how* this right is to be exercised and what exactly it includes, are far from being regulated in a uniform way in different states. Member states of the EU are no exception to this finding.

Let me mention just one example to demonstrate the significant divergence of national legal systems in the European area.

Non-access of suspects to a lawyer during the first (24) hours (or in exceptional cases during the first days) of police detention and questioning, the (in)famous *garde à vue*, was for centuries something like a sacred cow in France (see *Chr. Lazerges, Les désordres de la garde à vue, RSC 2010, 275*).

The official belief was –and still is to a certain extent- that access to a lawyer at this initial stage of the proceedings and presence of the same during questioning would seriously hamper the efficiency of the investigation minimising the frequency of self-incrimination and confessions by suspects. The same (negative) stance towards allowing lawyers to enter the police station characterised the laws of a number of European jurisdictions like the Netherlands, Belgium, Ireland or Scotland.

This regime was left intact until 2010 when the ECtHR ruled in *Brusco v France* (judgment of 14.10.2010, at 54) that barring suspects from access to a lawyer during police detention is incompatible with fair

trial requirements and the *Conseil Constitutionnel* (decision of 30.7.2010) found it incompatible with the Constitution. In the UK it was for the Supreme Court to rule in *Cadder v HM Advocate* (judgment of 26.10.2010, at 32 et seq.) that the Scottish law was in this respect incompatible with the requirements of a fair trial as defined by the Grand Chamber of the ECtHR in its seminal judgment *Salduz v Turkey* of 27.11.2008 (see *Dim. Gianoulopoulos*, “North of the Border and Across the Channel”: Custodial Legal Assistance and Reforms in Scotland and France, CLR 2013, 369). By contrast, in other EU countries early access of suspects to a lawyer and before being questioned by police authorities has always been widely accepted as a fundamental safeguard against coercion, abuse of power and miscarriages of justice ensuring fairness of the proceedings and admissibility of evidence collected at the pre-trial stage.

Still, even in this latter group of defence-friendlier member states the role of the lawyer is not understood in the same way. In some states -Greece is one of them- the lawyer has rather limited rights during the questioning of his client by police authorities or the investigating judge, i.e. he is not entitled to actively participate in the interview by asking questions, requesting clarifications, making statements or advising his client before answering specific questions etc., while in other states the active participation of the lawyer in the interview and the gathering of evidence is deemed necessary for efficiently exercising the right to legal assistance (see, *Ed Cape / J. Hodgson / T. Prakken / T. Spronken* [eds.], *Suspects in Europe*, Antwerp/Oxford 2007, Intersentia, 9 et seq.).

III. ECtHR case-law on the right to legal assistance

The ECtHR has issued a remarkable number of judgments in respect to the right to legal assistance in criminal proceedings.

In *Murray v UK* (judgment of 8.2.1996) the Court stated (at 63) that where national laws attach consequences to the attitude of an accused at the initial stage of police interrogation, Article 6 ECHR *“will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation”*.

The Court has developed its jurisprudence in *Salduz v Turkey* of 27.11.2008. This landmark judgment is the first in a series of rulings which clarified various important aspects of the right to legal assistance in criminal proceedings.

In *Salduz* the Grand Chamber of the Court highlighted (at 54) the importance of early access to a lawyer particularly where serious charges are involved and stated (at 55) that *“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 the suspect by the police”*.

In his concurring opinion Judge Zagrebelsky, joined by Judges Cassadeval and Türmen (see also in this respect the concurring opinion of the Court’s President Nicolas Bratza), stated *“that it is ... at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer and not only while being questioned”* and that *“the fairness of proceedings against an accused person who is in custody also requires that he be able to obtain (and that defence counsel to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on”*.

This important part of the above concurring opinion found its way next year into the Court’s judgment in *Dayanan v Turkey* (judgment of 13.10.2009, at 32) thus entering the main body of the Court’s jurisprudence. In *Dayanan* the Court found a violation of Article 6 (3)

despite the fact that the respondent had exercised his right to silence and made no admissions during his police detention.

An impressive number of other important judgments have been issued in recent years following the *Salduz* doctrine and specifying the Court's position on vital elements of the right to defence.

For example, in *Panovits v Cyprus* (judgment of 11.12.2008, at 68) and *Pischalnikov v Russia* (judgment of 24.9.2009, at 78) the Court has set high standards regarding the validity of a waiver of the right to legal assistance, noting that *“the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard”*.

In *Pavlenko v Russia* (judgment of 1.4.2010, at 98-99) the Court emphasised the priority of the lawyer chosen by the suspect over a lawyer assigned to him by state authorities.

IV. The Proposed EU-Directive on the right of access to a lawyer in criminal proceedings

1. The European Commission's Proposal

On June 8, 2011 the European Commission presented its Proposal for a Directive on the rights of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM(2011) 326 final). The proposed Directive, which was launched in accordance with the new legislation procedure introduced by the Lisbon Treaty (2009), seeks to partly implement Measure C on legal advice and legal aid (excluding legal aid which will be dealt with separately) and Measure D on communications with relatives, employers and consular authorities of the *Roadmap* for strengthening procedural rights of suspected or accused persons in criminal proceedings presented by

the Swedish Presidency on July 1, 2009 (see *C. Morgan*, Where Are We Now With EU Procedural Rights? EHRLR 2012, 428).

The Roadmap's intention is to restore the balance in the European area of freedom, security and justice between numerous and highly intrusive prosecutorial instruments such as the European Arrest Warrant, which were rapidly introduced after the Amsterdam Treaty, and procedural rights of suspects and accused persons, which in sharp contrast had been systematically neglected.

It suffices to notice in this respect the failure saga of the European Commission's Proposal for a *Framework Decision on certain procedural rights of 2004*, which was definitely abandoned three years later due to the vehement opposition by some member states (led by the UK), which disputed the legal basis as well as the need for such an instrument (see *T. Spronken*, EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach, EuCLR 2011, 217).

The Roadmap on procedural rights aims not only to ensure full implementation and respect of the standards set out in the ECHR and to improve uniformity of their application but also to expand existing standards where necessary. The Roadmap, which was adopted by the European Council on 30.11.2009, forms part of the (five-year) Stockholm Programme for "*an open and secure Europe serving and protecting the citizens*" (OJ C 115, 4.5.2010, 1).

In the Stockholm Programme it is stressed that "*the protection of the rights of suspected and accused persons is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union*".

Two Directives of the European Parliament and the Council have already been adopted: The first Directive (2010/64/EU of 20.10.2010) is on the right to translation and interpretation; the second Directive (2012/13/EU of 22.5.2012) is on the right to information in criminal proceedings. Member states are currently adjusting their legislations to these Directives.

It is noteworthy that the Directive on the right to information includes in its annex a model Letter of Rights (*T. Spronken, ibid. 223*). Its purpose is to inform suspects in a language they understand, especially those detained in police stations, in a timely and adequate manner about all basic procedural rights granted to them and thus facilitate the effective exercise of their defence.

The Draft Directive on the right of access to a lawyer presented by the European Commission is ambitious: Based on the case law of the ECtHR it includes a clear set of rules regulating essential aspects of this right establishing common minimum standards for all member states.

The Draft Directive follows the *Salduz* doctrine by imposing a duty on state authorities to allow suspects to have access to a lawyer of their choosing as soon as possible and upon deprivation of their liberty and prior to questioning by police or other competent authorities at the latest. Lawyers shall have the right not only to be present but also to actively participate in the questioning of their clients as well as in other important investigative acts (identity parades, taking of fingerprints or DNA samples etc.).

Moreover, they shall be entitled to inspect the detention amenities of their clients in order to ensure that these do not prevent them from effectively exercising their defence rights. Limited derogations from the right to access to a lawyer have to be authorised by a judicial authority, while statements of suspects or other evidence acquired in breach of the right to access a lawyer shall be excluded as evidence on which a conviction can be based.

The Draft Directive provides also that the right of access to a lawyer is recognised in EAW procedures including the assistance of a lawyer in the issuing member state.

2. Reactions to the Proposal

The Commission's Proposal was hailed by lawyers' and human rights organisations as an important step towards the creation of a European area of liberty and justice.

CCBE President *Georges Albert Dal* commented (8.6.2011) that the Proposal "*demonstrates the European Commission's commitment to ensuring that citizens have the same basic rights in their dealings with criminal justice systems, regardless of the country where the person is suspected or accused of having committed a crime*".

The Proposal received also positive comments in an Opinion of the Secretariat of the Council of Europe dated 9.11.2011.

However, it ran up against strong opposition by a number of influential states such as France, Belgium, the Netherlands, Ireland and the United Kingdom.

In a joint note to the Council of the European Union dated 21.9.2011 the opposing states expressed "*serious reservations about the Commission's approach*" claiming that the Draft Directive "*would hamper the effective conduct of criminal investigations and proceedings*" and complained that it goes beyond the current requirements of the ECHR" and the Court's established case law while not taking properly into account "*the different ways in which Member State systems secure the right to a fair trial*".

Much criticism was directed at the right of the lawyer to actively participate in investigative acts and to inspect the place of detention of his client and the exclusion of evidence acquired in violation of the rights established in the Directive.

Negotiations on the Commission's Proposal proved to be much more difficult than those on the previous two Directives as it is demonstrated by the fact that almost three years on they have not been concluded.

The opposition of member states to the Commission's Draft Directive had a significant impact on the Council's approach. The Council favoured a "slim" version of the Directive, in which safeguards for suspects in respect to scope and time of the right to access a lawyer,

derogations from this right, confidentiality of communications of suspects with their lawyers and remedies for violations of their rights etc. were substantively watered down falling clearly behind standards set by the ECtHR and thus contradicting the aims of the Roadmap on procedural rights.

Fortunately, the Council's extremely narrow approach to the right of access to a lawyer was not shared by the *European Parliament*, which opted for a more liberal approach. The European Parliament used its enhanced legislative powers under the Lisbon Treaty and insisted on a long list of amendments to the Council's version whose purpose is to restore the balance and effectively protect defence rights throughout the European Union.

It is expected that the negotiations will be concluded under the Irish Presidency and that the final text of the Directive to be adopted will reinstate some of the guarantees included in the initial wording of the Commission's Draft Directive.

The Council of the Bars and Law Societies of Europe (CCBE) has actively participated in the discussions following the launch of the Commission's Draft Directive on the right of access to a lawyer in criminal proceedings. We have closely monitored the various stages of the legislative procedure and submitted position papers (*see CCBE position papers of 21.1.2011, 8.7.2011, 29.9.2011, 6.6.2012, 22.1.2013 and 24.5.2013*), comments, etc. voicing the views of European lawyers and fighting for the protection of the fundamental right of legal assistance for all suspects and accused persons.

V. Issues in dispute

Let me conclude by addressing from a lawyers perspective five issues, which continue to be in dispute.

1. Time and scope of the right to access a lawyer

The earliest possible access to a lawyer is of paramount importance to guarantee that the defence rights will be “practical and effective” and not “theoretical and illusory”.

Lawyers are not an impediment to the smooth and efficient operation of criminal investigations. An active defence lawyer not only protects the suspect from coercion and other abusive practices but contributes his part to getting the truth on the table in accordance with the law.

“Wild” practices during police investigations produce inadmissible or unreliable evidence while early participation of a lawyer in investigating procedures ensures the quality and admissibility of evidence in subsequent proceedings.

2. Derogations from the right to access a lawyer

Derogations from the right to access a lawyer should be treated with great caution. If “compelling reasons” would justify a temporary derogation from this right in light of the particular circumstances, such a restriction must: a) be authorized by an independent judge not involved in the investigation of the acts in question b) be strictly limited in time and scope (e.g. to prevent an imminent danger for the life or liberty of other persons) c) bar the questioning of the person in respect to the acts he is suspected of d) render inadmissible as evidence of the suspect’s guilt statements made by him during such deprivation from his right to access a lawyer.

3. Confidentiality of communications

All communications between the suspect and his lawyer shall remain confidential.

In its Response to the Council dated 06.06.2012 the CCBE stated that it “*is of the firm opinion that there should be no exception to the principle of confidentiality*”, which “*should remain intact as a fundamental principle*” of a fair trial and of our profession.

As the ECtHR put it in its judgment *Castravet v Moldova* (judgment of 13.6.2007, at 49-50):

“One key element in lawyer’s effective representation of a client’s interests is the principle that confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers ... confidential communication with one’s lawyer is protected by the Convention as an important safeguard of one’s right to defence ... Indeed, if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness ...” (see also *Sakhnovskiy v Russia*, judgment of 2.11.2010, at 102, 104).

Invoking the risk of collusion between suspects and lawyers in order to justify interception of their communications is a fundamentally wrong argument. Colluding with a suspect to commit criminal acts is not part of lawyer client communications with the purpose to defend the client against the accusations he is facing. If there is evidence indicating criminal involvement of a lawyer in breach of his duties, procedures against him may be opened as provided for in domestic legislation.

4. Remedies

Effective remedies against breaches of the right to access a lawyer in its various aspects are of the outmost importance. No evidence acquired in violation of this right should be admitted and relied upon in subsequent proceedings to convict an accused person. Admitting such tainted evidence undermines the fair character of criminal proceedings and opens the door for miscarriages of justice.

Moreover, it does not de-motivate police and prosecuting authorities from applying abusive practices and systematically violating suspects’ rights.

The ECtHR has stressed in numerous judgments that a conviction based on such evidence impairs the right to a fair hearing

notwithstanding the fact that the accused person and his defence counsel have had the opportunity to challenge this evidence in subsequent trial hearings (see for example *Šebalj v Croatia*, judgment of 28.6.11, at 261 et seq.).

5. EAW and judicial assistance procedures

Individuals involved in such procedures are often in need of legal advice in both the requested and the requesting state.

The traditional position of the ECtHR has been that extradition proceedings in the requested state do not fall, as a rule, under Article 6 of the Convention, because they are limited to the surrender of a person to the requesting state where he will face criminal charges (see for instance the Court's decision in *Stapleton v Ireland* of 4.5.2010, at 27 et seq.).

However, EAW or judicial cooperation proceedings applying EU legal instruments fall under the Charter and therefore defence rights must be observed in accordance with Articles 47 and 48 of the Charter.

Furthermore, judicial cooperation procedures may very well have an impact on the "main" criminal proceedings and therefore care must be taken to ensure that the evidence gathered in the course of such proceedings does not violate defence rights.

In *Stojkovic v France* (judgment of 27.10.2011, at 50 et seq.) the Court ruled that a suspect's statement taken in Belgium in the absence of a lawyer –despite his request to be assisted by a lawyer– following a request by a French investigating judge, which subsequently formed the basis for his conviction by a court in France, violated his right to legal assistance in France, notwithstanding the fact that the Belgian legislation applicable at that time did not provide for legal assistance in such circumstances.

VI. Conclusion

We still have a long road to travel to achieve effective defence in Europe. Protecting individual rights in criminal proceedings is an ongoing project for liberty. Lawyers of Europe are called upon to join forces and defend the core values of our democratic societies.

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