

## Articles

## EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach

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### Abstract

*This article focuses on how procedural safeguards for suspects and defendants are protected by the European Convention on Human Rights and the increasing impact of the European Union in this area.*

*Criminal procedures vary enormously across European jurisdictions and so does the level of legal protection offered to suspects in criminal proceedings. Initial attempts by the European Union to establish minimum procedural rights for suspects and defendants throughout the EU failed in 2007, in the face of opposition by a number of Member States who argued that the European Convention on Human Rights (ECHR) and the enforcement mechanism of the European Court of Human Rights (ECtHR) rendered EU regulation unnecessary. However, with ratification of the Treaty, criminal defence rights appeared on the agenda again in order to increase mutual trust between Member States and thus improve the operation of mutual recognition. In November, 2009, the European Council adopted the Roadmap on Procedural Rights setting out a step-by-step approach to strengthen the rights of suspects and accused persons throughout the European Union. The first step has currently been taken through the adoption of the Directive on the right to interpretation and translation in criminal proceedings of 26 October, 2010, with two EU legislative proposals on the table: one on the right to information and one on the right to legal assistance in criminal proceedings. In parallel with these developments, two research projects have been conducted. One into the way suspects and defendants are informed of their rights throughout the EU and another one on access to effective defence in criminal proceedings across nine European jurisdictions that constitute examples of the three major legal traditions in Europe: inquisitorial, adversarial and post-state socialist. The outcomes of this research are the basis for critical analysis of the way EU policy aims to fill the gaps in human rights protection in the area of criminal procedural law.*

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## I. Rights of suspects and defendants within Europe: the European Convention on Human Rights

Since the middle of the twentieth century promoting the protection of human rights on the European continent has – at the international level – been primarily the task of the Council of Europe. Shortly after World War II, the Council of Europe was established to promote human rights, democracy and the rule of law. From a human rights perspective, one of its most important ‘achievements’ is, without a doubt, the European Convention on Human Rights, established in 1950 binding all current 47 Member States.

The ECHR sets out fundamental rights for those who are charged with a criminal offence. In this respect, the most important provision can be found in article 6 dealing with the right to fair trial. Also important for the protection of human rights in criminal cases are: article 3 (prohibiting torture), article 5 (dealing with the right to freedom) article 8 (dealing with the right to privacy) and art. 10 (regulating the freedom of speech).<sup>1</sup> Over the years, the Convention system has evolved into a well-known and lively human rights regime with the and its sophisticated case law playing the leading part. The European Convention on Human Rights is of vital importance for the protection of fundamental human rights in criminal proceedings within Europe.<sup>2</sup>

### 1. Challenges facing the system

It is not all roses in Strasbourg: for the last fifteen years Europe’s main human rights protector has been confronted with complicated challenges threatening its authority and effectiveness.

For years, the institutions have been faced with a steadily increasing backlog of cases caused by the increasing number of Member States and the frequent use of the individual complaint procedure.<sup>3</sup> As a result of the current caseload, it can take years before the Court reaches a final decision on any given case.

The vast majority of current violations in the case law of the ECtHR, concerns so-called ‘repetitive cases’: cases in which the Court decides on matters which have already been dealt with in previous cases but which remain problematic because the concerned member state has not (yet) taken the necessary steps to improve or adjust the situation. An important example of such repetitive cases concerns the excessive

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<sup>1</sup> See in general: *D.J. Harris, M. O’Boyle and C. Warbrick*, Law of the European Convention on Human Rights, 2009; *R.C. A. White and C. Ovey*, The European Convention on Human Rights, 2010 and *E. Bates*, The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent Court of Human Rights, 2010.

<sup>2</sup> Some even claim that ‘The European Convention on Human Rights is the most effective human rights regime in the world’: *A. Stone Sweet and H. Keller*, The Reception of the ECHR in National Legal Orders, in: *A. Stone Sweet and H. Keller* (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, p. 3.

<sup>3</sup> To illustrate the increasing workload of the ECtHR: on 31 December, 2007, there were 79,400 pending applications (before a judicial formation), on 31 January, 2011, this figure was as high as 143,350. This means that the number of pending applications has almost doubled in three years. Statistical information on the functioning of the ECtHR is available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/>

delay-cases against a small number of countries (such as Italy and France) in which the ECtHR, time after time, finds a violation of the right to be tried within a reasonable period.<sup>4</sup>

Although it is for the Member States to uphold complaints by victims of manifest violations of the Convention and to make reparation for the consequences of violations<sup>5</sup>, the fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by states. In a way, this is closely connected to the nature of the case law: decisions of the Court are always inextricably bound up with the circumstances of the case which makes it difficult to draw general conclusions from the case itself. When the Court finds that a member state has violated its obligations as laid down in the ECHR, it rarely occurs that part of national law (or practice) is *in abstracto* declared incompatible with the Convention.<sup>6</sup> As a result, whether a judgment of the ECtHR will have actual consequences for the national legal system depends to a large extent on the interpretation of the national authorities who have a substantial margin of appreciation in this respect.<sup>7</sup> In addition, it should be mentioned that the Court has the advantage of hindsight that parties and courts at national level do not have during the course of the ongoing proceedings. The judgment of the Court is always and inevitably *ex post*. For example, it is difficult to convert the case law on the right to call and question witnesses into a regulation at national level, regulating the right of the defence to call witnesses in the course of the proceedings. The requirement that a conviction should not be based solely or to a decisive extent on statements of a witness, which the defence could not test nor challenge, can only be assessed *after* the highest national court has reached its final verdict. The strengths of the Strasbourg complaint mechanism lies in doing justice to each individual case, but its weakness lies in the fact that it is hard to deduce general rules from its case law and that the Court has no powers to implement general implications of its judgments under national jurisdictions.

In the long run, the large amount of repetitive cases and the Court's growing backlog may have considerable consequences for the general role and function of the system. Essentially, they may cause the ECtHR to lose part of its authority as a mechanism for effective human rights protection. There already seem to be signs of 'fatigue', especially within certain Member States, with regard to the constant effort of fully implementing the requirements of the Convention.<sup>8</sup> In this respect, the

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<sup>4</sup> As provided for in art. 6 § 1 ECHR.

<sup>5</sup> See art. 46 § 1 ECHR.

<sup>6</sup> When dealing with alleged violations of art. 6 ECHR the Court will always assess whether 'the procedure as a whole' was in accordance with fair trial requirements. See, for example, ECtHR *Bykov v. Russia*, Application no.4378/02 Judgment of 10 March 2009. Judgments of the ECtHR, considering art. 6 ECHR, will therefore never be based on one isolated incident during criminal proceedings.

<sup>7</sup> With regard to the specific subject of criminal defence rights, there is another characteristic of case law influencing its effectiveness. As a general rule, the ECtHR exercises restraint when it comes to the quality of the defence: it is a basic principle of ECtHR case law that the conduct of the defence is essentially a matter between the defendant and his counsel in which national authorities and the ECtHR should not interfere, see for example ECtHR *Kamasinski v. Austria*, Application no. 9783/82, Judgment of 19 December 1989, margin no 65.

system seems to be trapped in a vicious circle: because Member States do not (adequately) fulfil their ECHR-obligations, the repetitive nature of the case law increases which – in turn – causes a threat to the authority of the ECtHR due to the growing feeling that its judgments mainly concern old wine in new bottles.

The current problems with the functioning of the system, however, do not refrain the Court from delivering ‘revolutionary’ judgments every now and then. An important example in this respect is the 2009 *Salduz*-case<sup>9</sup> concerning the right to legal advice before and during police interrogation that has initiated major law reforms in the Netherlands, Belgium, France, Switzerland and Scotland with regard to the assistance of lawyers in the phase of police interrogation.<sup>10</sup>

## 2. What to do about the gap in European human rights protection?

Although it is a general principle of ECtHR case law that the Convention is intended to guarantee rights that are not ‘*theoretical and illusionary*’ but rights that are ‘*practical and effective*’<sup>11</sup> the Strasbourg system does not seem to be able to (adequately) enforce this rule in the criminal justice systems of its Member States.

Next to the considerable amount of repetitive cases, research on the existing level of safeguards within the EU shows that a considerable number of European countries do not fulfil their obligations resulting from the Convention. A study conducted on the existing level of procedural safeguards in all 27 EU Member States illustrates that certain fundamental rights – such as the right to remain silent, to have access to the case file and to call and/or examine witnesses or experts: all basic requirements of a fair trial in the ECHR – are not provided for in the legislation of all Member States.<sup>12</sup> It is also clear that certain fundamental rights are guaranteed by

<sup>8</sup> ‘*The legislator, the administrator and the courts have other pressing needs pushing human rights to the background*’: C. Brants and S. Franken, The protection of fundamental rights in criminal process – General report, Utrecht Law Review 2009-2, p. 49.

<sup>9</sup> ECtHR, *Salduz v. Turkey*, Application no. 36391/02, Grand Chamber Judgement of 27 November, 2009.

<sup>10</sup> See for the Netherlands Concept Wetsvoorstel Rechtsbijstand bij Politieverhoor, 15 April, 2011; Belgium Wetsontwerp tot wijziging van de wet van 20 juli, 1990, betreffende de voorlopige hechtenis en van het Wetboek van strafvordering, om aan elkeen die wordt verhoord en aan elkeen die van zijn vrijheid wordt beroofd rechten te verlenen, waaronder het recht om een advocaat te raadplegen en door hem te worden bijgestaan, 4 March 2011, Doc 53 1279/001; France: LOI n° 2011-392 du 14 avril, 2011, relative à la garde à vue (I) NOR: JUSX1022802L; Switzerland Directive de la Commission du Barreau du 21 December, 2010, concernant Permanence de l’avocat dit de la première heure instituée par l’art. 8A LPAv; Scotland: Criminal Procedure Legal Assistance, Detention and Appeals (Scotland) Bill, 26 October, 2010, (SP Bill 60), introduced in the Scottish Parliament on the same day of the judgment of the UK Supreme Court of 26 October, 2010, in *Cadder v HMA* [2010] 43 rendering Scottish limitations of access to a lawyer in violation with Strasbourg jurisprudence. All documents can be found on the website of the Dutch Criminal Bar: <http://www.advocatenorde.nl/3363/advocaten/salduz-tour-d-urope.html?thema=thema/salduz&themaID=3236>

<sup>11</sup> This is, according to the ECtHR, ‘particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (...)’ ECtHR, *Artico v. Italy*, Application no. 6694/7413, Judgment of 13 May, 1980, margin no 33.

<sup>12</sup> See T. Spronken, G. Vermeulen, D. de Vocht and L. van Puyenbroek, EU Procedural Rights in Criminal Proceedings, 2009. This study was carried out as a follow-up report to a similar study conducted by T. Spronken and M. Attinger a few years earlier: See T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: existing levels of safeguards in the European Union*, 2005, available at <http://arno.unimaas.nl/show.cgi?fid=3891>.

law but at the same time it is doubtful whether their implementation in everyday practice corresponds to the Strasbourg standard.<sup>13</sup>

In short, it can be argued that the European Court of Human Rights has been very successful in setting general (minimum) standards but since it cannot provide for general guidelines on how to implement them, the *practical and effective* nature of the Convention rights leaves much to be desired. As such, the current situation in practically all EU Member States shows that the ECHR lacks the instruments to adequately protect procedural safeguards in criminal proceedings in the Member States.

If the level of human rights protection in criminal proceedings is insufficient in practically all European countries and this would call for additional regulations to provide for adequate standards of protection throughout Europe, the question remains: where should these regulations come from?

Currently, it has become increasingly likely that the European Union is willing and able to fill the aforementioned gap in European human rights protection. Given its original economic objectives, the EU initially had no explicit ambitions in the field of human rights protection and was not – or rarely – active in the area of criminal (procedure) law. This picture has, however, drastically altered over the last few years.

## II. EU policy on procedural rights of suspects and defendants: background and recent developments

### 1. Proposal for a Framework Decision on certain procedural rights (2004)

The Treaty of Amsterdam (which entered into force in 1999) made fundamental changes to the Maastricht Treaty and *inter alia* introduced the Area of Freedom, Security and Justice (AFSJ) replacing the former third pillar-title ‘Area of Justice and Home Affairs’. In 1999, the European criminal law policy received new impetus at the European Council of Tampere, introducing mutual recognition as the cornerstone of judicial cooperation in criminal matters.<sup>14</sup> Over the years, the emergence of criminal law as a topic of EU law has led to many achievements concerning police and judicial cooperation, such as the European Arrest Warrant and the European Evidence Warrant. In sharp contrast to this, until recently, there has been little to no progress in developing similar instruments for the creation of common standards for the protection of suspects and defendants in criminal proceedings. Before the entering into force of the Lisbon Treaty, there has been one unsuccessful attempt to create an EU level of the most important procedural safeguards for

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<sup>13</sup> *Spronken et al* (fn. 13), p. 111. See also *E. Cape, Z. Namoradze, R. Smith and T. Spronken*, *Effective Criminal Defence in Europe*, 2010, Chapter 12.

<sup>14</sup> Commission of the European Communities, Presidency Conclusions, Tampere European Council 15 and 16 October, 1999, SI (1999). In addition to mutual recognition, the Tampere Conclusions listed approximation of substantive and procedural law as key objectives of Justice and Home Affairs.

suspects and defendants. In 2004, the European Commission presented a proposal for a Council Framework Decision to set common minimum standards as regards to certain procedural rights applying in criminal proceedings throughout the European Union.<sup>15</sup> The original proposal contained the right to legal advice (including legal aid), the right to free interpretation and translation, specific attention for persons who cannot understand the proceedings, the right to communication and/or consular assistance and the right to information (including the duty to inform a suspected person of his rights in writing).

For many years, the proposed Framework Decision was a subject of heated debate among Member States. One of the main arguments of the opponents was that the European Convention on Human Rights already provides for procedural safeguards in criminal proceedings and that there is no need for the EU to create another set of rules on this subject. In addition, some opposing Member States argued that there was no legal basis in the EU Treaties for such a proposal and that the Union therefore did not have the competence to deal with the issue of procedural rights. Several revised (and much more limited) counter-proposals were introduced but due to the difficulties of the negotiation process, none of them were ever adopted. Eventually, in 2007, no further action was planned on the procedural-rights topic and the matter – at least temporarily – disappeared of the EU's agenda.

The failed negotiations on the 2004 proposed Framework Decision had made it painfully clear that it was difficult to reach political agreement on whether and how the EU should establish a 'separate' set of standards for procedural rights in criminal proceedings. However, after 2007, the awareness grew that the current discrepancies in levels of procedural safeguards between Member States could seriously affect the realisation of an 'area of freedom, security and justice'. After all, mutual recognition – as the cornerstone of cooperation in criminal matters – relies on mutual trust and confidence, and can therefore be seriously hindered by divergent standards on suspects' procedural rights.<sup>16</sup>

As a result of the awareness on this matter, the subject of procedural rights was recently put back on the political agenda, and, as will be discussed below – since the entering into force of the Lisbon Treaty – it may be expected that the realisation of EU legislation in this field will be less problematic in the near future than before.

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<sup>15</sup> Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union', 28 April, 2004, COM(2004) 328 final. This Framework Decision followed a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU, 19 February, 2003, COM(2003) 75 final.

<sup>16</sup> See also G. Vermimmen-Van Tiggelen, L. Surano and A. Weyembergh, The future of mutual recognition in criminal matters in the European Union, 2009. As the application of the European Arrest Warrant in practice shows, states try to find ways of not being obliged to cooperate with a state they don't trust: C. Rijken, Re-balancing security and justice: protection of fundamental rights in police and judicial cooperation in criminal matters, Common Market Law Review 2010-47, p. 1456.

## 2. The Lisbon Treaty (2009)

The Lisbon Treaty entered into force on 1 December, 2009.<sup>17</sup> With regard to criminal (procedure) law in general – and more specifically the protection of rights of suspects and defendants – the Lisbon Treaty has at least three important consequences.

First of all, the Treaty has introduced several institutional changes, significantly simplifying the decision making process in the field of criminal law. With the Treaty of Lisbon, the three pillar system has been abolished leaving the EU with one institutional structure for all areas of activity with the directive as its main legislative tool and majority voting (instead of unanimity) as the main voting mechanism. This is important because – as the fate of the 2004 Framework Decision had made painfully clear – the unanimity rule dominating pre-Lisbon decision making on third pillar issues made it virtually impossible to reach consensus on procedural rights matters. The directive is also a more influential legislative tool than the framework decision, *inter alia* because according to the direct effect doctrine of the European Court of Justice (ECJ), unimplemented or badly implemented directives can actually have direct legal force. In addition, when the provisions of a directive are described unconditionally and are sufficiently precise, they leave the member state no room for interpretation and they must be strictly complied with.<sup>18</sup>

As a result, it is fair to say that the Lisbon Treaty has considerably strengthened the legislative powers of the EU in the field of criminal (procedure) law. More specifically, the above-mentioned institutional changes have made it easier for the EU to draw up – by means of directives – (minimum) rules on, *inter alia*, the rights of individuals in criminal procedures.<sup>19</sup>

Secondly, as a result of the Treaty of Lisbon, it is now possible for the EU to accede to the ECHR.<sup>20</sup> Debate about the accession of the EU to the European Convention had already been going on for decades but had not yet led to any concrete steps being taken. Official talks on the EU's accession started in July, 2010, and the European Commission has proposed negotiation directives but it is a complicated process which is expected to take several years. Once the accession takes place, however, it is beyond doubt that this will have far-reaching consequences for the European system of human rights protection. With the EU expand-

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<sup>17</sup> Extensively on the Treaty of Lisbon: P. Craig, *The Treaty of Lisbon, Process, Architecture and Substance*, *European Law Review* 2008–33(2), p. 137–166.

<sup>18</sup> A. Klip, *European Criminal Law. An Integrative Approach*, 2009, p. 48.

<sup>19</sup> Art. 82 § 2 under b Treaty on Functioning of the European Union provides the explicit legal basis for such instruments: 'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (...) (b) the rights of individuals in criminal procedure; (...) Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.'

<sup>20</sup> Also, the fundamental rights as guaranteed by the ECtHR and as they result from the constitutional traditions common to the member states now constitute general principles of European Union law. See respectively art. 6 § 2 and 3 Treaty on European Union.

ing its activities in human rights protection, the division between the legal orders of the European Union on the one hand and the Council of Europe on the other, will become increasingly unclear. The complementary relationship between both organisations raises many complex legal questions on how the two organisations could and should coexist in the near future. For example, when the European Union will indeed accede to the ECHR, the ECHR and its control mechanisms will also apply to EU acts. This means that it will be possible for the ECtHR to examine whether the application and implementation of EU legislation is in conformity with Strasbourg standards. What if the ECJ's interpretation of ECHR norms differs from the interpretation given by the Strasbourg Court though and *vice versa*?<sup>21</sup>

Thirdly, with the entering into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (CFREU) has become legally binding.<sup>22</sup> Although there is debate on the added value of the Charter to the ECHR,<sup>23</sup> it is a fact that it creates a new, separate set of rights, freedoms and principles which can be used by the ECJ and national courts when interpreting EU law.<sup>24</sup> The Charter includes – *inter alia* – the right to a fair trial and respect for the rights of the defence.<sup>25</sup>

### 3. The Roadmap on procedural rights (2009)

A few months before the entering into force of the Lisbon Treaty, the matter of procedural rights was explicitly put back on the EU's agenda by the European Commission.<sup>26</sup> Subsequently, the Swedish presidency presented a Roadmap on procedural rights in which Member States agreed that measures at European level were necessary.<sup>27</sup> In the Roadmap, strategic guidelines were formulated for developing an area of freedom, security and justice in Europe for the period 2010–2014. It was explicitly mentioned in the Roadmap that EU action in the field of procedural rights is essential for the purpose of enhancing mutual trust within the European Union and to complement and balance existing EU policy on law enforcement and prosecution. Furthermore, it was stressed that there was room for

<sup>21</sup> From a procedural point of view, it might be possible that a question on procedural rights is – for example in a preliminary ruling – answered in a certain way by the ECJ and subsequently brought before the ECtHR. Until now, the two courts generally respect and follow each other's judgments but there are already numerous examples of divergent interpretations, for example on the right to respect for private and family life (art. 8 ECHR). See on this matter: *L. Rincón-Eizaga*, Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of article 8 of the European Convention on Human Rights, *International Law: revista colombiana de derecho internacional*, 2008–11, p. 134–144.

<sup>22</sup> Art. 6 § 1, Treaty on European Union.

<sup>23</sup> See for example *Klip* (fn. 19), p. 213: '*The added value of the Charter is limited because it does not offer much more or different rights than those that were already protected under the ECHR*'.

<sup>24</sup> See for the consequences with regard to the powerful legislative tools and effective control mechanism of the EU the Conclusion below.

<sup>25</sup> The right to an effective remedy and the right to a fair trial are laid down in article 47 of the Charter of Fundamental Rights of the European Union.

<sup>26</sup> Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM (2009) 262 final, Brussels 20–6–2009.

<sup>27</sup> Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09, DROIPEN 53, COPEN 120.

further action on the part of the EU to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.<sup>28</sup>

The Roadmap was adopted by the European Council on 10–11 December, 2009, as an explicit part of the Stockholm Programme, containing guidelines for a future common policy in the field of justice and home affairs.<sup>29</sup> In the Stockholm Programme, the European Council stated:

*‘The protection of the rights of suspected and accused persons in criminal proceedings 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. The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme.’<sup>30</sup>*

The Roadmap contains six measures which should – during the years 2010–2014 – result in legislation providing a minimum set of procedural rights within the European Union on the following topics:

- Measure A: Translation and Interpretation
- Measure B: Information on Rights and Information about the Charge
- Measure C: Legal Advice and Legal Aid
- Measure D: Communication with Relatives, Employers and Consular Authorities
- Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable
- Measure F: A Green Paper on Pre-Trial Detention.

According to the step-by-step approach chosen in the Roadmap, these matters should be dealt with one at a time. The first measure, dealing with the least controversial subject of the right to translation and interpretation, was adopted in 2010.<sup>31</sup>

With regard to the second measure concerning the right to information, a proposal for a directive on the right to information in criminal proceedings is currently being discussed in the European Parliament.<sup>32</sup> Originally, Member States wanted to limit the scope of this directive only to suspects and defendants in cross border cases. This led to heavy criticism since such a limitation would result in differential treatment between citizens of the EU, and thus in discrimination.<sup>33</sup> The

<sup>28</sup> Resolution of the Council of 30 November, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

<sup>29</sup> Council of the EU, The Stockholm Programme – An open and secure justice serving and protecting the citizens OJ 2010 C 115/01.

<sup>30</sup> Council of the EU, The Stockholm Programme – An open and secure justice serving and protecting the citizens OJ 2010 C 115/01, § 2.4.

<sup>31</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October, 2010, on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/ 0001 – 0007.

<sup>32</sup> Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392 final.

draft proposal was adopted by the Commission in July, 2010, and offers a right to information to all suspects/defendants and is thus not limited to cross border cases.

In the field of measure C of the Roadmap, dealing with the right to legal advice, the European Commission has also adopted a draft proposal.<sup>34</sup>

#### **4. Measure B: Information on Rights and Information about the Charges**

The suggestion to inform suspects and accused persons of their basic rights was – at the European Union level – addressed for the first time by the Commission in its Green Paper of 19 February, 2003, on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.<sup>35</sup> The Commission stated that it is important for both the investigating authorities and the persons under investigation to be fully aware of existing rights and therefore suggested the institution of a scheme requiring Member States to provide suspects and defendants with a written note of their basic rights – a ‘Letter of Rights’. According to the Commission, this suggestion received a favourable response during its consultations prior to the Green Paper. In the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of 28 April, 2004,<sup>36</sup> the Commission proposed a written Letter of Rights, notifying suspects of their rights to be introduced as one of the common minimum standards to be regulated in a framework decision.<sup>37</sup> To require Member States to produce a short, standard written statement of basic rights and to make it compulsory for all suspects at the earliest possible opportunity, especially before the first police interrogation, in a language that the suspect would be able to understand was, according to the Commission, a simple and inexpensive way to ensure an adequate level of knowledge. The Member States were unable to reach an agreement on the proposed text and the negotiations were stopped.

As mentioned above, on the eve of the Lisbon Treaty coming into force, the Swedish Presidency once again took up the issue of procedural safeguards by presenting a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings which provided for a step-by-step approach.<sup>38</sup> According to the Roadmap, the second step, Measure B, is described as follows:

Measure B: Information on Rights and Information about the Charges

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<sup>33</sup> See, for example, the Open Letter from several international human rights organizations to European Commissioner for Justice Viviane Reding (29–6–2010), available at: <http://www.soros.org/initiatives/brussels/news/criminal-proceedings-call-20100629/Open-letter-20100629.pdf>.

<sup>34</sup> Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final.

<sup>35</sup> COM(2003) 75 final.

<sup>36</sup> COM(2004) 328 final.

<sup>37</sup> Next to access to legal advice, access to free legal interpretation and translation, special features for vulnerable suspects and access to consular assistance.

<sup>38</sup> Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09 DROIPEN 53 COPEN 120.

Short explanation:

The suspect or defendant is likely to know very little about his/her rights. A person that is suspected of a crime should get information on his/her basic rights in writing [ideally by way of a letter of rights]. Furthermore, that person should also be entitled to receive information about the nature and cause of the accusation against him or her. The right to information should also include access to the file for the individual concerned.<sup>39</sup>

## 5. Research Project: An EU-Wide Letter of Rights

To gain insight into the matter, a study has been conducted on the way suspects in the EU Member States are informed of their rights in writing during criminal proceedings. In this study, a normative framework has been developed, based on the jurisprudence of the ECtHR to establish standards and a legal basis for information that should be given to the suspect in the initial phase of police investigations. Secondly, texts were gathered in all Member States as to how suspects were informed of their rights by means of standardised written information. These texts were analysed and, finally, a model has been designed for an EU-wide Letter of Rights to be applicable throughout the EU, which was intended to function as a source of inspiration for initiatives at national level as well as at EU level. The research was concluded in July, 2010.<sup>40</sup>

The study revealed that in 17 (of the 27) EU Member States, suspects are informed of their rights by a Letter of Rights or in a similar standardised form. In the documents that were gathered, 12 topics could be identified as having been addressed, although in different compounds and with different frequency. All documents contain information on legal assistance, although to a lesser extent, information on legal aid is provided. In addition, the right to silence, to have contact with trusted persons, the right to interpretation and translation, medical care and consular assistance are also dealt with in a considerable number of Letters of Rights and similar forms. With lesser frequency, access to the file, information on charge or suspicion, detention and custody, provisions for vulnerable suspects, conditions of detention and participation in proceedings, are mentioned.

Significant differences could be observed as to how and in what kind of format the information is provided. In some Member States, information on rights is included in a standardised form of the record of the questioning of the suspect by the police, which clearly functions as a checklist for the interrogating officer who has to read out the suspect's rights to him. The suspect has to sign the form in order to record that the interrogating officer has performed his duty of cautioning the suspect.<sup>41</sup> Other Member States provide information in the form of leaflets or brochures that obviously are meant to be handed out to suspects.

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<sup>39</sup> Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09 DROIPEN 53 COPEN 120.

<sup>40</sup> T. Spronken, *An EU-Wide Letter of Rights, Towards Best Practice*, 2010.

<sup>41</sup> This is the case in the Czech Republic, Luxembourg and Estonia.

An important aspect for a Letter of Rights or written information to be understandable is the language used. In many cases, the rights are formulated in very formal and legal language, even using lengthy quotations of legal provisions, which are probably very difficult for lay people to understand. There are also examples, however, of more or less successful efforts to draft the information into a more simple and understandable form.<sup>42</sup> Where juveniles are concerned it has to be borne in mind that on average within the EU, children from the age of 15 years old are considered criminally liable. Some Member States, however, apply diverging age limits. In Cyprus, for example, children from the age of 7 can be considered liable and in France, children from the age of 10 are criminally liable.<sup>43</sup> Letters of Rights should also provide understandable information for this category of especially vulnerable suspects.

Only a few Member States have the Letter of Rights available in different languages, something which is obviously detrimental for the effectiveness of a Letter of Rights for foreign suspects. England and Wales, Germany, Sweden and Belgium are noticeable exceptions to this rule, providing a Letter of Rights (respectively written information) that is translated in more than 40 languages.<sup>44</sup>

Interviews conducted with practitioners provide evidence that Member States using a Letter of Rights appear to have a well-organised procedural framework to support it. The effectiveness of the Letter of Rights and its procedural framework is, however, very much dependent on the way it is brought into practice. The attitude of the police is pivotal to the question of whether or not the Letter of Rights is given in accordance with the underlying legal obligations. In general, the attitude of the police towards the Letter of Rights is that it is considered to be a nuisance, rather than a valuable procedural right for the defence. This means that the Letter of Rights is treated as a formality that gets in the way of the interrogation.

Consequently, in the opinion of the interviewed lawyers, the police often negatively impact the effectiveness or value of the Letter of Rights, for example, by discouraging the person deprived of his liberty to exercise his defence rights, not explaining these rights adequately or by starting with informal chats before informing about the defence rights. It therefore seems that in many Member States adequate instructions as to how and when to make the Letter of Rights available to the person deprived of his liberty is lacking.

The model for a pan-European Letter of Rights (see Appendix) that has been developed within the aforementioned study, addresses the situation where a person is deprived of his liberty because he is suspected of having committed a criminal offence. The model contains the core basic rights that are applicable from the first contact that the suspect has with the police in relation to a criminal investigation and are based on norms derived from the ECHR and other international treaties.

<sup>42</sup> See, for instance, the Letters of Rights of Austria, Germany, Luxembourg and Spain in *Spronken* (fn. 39) Annex 1) and the written information provided in Belgium and Ireland.

<sup>43</sup> See *Spronken and Attinger* (fn. 13), p. 81.

<sup>44</sup> For the written information given to persons in administrative arrest in Belgium, see *Spronken* (fn. 39) Annex 2.

## 6. Proposed directive on the right to information in criminal proceedings

At the moment of finalising the results of the Letter of Rights-study, the European Commission presented a proposal for a directive on the right to information in criminal proceedings, including an indicative Model Letter of Rights inspired by the model developed in the study.<sup>45</sup> The most striking difference between the model and the proposed directive was that originally the latter did not address the right to silence. This gave rise to criticism in Council and the European Parliament and subsequently it was proposed that the suspect should also be informed of his right to silence.<sup>46</sup>

The fact that the right to silence was not included in the first draft of the proposed directive is a good example of the difficulties that are faced when trying to draft practical rules for the implementation of procedural safeguards aimed to be applicable throughout the EU. Evidently, the right to silence is considered to be one of the fundamental features of the concept of fair trial as formulated by the ECtHR, and is applicable immediately upon arrest or before the first questioning of a suspect. It is therefore quite astonishing that this right would not be included in a directive setting minimum standards. The most likely reason for not including the right to silence in the first draft is that within Member States there might be certain restrictions or exceptions to the right to silence. This is the case in England and Wales, for example, where adverse inferences may be drawn from using the right to silence. Also, in some Member States the right to silence does not apply in situations where a person is not yet formally suspected of an offence.

## 7. Measure C: Right to Legal Advice and Legal Aid

In June, 2011, the European Commission adopted a draft proposal for a directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest.<sup>47</sup> The objective of the directive is to lay down rules governing the rights of suspected and accused persons and persons subject to a European Arrest Warrant to have access to a lawyer in criminal proceedings against them, and rules governing the right of suspects and accused persons who are deprived of their liberty to communicate upon arrest with a third party.

The design of the proposed directive is ambitious. The aim is that the Directive should apply from the time a person is made aware by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence and it lays down, as a general principle, that all suspected and accused persons should have access to a lawyer as soon as possible, and at the latest, upon deprivation of liberty before the start of the questioning. Access to a lawyer must be

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<sup>45</sup> COM (2010) 392 final.

<sup>46</sup> See Draft Report of Committee on Civil Liberties, Justice and Home Affairs, 20 December, 2010, 2010/0215 (COD).

<sup>47</sup> Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final.

granted upon and during questioning and, in principle, no derogation of this right should be possible. Article 4 of the proposed Directive expressly states that the lawyer shall have the right to be present at any questioning and hearing and shall have the right to ask questions, request clarification and make statements that have to be recorded. In addition, the confidentiality of meetings between the suspect or accused person and their lawyer, and any other form of communication, should be ensured. The proposed Directive contains detailed conditions for the waiver of these rights.

The proposed directive is based on recent Strasbourg case law that has confirmed the importance of legal assistance for a proper defence in all its aspects and has made clear that the right to legal assistance arises immediately upon arrest. This case law is also referred to as the *Salduz*-doctrine.<sup>48</sup> Especially in the early stages of the criminal investigation, it is the task of the lawyer, amongst other things, to ensure respect for the right of the accused not to incriminate himself. The ECtHR has stressed that the principle of equality of arms requires that a suspect, as from the first police interrogation, must be afforded the whole range of interventions that are inherent to legal advice such as discussion of the case, instructions by the accused, the investigation of facts and search for favourable evidence, preparation for interrogation, support of the suspect and control of the conditions under which a suspect is detained.<sup>49</sup> The ECtHR has even set standards for sanctioning breaches of the right to legal assistance by ruling that incriminating statements obtained from suspects who did not have access to a lawyer may not be used in evidence.<sup>50</sup>

This directive will probably be more difficult to negotiate than the previous two on the right to interpretation and translation, and on the right to information, first because the impact on the jurisdictions that still have strong inquisitorial features will be immense. There still are Member States where the right for a lawyer to be present during interrogations is not safeguarded<sup>51</sup>, where access is not granted immediately upon arrest<sup>52</sup> or where access can be restricted when the interests of the investigation so require.<sup>53</sup>

Another hurdle will be its financial consequences for the Member States. The right to legal assistance is inextricably bound up with the right to legal aid. This is a controversial issue on which there is no conformity within the EU Member States regarding matters such as mechanisms to ensure that legal advice is available, minimum requirements regarding eligibility for legal aid as well as minimum quality criteria, and remuneration for lawyers providing legal assistance paid for by the state. The proposed Directive does not seek to regulate the issue of legal aid; that

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<sup>48</sup> Following the judgment of the ECtHR *Salduz v. Turkey* (fn. 10) that has been confirmed, since in more than 100 other judgments of the ECtHR.

<sup>49</sup> Cape et al (fn. 13), Chapter 2, § 4.3.

<sup>50</sup> ECtHR *Salduz v. Turkey* (fn. 10). See also more recently: ECtHR, *Séhalj v. Croatia*, Application no. 4429/09, Judgement of 28 June, 2011.

<sup>51</sup> The Netherlands, Belgium, Ireland, see *Spronken et al*, (fn.19), p. 51.

<sup>52</sup> Austria, Germany, Denmark, Hungary, Ireland, Luxembourg, Sweden, see *Spronken et al*, (fn.19), p. 38- 39.

<sup>53</sup> Such as supervision of communications in Austria, Belgium, The Netherlands, Poland, Romania, Czech Republic, Spain, Sweden and the UK, see *Spronken et al*, (fn.19), p. 49.

particular matter has been postponed to a later stage. However, it can hardly be expected that when negotiating the right to access to a lawyer Member States will not have the financial consequences in the back of their minds.

Despite the ambitious and well considered design of the proposed Directive to adequately safeguard the right to legal assistance, it is questionable whether regulating access to a lawyer will be effective when other areas are not included simultaneously such as legal aid, access to the case-file, time and facilities to prepare a defence and drive back of systematic application of lengthy periods of pre-trial detention. The research project on effective criminal defence that will be described below offers evidence that a holistic approach is needed.

## 8. Effective Criminal Defence in Europe

The research project, 'Effective Defence Rights in the EU and access to justice: investigating and promoting best practice' was conducted over a three year period commencing in September 2007 and concluded in June 2010. A team of 30 scholars and practitioners coming from nine jurisdictions have closely cooperated in order to produce comparable information for analysis. The jurisdictions involved are Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey. The reasons for choosing these jurisdictions were that they constitute examples of the three major legal traditions in Europe: inquisitorial, adversarial and post-state socialist. Within the inquisitorial traditions, France and Belgium have a Napoleonic background while Germany and Italy have significantly departed from that tradition. Hungary and Poland as former 'East-bloc' nations had been required to make significant adjustments to their legal systems as a condition of EU membership. Turkey was included as a potential Member State of the EU, which was worthy of study in its own right.

The project team developed a detailed set of research questions to elicit information about the constituent elements of criminal defence. Based on the research questions, in-country researchers from the chosen jurisdictions – all experts in criminal law in their respective countries – provided information on their criminal justice system and the identified defence rights, using a structured approach provided by the project team. The results were discussed within the research team and finally described in country reports that were validated by independent in-country reviewers. The data of all nine jurisdictions involved in the study were analysed and conclusions and recommendations were made. The complete results, country reports, analysis and recommendations are published in a book.<sup>54</sup>

### a) The research questions

One of the main premises underlying this research was that effective criminal defence does not only require adequate legal assistance but also a legislative and procedural context, as well as organisational structures, that enable and facilitate

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<sup>54</sup> *Cape et al.*, (fn. 14).

effective defence being a crucial element of the right to fair trial. This argument is based on the presupposition that no matter how good legal assistance is, it will not guarantee fair trial if the other essential elements of fair trial are missing. Thus, effective criminal defence has a wider meaning than simply competent legal assistance. In the research, therefore, the assessment of access to effective criminal defence was approached on three levels:

Whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights taking ECtHR jurisprudence, where it is available, as establishing a minimum standard.

Whether regulations and practices are in place that enables those rights to be 'practical and effective'.

Whether there exists a consistent level of competence amongst criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned with processes as well as outcomes, and in respect of which the perceptions and experiences of suspects and defendants are central.

The baseline for the examination and assessment was the ECtHR jurisprudence on the rights set out in article 6 ECHR, and also the jurisprudence in articles 5, 8 and 10 ECHR where this concerns the right to release during the pre-trial phase, confidential lawyer/client communication, and freedom of speech in the context of criminal procedure.<sup>55</sup>

It appeared from the analysis of each of the nine countries in the study that the various rights and standards cannot be considered in isolation from each other. Each has a dynamic relationship with some or all of the other rights. For example, the ability of a defence lawyer to effectively advise his or her client, whether at the investigative or trial stage, will be dependent on the information that is made available to them by the investigating or prosecuting authorities, and the timing of such disclosure.<sup>56</sup>

## b) Five major themes

From the country studies, five major themes emerged showing deficiencies in the mechanisms and judicial cultures to support effective criminal defence in practically all jurisdictions that were included in the study.<sup>57</sup>

First, legal assistance is in many countries problematic, especially with regard to access to legal assistance, the timeliness of the access and the quality of legal assistance.

Secondly, legal aid, closely linked to the right to legal assistance, is often ineffective due to slow, unclear and complicated application methods. In addition, availability, quality and independence of criminal defence lawyers in legal aid cases

<sup>55</sup> *Cape et al.*, (fn. 14), Chapter 2 The European Convention on Human Rights and the right to effective defence, p. 23-62.

<sup>56</sup> *Cape et al.*, (fn. 14), Chapter 13 The Effective Criminal Defence Triangle: comparing patterns, p. 573-580.

<sup>57</sup> *Cape et al.*, (fn. 14), Chapter 13 The Effective Criminal Defence Triangle: comparing patterns, p. 581-611.

proved to be inadequate, *inter alia*, due to low remuneration provided for legal aid work.

Thirdly, interpretation and translation are not always guaranteed and, in particular, problems arise with regard to which documents are to be translated and how this is funded.

The fourth theme concerns adequate time and facilities to prepare a defence. It is significant that criminal investigations and proceedings are largely conducted according to the needs, interests and timetables of the investigative and judicial authorities and do not take into account the needs of the suspect or accused. This is especially the case in the initial stages of the investigation of which it is acknowledged that this stage often has a determinative effect on the eventual outcome of the case. Problems arise with regard to the way suspects are informed of their rights, such as the right to silence, lack of clarity at what moment rights become effective, time to prepare for pre-trial hearings, access to the case file, various forms of expedited proceedings that do not take into account the needs for an effective defence and no rights for independent investigation on behalf of the defence.

The fifth and final theme concerns the excessive use of pre-trial detention that in itself implies major concerns for the adherence to the presumption of innocence but which also impacts on the defence strategy. The right to pre-trial release is poorly developed in most countries and being in custody limits the ability of suspects to prepare their defence. These problems are exacerbated by the fact that under many jurisdictions, the material on which applications for detention are based is not disclosed to the accused, legal aid is, in practice, rarely available at this stage and if it is, lawyers tend to be passive to argue the case owing to low remuneration.

### III. Conclusion

The results of the study in the nine European countries demonstrate that effectiveness of criminal defence does not simply depend upon whether suspects have access to legal assistance. Effective criminal defence relies on the presence of, and interrelationship between, a range of principles, laws, practices and cultures. It is of paramount importance that rights are expressed in sufficient detail and supported by appropriate enforcement mechanisms and judicial cultures. It thereby has to be taken into account that defendants are mostly poor, which requires an adequate legal aid system. In order to be practical and effective, all components have to be in balance and require appropriate timing. For example without access to interpretation and translation, for example, it is hard to imagine how a defendant who does not speak the language could actually participate in the proceedings or communicate with his lawyer. Furthermore, the right to silence cannot protect the suspect from making incriminating statements when he is not aware or informed of this right before his interrogation. And last but not least, without a properly functioning legal aid system, access to adequate legal advice is unattainable for most suspects.

National governments clearly have an important role to play in establishing the legislative context within which effective criminal defence is possible. Evidential and procedural rules, and effective enforcement mechanisms, are of fundamental importance in ensuring access to effective criminal defence. Similarly, national governments have an important responsibility for establishing structures and providing resources to ensure that free legal assistance, as well as free interpretation and translation, are available in a timely fashion to those who cannot pay for this themselves.

As set out before, it has become increasingly clear that the Strasbourg human rights regime is not (sufficiently) able to make sure that national authorities pay due diligence to all the responsibilities mentioned above. The ECHR and the ECtHR jurisprudence that flows from it has been, and continues to be, of crucial importance in establishing European standards in relation to effective criminal defence but there are important limitations to the Strasbourg convention mechanism.<sup>58</sup> Some of them are practical, such as the backlog of cases waiting to be heard. Others are more systemic such as the *ex post* nature of the application process and the weak mechanisms for ensuring compliance with ECtHR decisions. Furthermore, the ECtHR has largely, and rightly, been reluctant to go beyond formulating broad requirements when it comes to certain crucial elements of effective criminal defence, such as the standards of criminal defence lawyers.<sup>59</sup>

The fact that the current level of human rights protection in criminal proceedings is insufficient in practically all existing EU Member States shows that additional action at the European level is necessary and should be taken as soon as possible. The European Union has recently taken up this task, developing a policy on procedural rights for suspects and defendants in criminal proceedings.

Although, at this stage, there are still many uncertainties on how the EU policy on procedural rights will develop, it can be argued that the EU potentially has far more possibilities to enforce human rights standards than the Strasbourg institutions do. After all, with its powerful legislative tools and effective control mechanism, the EU is better equipped than the Council of Europe to ensure that national authorities establish the legislative framework to make effective criminal defence possible. The Lisbon Treaty has enhanced the role of the ECJ in relation to procedural rights and allows for minimum rules to be adopted in relation to rights of individuals. This has opened the way for enforcement mechanisms which have a character other than the *ex post* complaints to the ECtHR and can be of additional value to the Strasbourg control mechanism. The EU enforcement mechanism operates in a different way and provides for the general competence of the ECJ concerning questions of interpretation of the Treaty.<sup>60</sup> Every national court may in criminal

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<sup>58</sup> *Cape et al.* (fn. 14), Chapter 2 § 8.1. and also, for example, G. Vermeulen and L. van Puyenbroeck, 'Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union', in: M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, T. Vander Beken, F. Vander Laenen, G. Vermeulen and G. Vynckier (eds.), *EU and International CrimeControl*, 2010, p. 49.

<sup>59</sup> *Cape et al.* (fn. 14), Chapter 2, § 4.6.

<sup>60</sup> Art. 267 TFEU.

proceedings ask the ECJ to give a preliminary ruling on a relevant issue. In addition, the European Commission has the power to bring a case against a member state for failing to fulfil its obligations under the Treaty. A finding that a member state has not brought its national legislation into compliance may result in financial penalties imposed by the ECJ. These possibilities will be especially relevant when directives on procedural safeguards have been adopted.

Only the future will tell whether the EU's potential in this respect can and will be used to the full. To a large extent, this will depend on the scope and contents of the legislative instruments foreseen in the Roadmap on Procedural Rights. Obviously, the step-by-step strategy chosen in the Roadmap has at least one advantage: small bits will be easier to swallow than the bigger portion which was served to the Member States in the 2004 proposal for a Framework Decision. However, there might also be a downside to the step-by-step approach: after all, as mentioned before, most of the procedural rights of suspects are complementary to each other and, therefore, it remains to be seen whether it is wise to deal with them separately.

The negotiations on the development of an EU policy on procedural rights are at a crucial stage right now. Measure C, in particular, concerns rather controversial topics on which there is little conformity between Member States, which makes it difficult to reach a balanced approach that fits into each jurisdiction, making effective criminal defence possible. It remains to be seen whether and how the planned directives will in fact force national authorities to create the necessary conditions for effective criminal defence. Only when this is the case will the European Union be able to fill the gaps which Strasbourg cannot fill by actually providing suspects and defendants with rights that are practical and effective.

## Appendix

### Model EU-Letter of Rights for Suspects and Defendants in Criminal Proceedings

You are entitled to keep this letter of rights with you during your detention.

If you are deprived of your liberty by the police because you are suspected of having committed an offence you have the following rights:

**A. to be informed of what offence you are suspected**

**B. not to answer the police's questions or to give any statements to the police**

**C. to assistance of a lawyer**

**D. to an interpreter and translation of documents, if you do not understand the language**

**E. to notify somebody of your deprivation of liberty**

**F. to inform your embassy if you are a foreigner**

**G. to know for how long you can be detained**

**H. to see a doctor if you feel ill or need medicine**

You can find more details on these rights inside:

### **A. Information on the suspicion**

- You have the right to know what offence you are suspected of immediately after deprivation of liberty, even if the police do not question you.

### **B. Right to remain silent**

- You do not have to answer the police's questions nor give any statements to the police
- A lawyer can help and advise you on the law and help you to take decisions on whether or not to answer questions.
- If you want a lawyer, the police are not allowed to start questioning you before you have had the opportunity to talk with a lawyer.

### **C. Help of a lawyer**

- You have the right to talk to a lawyer before the police start questioning you.
- If you ask to speak to a lawyer, it does not make you look like you have done anything wrong.
- The police must help you to get in touch with a lawyer.
- If you are not able to pay for a lawyer, the police have to provide you with information how to get free legal assistance.
- If you want to talk to a lawyer but do not know one, or cannot get in touch with your own lawyer, the police must take care of arranging that a lawyer is appointed for you in case you have a right to free legal assistance.
- The lawyer is independent from the police and will not reveal any information you give to him or her without your consent.
- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
- You can ask your lawyer to be present during the interrogation by the police.

#### **D. Help of an interpreter**

- If you do not speak or understand the language, the police will arrange for an interpreter.
- The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order or decision concerning your detention.
- You have the right to have documents of the investigation translated that are important for a request for release (see under G).

#### **E. Telling somebody that you are detained**

- Tell the police if you want someone, for example a family member or your employer, to be told that you are detained.

#### **F. For foreigners: how to contact your embassy**

- If you are a foreigner, you can tell the police to inform your embassy or consular authority that you are detained and where you are being held.
- The police must help you if you want to talk to officials of your embassy or consular authority.
- You have the right to write to your embassy or consular authority. If you do not know the address the police must help you.
- The embassy or consular authority can help you with finding a lawyer.

#### **G. How long can you be deprived of your liberty?**

- You have the right to ask a judge for your release at any time. Your lawyer can advise you on how to proceed.
- You or your lawyer can ask to see the parts of the case-file relating to the suspicion and detention or be informed about their content in detail.
- If you are not released, you must be brought before a judge within \* hours after you have been deprived of your liberty.
- The judge must then hear you and can decide whether you are to be released or to be kept in custody.
- You have the right to receive (a translation) of the judge's decision if he decides that you will remain in custody.

#### **H. Medical care**

- If you feel ill or need medicine, ask the police to see a doctor.
- You have the right to be examined by a doctor in private.
- You can ask for a male or a female doctor.

# Reform of French Police Custody and European Law

Jocelyne Leblois-Happe<sup>\*</sup>

## Abstract

*The reform of French police custody, effective since 1<sup>st</sup> June 2011, was provoked at the same time by the evolution of the European and constitutional case law and by a press campaign denouncing the misuse of this measure. The progress is clear, because now the concerned person is informed about its right to remain silent and has the right to be assisted by a lawyer during its custody. Nevertheless, some incapacities remain both towards the European law of human rights (role of the prosecutor) and towards the law of the European Union (right to interpretation and translation, lawyer).*

## I. Introduction

The reform of French police custody (*garde à vue*), adopted in spring 2011, was the result of an unusual and novel process. Indeed, before July 2010 it was not at all foreseeable that this ‘key measure’ of French criminal procedure would be modified to this extent.

Police custody means deprivation of liberty by the police for the purpose of investigation. It is not a measure of the “*police administrative*” (i.e. police in charge of maintaining public order) but of the “*police judiciaire*” (i.e. police in charge of handling infractions against public order), because it only tends to prevent dangerous behaviour in an incidental manner; its main function being to enable the procurement of information concerning a suspected breach. Police custody is not a precondition to detention before trial either; it is an independent measure, a “tool” which the police can use to gather evidence concerning a breach and to find the perpetrators.

As its name suggests – the French expression for police custody is “*garder à vue*” which literally means “to keep in sight” / “to watch attentively” – the measure has its origin in this practice. It first appeared in 19<sup>th</sup> century, a time when the Code of Criminal Procedure (*code d’instruction criminelle*) knew – unless the criminal was caught in the act of committing an offence (*in flagrante delicto*) – only one legal framework for investigations preparing trial: judicial inquiry. With the law of 8<sup>th</sup> December, 1897, which allowed the suspect to be assisted by a lawyer from the first interrogation by the custodial judge onwards, police officers got used to interrogating the suspect before taking him to the custodial judge in order to gather as much information as possible before the lawyer would be present<sup>1</sup>. Thus the measure did not only mean to keep the suspect “à l’œil” (i.e. in sight, literally: at the eye); it

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<sup>1</sup> J. Leroy in: *Jurisclasseur Procédure pénale*, App. Art. 53 à 73, Police Custody (*Garde à vue*), no 22.

mainly meant to keep him “à l’ouïe” (i.e. in hearing distance, literally: at the ear)<sup>2</sup>, isolating him from the outer world for a short period.

When the criminal procedure was reformed at the end of the fifties, the legislator had to decide between two options: Either he continued to ignore police custody and took the risk that this practice would develop without any control or he sacrificed this “invention” by constraining it with certain rules. Very fortunately, the latter solution prevailed and police custody was incorporated into the Code of Criminal Procedure (*code de procédure pénale, CCP*)<sup>3</sup>.

The measure continued to develop during the 20<sup>th</sup> century, as the legislator regularly strengthened the protection of the suspected person<sup>4</sup>. This improvement can be explained by the advantages of police custody. The measure allows a profound and ample interrogation of the suspect by inabbling his escape and any propensity he may have towards destroying evidence or alerting possible accomplices. Police custody also implies some hazards. It is – first of all – a deprivation of liberty decided by the police without any prior intervention by a member of the judicial authority, although article 66 of the Constitution of 4<sup>th</sup> October, 1958, defines the judicial authority as the custodian of individual liberty (“*gardienne de la liberté individuelle*”). Moreover, the risks of abuse and pressure, psychological as well as physical, are real, as three convictions by the European Court of Human Rights against for violation of article 3 of the European Convention on Human Rights illustrate<sup>5</sup>.

Despite of these convictions and several legislative modifications, the number of cases of police custody has not ceased to increase and has continued to do so since the beginning of 21<sup>st</sup> century: from 364,535 police custodies in 2000 to 792,293 cases in 2009<sup>6</sup>!

In spring 2010, a press campaign and the book of a journalist containing profoundly researched information<sup>7</sup> criticised the abuse of the measure. That criticism was supported by the penal doctrine which suggested that some of the judgments made by the European Court between 2008 and 2010, especially against Turkey (judgment *Salduz*, Grand Chamber, application no. 36391/02, 27 November 2008; *Dayanan*, application no. 7377/03, 13<sup>th</sup> October 2009), revealed the incompatibility of French law with the requirements of the European Convention on Human Rights<sup>8</sup>. Thus, the legal profession tried to convince the Constitutional Council into confirming the conformity of police custody with the rights and

<sup>2</sup> See *R. Merle*, Police custody (La garde à vue), *La Gazette du Palais* (Gaz. Pal.) 1969, 2, Doctr., p. 18 et seq..

<sup>3</sup> *J. Leroy* (n. 1), no 23.

<sup>4</sup> See *H. Vlamynck*, Police Custody under the Code of Criminal Procedure of today (La garde à vue du Code d’instruction criminelle à nos jours), *Actualité Juridique Pénal Dalloz* (AJPénal) 2008, p. 257 et seq..

<sup>5</sup> Judgments *Tomasi* (Application no 12850/87, 27<sup>th</sup> August 1992), *Selmouni* (Application no 25803/94, 28 July 1999) and *Rivas* (Application no 59584/00, 1<sup>st</sup> April 2004).

<sup>6</sup> Etat 4001 annuel, DCPJ, *Le Monde*, « Police custody: 54% of increase since 2000 » (« Garde à vue: 54% d’augmentation depuis 2000 »), 22<sup>nd</sup> April 2008; Observatoire national de la délinquance et des réponses pénales (ONDRP), Police Custody in France (La garde à vue en France), Focus, n<sup>o</sup>4, juillet 2010, p. 9; Bill concerning the police custody, Study of impact (Projet de loi relatif à la garde à vue, Etude d’impact), 12<sup>th</sup> October 2010, <http://www.assemblee-nationale.fr/13/pdf/projets/pl2855-ei.pdf>.

<sup>7</sup> *M. Aron*, People in custody (Gardés à vue), Les arènes, 2010.

freedoms guaranteed by the Constitution (“*droits et libertés que la Constitution garantit*”, art. 61, 1<sup>st</sup> para. of the Constitution), arguing the priority question of constitutionality (“*question prioritaire de constitutionnalité*”, QPC) implemented by the constitutional law of 23<sup>rd</sup> July 2008<sup>9</sup>.

The Constitutional Council pronounced its decision on 30<sup>th</sup> July, 2010. It abolished – with deferred effect by 1<sup>st</sup> July 2011 – the clauses concerning the ordinary proceedings of police custody<sup>10</sup>. The constitutional jurisdiction considered that the rules in the Code of Criminal Procedure (*Code de procédure pénale*) did not conform to the constitutional rules in several respects, especially concerning the fact that every infraction, irrespective of its gravity, could lead to police custody, with the individual concerned neither being effectively assisted by a lawyer nor being notified of his right to remain silent<sup>11</sup>.

Consequently, lots of lawyers asked the judges to abrogate the police custody of their clients, because they had neither been informed of the right to remain silent, nor had they been assisted during their interrogations. They invoked the dissonance of the statute law with § 3 of article 6 of the European Convention on Human Rights which admits to “*everyone charged with a criminal offence*” 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 the interests of justice so require* “. By three judgments delivered on 19<sup>th</sup> October, 2010, the criminal division of the Court of Cassation rendered the judgment that the text concerning police custody was indeed not in conformity with the Convention but, on the other hand, that new rules could not be applied immediately because the principle of legal certainty and an efficient administration of the justice had to be guaranteed. The criminal division therefore deferred the effect of the new rules to the date when the law reforming the police custody would come into effect, until 1<sup>st</sup> July, 2011, by the latest<sup>12</sup>.

A legislative proposal for reforming police custody was proposed to the Parliament the same month and voted on within less than six months. Law no. 2011-392 of 14<sup>th</sup> April, 2011, regarding police custody, rewrote articles 62 and the following (“*garde à vue*” of ordinary proceedings) and 706-88 and the following (derogatory “*garde à vue*”, concerning organised crime) of the Code of Criminal Procedure (*code de procédure pénale*). The law was due to come into effect on 1<sup>st</sup> June, 2011<sup>13</sup>.

<sup>8</sup> See so in particular: *F. Fourment, L. Mortet*, The control of the judicial authority over measures of constraint: the case of police custody (Le contrôle de l'autorité judiciaire sur les mesures de contrainte: le cas de la garde à vue) in: V. Malabat, B. de Lamy, M. Giacomelli (eds), *La réforme du Code pénal et du Code de procédure pénale*, *Opinio doctorum*, Dalloz, Thèmes & commentaires, Paris, 2009, p. 171 et seq.; Haritini Matsopoulou, « Plea for a redefining of the role of the lawyer during the police custody » (« Plaidoyer pour une redéfinition du rôle de l'avocat pendant la garde à vue »), case note ECtHR, *Dayanan v. Turkey*, 13 October 2009, Gaz. Pal. 2-3 December 2009, p. 19 et seq.

<sup>9</sup> Law no 2008-724 of modernization of the institutions of the 5<sup>th</sup> Republic (de modernisation des institutions de la Vème République).

<sup>10</sup> The applicable rules in organized criminality had been the object of a control of constitutionality a priori in 2004. The Constitutional Council considered that it did not there take place to return above.

<sup>11</sup> Decision no 2010-14/22 QPC, 30. 7. 2010, *M. Daniel W. et autres*.

<sup>12</sup> Cour de cassation, chambre criminelle (Cass. crim.) 19 October 2010, Appeals n°10-85051, 10-82306, 10-82902.

This reckoning did not, however, count on disagreement within the highest judicial jurisdiction between the criminal division (competent for criminal cases in general) and the 1<sup>st</sup> civil division (competent for law – including criminal law – relating to foreigners). This disagreement brought about a Plenary Chamber of the Court of Cassation (*Assemblée plénière de la Cour de Cassation*) which decided on the compatibility of the existing law with the European Convention and the date of effect of its decision by four judgments, the same day that the new law was released. Regarding the conformity of police custody with the Convention, the plenum confirmed the solution adopted by the criminal division; in contrast, concerning the date of effect of this statement, the plenum returned to the classic position: The member states of the Convention for the Protection of Human Rights and Fundamental Freedoms have to respect the decisions by the European Court of Human Rights which means not to wait until they would be taken to court, not having modified their legislation; with the rights guaranteed by the Convention being effective and concrete, the principle of legal certainty and the necessity for efficient judicial administration cannot be used to deprive a person of his right of an equitable process (*“les Etats adhérents à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales sont tenus de respecter les décisions de la Cour européenne des droits de l’homme, sans attendre d’être attaqués devant elle ni d’avoir modifié leur législation”; “les droits garantis par la Convention devant être effectifs et concrets, le principe de sécurité juridique et les nécessités d’une bonne administration de la justice ne peuvent être invoqués pour priver un justiciable de son droit à un procès équitable”*<sup>14</sup>).

The minister of justice immediately gave instruction to the prosecutors that the clauses of the law of 14<sup>th</sup> April, 2011, concerning the notification of the right to remain silent and assistance by a lawyer would come into effect the same day. The chaos provoked by this rash application was amplified by several judgments of the Court of Cassation which followed shortly after. In its judgment of 11<sup>th</sup> May, 2011,<sup>15</sup> the criminal division decided that a conviction must not be based on the declarations made by a person during his police custody if the person was not assisted by a lawyer. In four judgments of 31<sup>st</sup> May, it decided that every person placed under police custody must be informed of his right to remain silent and – only with exceptions justified by compelling reasons caused by special circumstances

<sup>13</sup> See : What reforms for police custody? (Quelle réforme pour la garde à vue ?), Special file, AJPénal 2010, p. 470 et seq.; E. Mathias, For a law of the free suspects (about the bill concerning police custody) (Pour une loi des suspects... libres (à propos du projet de loi relatif à la garde à vue)), Droit pénal (Dr. pénal) 2011, Etudes, n°6 ; H. Matsopoulou, An unfinished reform – About the law of April 14<sup>th</sup>, 2011 (Une réforme inachevée – A propos de la loi du 14 avril 2011), La Semaine juridique, édition générale (JCP G) 2011, Fast outline (Aperçu rapide), 542; J. Pradel, A perplexed glance on the new police custody – About the law of April 14<sup>th</sup>, 2011 (Un regard perplexe sur la nouvelle garde à vue – A propos de la loi du 14 avril 2011), JCP G 2011, doctr. 665 ; M.-L. Rassat, To go back again to the work – incapacities of the reform of the police custody (A remettre sur le métier – Des insuffisances de la réforme de la garde à vue), JCP G 2011, Free comments (Libres propos), 632. Police custody can be also practised within the framework of an instruction by virtue of the article 154 of the Code of criminal procedure, which dismisses quoted articles. This hypothesis will, however, be left aside in the developments which follow.

<sup>14</sup> Cour de cassation, assemblée plénière (Cass. ass. plénière), 15<sup>th</sup> April 2011, Appeals no 10-17049, 10-30313, 10-30316, 10-30242.

<sup>15</sup> Appeal no 10-84251

of the case in hand – his right to be assisted by a lawyer, with the exception of an unequivocal waiver, from the outset and that police custody in which these rights had not been taken account of should be abrogated<sup>16</sup> (*toute personne placée en garde à vue doit “dès le début” de la mesure “être informée de son droit de se taire et, sauf exceptions justifiées par des raisons impérieuses tenant aux circonstances particulières de l’espèce, pouvoir bénéficier, en l’absence de renonciation non équivoque, de l’assistance d’un avocat”*).

On 1<sup>st</sup> June, 2011, the complete law of the reform came into effect, which suggests the beginning of a calmer period. The new rules are definitely more akin to the requirements imposed in the two European normative spaces. However, they do not fully conform to these requirements in respect of the preconditions for police custody (I) and the rights acknowledged to the person placed under police custody (II)<sup>17</sup>.

## II. Preconditions for police custody

Police custody is now defined by the Code of Criminal Procedure as being a constraining measure (...) by which a person (...) is kept at the disposal of the investigators (*“une mesure de contrainte (...) par laquelle une personne (...) est maintenue à la disposition des enquêteurs”*; art. 62-2, 1<sup>st</sup> para.) The preconditions of this measure result from rules stated by the law regarding the concerned persons (1) and the duration of the deprivation of liberty (2).

### 1. Concerned persons

These are both persons who could be placed under police custody and those who are entitled to decide over the application of the measure.

Persons who could be placed under police custody are those against whom exist one or several plausible reasons to suspect (*“une ou plusieurs raisons plausibles de soupçonner”*) that they have committed or attempted to commit a crime or offence (legally) punishable by imprisonment (*“commis ou tenté de commettre un crime ou un délit (légalement) puni d’une peine d’emprisonnement”* (art. 62-2, 1<sup>st</sup> para. Code of Criminal Procedure). The criterion is borrowed from article 5 § 1 c) of the European Convention on Human Rights according to which a person can be deprived of his liberty if there are probable causes to suspect that he committed an infraction (*“on reasonable suspicion of having committed an offence”*). Furthermore, police custody must be the only way in which at least one of the following objectives is achieved: (1.) to allow the execution of the investigation which implies the presence or the participation of the person; (2.) to guarantee that the person is brought before the prosecutor so that the magistrate can decide on the continuation of the investigation; (3.) to avoid the person modifying the evidence; (4.) to avoid the

<sup>16</sup> Appeals nos 11-81412, 11-80034, 10-88293, 10-88809.

<sup>17</sup> See, of the same opinion: *J. Alix*, The rights of the defence during the police investigation after the reform of police custody: inventory of fixtures and perspectives (Les droits de la défense au cours de l’enquête de police après la réforme de la garde à vue: état des lieux et perspectives), *Recueil Dalloz (D.)* 2011, p. 1699 et seq.

person exerting pressure on the witnesses or the victims or their families and close relations; (5.) to avoid the person colluding with other individuals suspect of being his abettors or accomplices; (6.) to guarantee the implementation of measures with the aim to stop the crime or offence (*“l’unique moyen de parvenir à l’un au moins des objectifs suivants : 1° Permettre l’exécution des investigations impliquant la présence ou la participation de la personne ; 2° Garantir la présentation de la personne devant le procureur de la République afin que ce magistrat puisse apprécier la suite à donner à l’enquête ; 3° Empêcher que la personne ne modifie les preuves ou indices matériels ; 4° Empêcher que la personne ne fasse pression sur les témoins ou les victimes ainsi que sur leur famille ou leurs proches ; 5° Empêcher que la personne ne se concerta avec d’autres personnes susceptibles d’être ses coauteurs ou complices ; 6° Garantir la mise en œuvre des mesures destinées à faire cesser le crime ou le délit”*, art. 62-2, para.2 Code of Criminal Procedure). These new clauses which now obligate the police to justify placement under police custody tend to guarantee the necessity and proportionality of deprivation of liberty, in conformity with the general principle which the introductory article (III) of the Code commemorates: “The compulsory measures which can be imposed on the suspected or accused person must be strictly limited to the necessities of the procedure and proportional to the gravity of the infraction”. (*« Les mesures de contrainte dont (la personne suspectée ou poursuivie) peut faire l’objet (...) doivent être strictement limitées aux nécessités de la procédure (et) proportionnées à la gravité de l’infraction »*). Nevertheless, accorded this way, the guarantee cannot be effective unless the judges accept to control the respective decision of the police – the Court of Cassation has so far refused<sup>18</sup> to do so.

The persons deciding on the placement under police custody are exclusively members of the *police judiciaire*. The competence for this decision is limited to officers being qualified as officers of the *police judiciaire* (OPJ); these are officers with a minimum of experience in their function who have passed a special exam and have obtained personal authorization by the general attorney at the Court of Appeal (*cour d’appel*) (art. 16 Code of Criminal Procedure). This guarantee is, however, rather feeble as emphasized by the Constitutional Council in its decision of 30<sup>th</sup> July, 2010, because the conditions for qualifying as an OPJ have diminished over time<sup>19</sup>. It is therefore even more important that the duration of the measure is limited by law.

## 2. Duration of police custody

The initial delay of retention is a maximum of 24 hours (art. 63, para. 2 Code of Criminal Procedure), albeit this can be extended if necessary.

According to ordinary proceedings, police custody can be extended for a second period of 24 hours if the person is suspected to have committed a crime or offence (legally) punishable by imprisonment for at least one year and if the deprivation of

<sup>18</sup> See so Cass. crim. 4 janvier 2005, n°04-84876, AJPén 2005, p. 160, comment *J. Leblois-Happe*, Dr. pénal 2005, no 49, comment *A. Maron*.

<sup>19</sup> Aforementioned decision, no 17.

liberty is the only way to achieve one of the objectives mentioned above. The decision is made by the prosecutor to whom the person has to be presented, either in person or via videoconference. However, by way of exception, extension may also be authorised with a decision that is written and justified by the officer (art. 63, para. 2 Code of Criminal Procedure).

As for organised crime, police custody can be additionally extended for 48 hours by decision of a specialised judge, the judge of liberties and detention (*judge des libertés et de la detention*). The same judge can decide to extend it once more for a further two days if the investigation suggests a terrorist infraction and the serious risk of a terrorist attack or if the necessities of international cooperation require doing so. The prior presentation of the person is the rule; the law allows for exceptions nevertheless (art. 706-88 and 706-88-1 Code of Criminal Procedure).

These rules were revised by a law of 14<sup>th</sup> April, 2011, with the aim of limiting extended police custodies and strengthening the control exercised by the judicial authority. It goes without saying that the legislator has not been very audacious in such matters.

The guarantee linked to the condition that the investigation must be concerned with an infraction punishable by imprisonment for at least one year is a pretence because the simple theft of any object already incurs a penalty of three years' imprisonment (art. 311-3 Code of Criminal Law – *Code pénal*)!

Moreover, it is regrettable that the option for extension of police custody without the concerned person being brought before a member of the judicial authority has been maintained. Article 5 § 3 of the European Convention on Human Rights says that “*everyone arrested or detained in accordance with the provisions of paragraph 1 c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power*”. The European Court considers that this judicial control must be automatic and that the person must be heard by the officer who affirms the legality and the justification of the deprivation of liberty or – where appropriate – decides on the person's release<sup>20</sup>. Not always implying a systematic presentation to the authority in charge, French law is not in conformity with these requirements.

Finally, the authority to enable the first extension of police custody is left to the prosecutor, even though the European Court of Human Rights in 2008 (judgment *Medvedyev v. France*, 10<sup>th</sup> July, 2008) and in 2010 (judgment *Moulin v. France*, 23<sup>rd</sup> November, 2010) pronounced the judgment that – owing to the lack of independence respecting the executive authority and of impartiality in the process – the prosecutor was not a “judge[s] or other officer[s] authorised by law to exercise judicial power” (he is the prosecuting authority). Certainly the Court gives a rather flexible interpretation of the adverb “promptly” and it is deducible from its jurisdiction that a detention of less than three or four days without presentation to a judge is in conformity with the Convention<sup>21</sup>. France, therefore, has no reason to fear any condemnation over this. It would still have been appropriate though to have

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<sup>20</sup> *Wintzenberg v. Pays-Bas*, Application no 6301/73, 24<sup>th</sup> October, 1979, *Medvedyev v. France*, Grand Chamber, Application no 3394/03, 29<sup>th</sup> March, 2010.

ascribed the decision on extension of police custody to a judge, because the meaning of the European Habeas Corpus is emphasised in the jurisdiction of the Court of Strasbourg<sup>22</sup>. Analogically, it is not certain that the rights acknowledged to the concerned person are sufficient in the light of the European requirements.

### III. Rights of persons under police custody

The Code of Criminal Procedure acknowledges four rights to the person being deprived of his liberty by the police: the right to receive certain information (1), the right to inform a third party (2), the right to be examined by a doctor (3) and, finally, the right to be assisted by a lawyer (4). The new law involves modifications to each of these elements.

#### 1. The right to information

After having declared his identity, the person placed under police custody must be informed of this measure and its potential duration, about the character and the presumed date of the infraction which he is suspected of, and of his rights, especially the right to remain silent (art. 63-1 Code of Criminal Procedure). This information has to be communicated “promptly” (i.e. at the start of his placement under police custody), in a language which he understands and – where appropriate – via written forms. If he does not understand French, he has to be informed of his rights by a translator and – where appropriate – by written forms for immediate information (ibid.).

This right to information was extended by the new law, with the objective to bring French law into conformity with the right derived from the European Convention on Human Rights. The right to remain silent is actually one of the elements of the right not to contribute to incriminating oneself, as applied by the European Court for the first time in judgment of *Funke v. France* on 25<sup>th</sup> February, 1993, and rendered more precisely in the later jurisdiction (especially in the judgment *John Murray v. United Kingdom* on 8<sup>th</sup> February, 1996). The Court of Strasbourg certainly hesitates in demanding that the concerned person has to be explicitly informed on this. Nevertheless, an approximation of such a demand is perceptible in the judgment *Brusco v. France* on 14<sup>th</sup> October, 2010<sup>23</sup>. The conclusion that article 6 was violated is mainly based on the observation that it is not apparent – either from the files or from the transcripts of the testimony – that the applicant had been informed of his right to remain silent at the beginning of his interrogation, his right not to answer or to answer only the questions he liked and

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<sup>21</sup> See judgments *Brogan v. United Kingdom*, Application no 11209/84, 20<sup>th</sup> November, 1988 and *Igdeli v. Turkey*, Application no 29296/95, 20<sup>th</sup> June, 2002. See to *D. Rebut*, The *Medvedyev* Judgment and the reform of police custody (L'arrêt *Medvedyev* et la réforme de la procédure pénale), D. 2010, p. 970 et seq.

<sup>22</sup> See: Is it necessary to reform the status of the prosecution? (Faut-il réformer le statut du ministère public ?), Special file, AJPénal 2011, p. 106 et seq..

<sup>23</sup> Application no 1466/07.

that the lawyer who came twenty hours after being held in police custody was not able to inform him of his right to remain silent and his right not to contribute to incriminating himself before his first interrogation had started (§ 54). The obligation for police officers to inform the person deprived of liberty of his rights, as stipulated under the new law, should therefore be welcomed.

Independently of this special aspect, it is possible to question whether or not the information given during police custody fulfils the requirements which are adopted stepwise within the European Union.

The directive of 20<sup>th</sup> October, 2010, on the right to interpretation and translation in criminal proceedings<sup>24</sup> was the first act to be adopted with the objective to strengthen the procedural rights of persons on EU territory. It offers the person suspected having committed an infraction the right to be assisted by an interpreter “without delay”, as well as during interrogations by the police and, if necessary, in order to communicate with his counsellor, if he does not understand the language of the procedure (art. 2 1. and 2.). The concerned person has the right to refuse the assistance of an interpreter or to consider the quality of the interpretation insufficient “to safeguard the fairness of the proceedings” (art. 2 5.). The person also has the right to obtain a written (or at least oral) translation of the essential files for his defence, especially concerning the decision to deprive him of his liberty and the document reporting on the accusations against him, within a reasonable period (art. 3 1., 2. and 7.)<sup>25</sup>. He has the right to refuse the translation and its quality (art. 3 5.). Even though these rules seem to be respected in practice, French law does not formally guarantee the presence of an interpreter nor the option to decide on the presence of an interpreter or the option to consider the interpretation insufficient.

The proposal for a directive on the right to information in criminal proceedings made by the European Commission on 22<sup>nd</sup> July, 2010<sup>26</sup>, provides that the member States have to make sure that any person suspected or accused of having committed a criminal offence “is promptly provided with information on his procedural rights in simple and accessible language.” (art. 3). This explanation, “as a minimum” has to contain information on the following rights: the right to be assisted by a lawyer – free of charge, if necessary –, the right to be informed of the accusations against him, the right to access the case-files if necessary, the right to interpretation and translation, and the right to be rapidly brought before a judge in case of detention (art. 3). The person deprived of his liberty has to receive this information rapidly and in written form (declaration of rights) and has to be enabled to read the declaration of rights and to keep it throughout the complete duration of the deprivation of his liberty (art. 4). Furthermore, the suspect has to be informed, in detail, of the accusations against him, including information on a) “the circumstances in which the infraction was committed, including the time, place and degree of participation in the offence” and b) “the nature and legal classification of the offence” (art. 6). The rules defined in the Code of

<sup>24</sup> O.J. 2010 L 280/1.

<sup>25</sup> The irrelevant passages for the exercise of the defence are not to be translated (art. 3 4.).

<sup>26</sup> COM(2010) 392 final.

Criminal Procedure (*Code de procédure pénale*) do not seem to satisfy these requirements (albeit these can still be modified) completely. The given information is not as precise as the proposition for the directive suggests; besides, the information is still not given in written form.

The second right conceded to persons under police custody tends to break the isolation provoked by the deprivation of liberty.

## 2. The right to inform a third person

If desired, the person under police custody has the right to inform a person who he usually lives with, a parent, one of his brothers and sisters or his caregiver or guardian by phone. He can also inform his employer and, if he is a foreigner, the embassy of his country (art. 63-2, 1<sup>st</sup> para., Code of Criminal Procedure). The information has to be delivered within three hours, except under insurmountable circumstances. The prosecutor may, however, decide against fulfilling this requirement due to necessities of the investigation (*“en raison des nécessités de l’enquête”*; art. 63-2 para. 2 and 3 Code of Criminal Procedure).

The text must be compared to the proposal for a directive on the right of the access to a lawyer in criminal proceedings and on the right to communicate upon arrest of 8<sup>th</sup> June, 2011<sup>27</sup>. If the information of the embassy seems to be directly inspired by article 6, articles 5 – concerning the right to communicate with a third person after detention – and 8, which enumerates the possibilities for exceptions, seem to contain more rules than is required under French law. The first paragraph of article 5 actually provides that the member States shall ensure that the person deprived of his liberty has the right to communication *“with at least one person named by him as soon as possible”*. It means the right to “communication” and not to “information”, as provided for under article 6, so that the idea of an exchange is implied; besides, it seems that the appointed third person can be chosen freely by the concerned person. The possibilities to infringe these rights are strictly defined in article 8. The infringement requires *“exceptional circumstances”* and must result from a specifically justified decision made by a judicial authority. Moreover, the infringement shall a) be justified *“by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person”*, b) *“not be based exclusively on the type or seriousness of the alleged offence”*, c) be limited to *“what is necessary”*, d) *“be limited in time as much as possible and in any event not extend to the trial stage”* and, finally, e) *“not prejudice the fairness of the proceedings”*. The possibility for the prosecutor to infringe the right to inform a third person because of necessities of the investigation (*“en raison des nécessités de l’enquête”*), seems to be too vague to be in conformity with these requirements.

The third right is complementary to the second. It is intended to protect the physical and mental integrity of the person being deprived of his liberty.

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<sup>27</sup> COM(2011)326 final.

### 3. The right to be examined by a doctor

Every person under police custody can ask to be examined by a doctor. The physician is appointed by an officer of the "*police judiciaire*" or by the prosecutor and has to be advised within three hours, unless insurmountable circumstances prevent it. Family members of the person under police custody are also entitled to request the consultation, in addition to the police officer and the prosecutor. The doctor examines the person under police custody in total privacy from others, who remain outside the room (unless the doctor decides otherwise) and writes a report in which he estimates the aptitude of the person under police custody (art. 63-3 Code of Criminal Procedure).

The fourth and final right is the most recent and debated right: the right to be assisted by a lawyer<sup>28</sup>.

### 4. The right to be assisted by a lawyer

Before the law of 14<sup>th</sup> April, 2011, came into effect, a person under police custody did not have this right but was only allowed to talk to a lawyer ("*s'entretenir avec un avocat*"). Furthermore, the Court of Cassation pronounced the judgment that no legal requirement instructed the police to delay the hearing of a person under police custody in order to await the arrival of the lawyer who is to support the interview ("*aucune disposition légale n'impose au policier de différer l'audition d'une personne gardée à vue dans l'attente de l'arrivée de l'avocat assurant (cet) entretien*")<sup>29</sup>.

This status of the law was considered unconstitutional by the Constitutional Council on 30<sup>th</sup> July, 2010. Neither was it in conformity with the dispositions of the European Convention on Human Rights in keeping with the way they are interpreted by the Court.

While there is provision for the person placed under police custody to ask for assistance from the outset (of custody) by a lawyer chosen by him or his family or appointed by the department if the person so desires (art. 63-3-1 Code of Criminal Procedure), this assistance can be delayed for a maximum of 48 hours in the case of organised crime or an offence, and up to 72 hours in the case of a terrorist infraction or drug dealing, in light of compelling reasons caused by special circumstances of the case in hand, either with the objective to gather or preserve evidence, or with the objective to prevent a hazard to persons ("*en considération de raisons impérieuses tenant aux circonstances particulières de l'enquête ou de l'instruction, soit pour permettre le recueil ou la conservation des preuves, soit pour prévenir une atteinte aux personnes*"; art. 706-88 Code of Criminal Procedure). The decision, written and reasoned, is made by the prosecutor for the first 24 hours, and, thereafter by the judge of liberties and detention (*judge des libertés et de la détention; ibid*).

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<sup>28</sup> The victim of the breach also benefits from this right when confronted with the person who is in police custody (art. 63-4 CPP).

<sup>29</sup> Cass. crim. 13<sup>th</sup> December, 2006, Appeal no 05-87706.

From his arrival at the police station on, the lawyer has to be informed of the presumed nature and date of the infraction being investigated (art. 63-3-1). He can, by request, inspect the transcript of the notification of the placement under police custody, the report of a doctor when eventually written, as well as the transcripts of the hearing of his client (art. 63-4-1 Code of Criminal Procedure). The lawyer is then allowed to talk to the person under police custody during thirty minutes, under conditions respecting the confidentiality of the conversation (art. 63-4 Code of Criminal Procedure).

He can be present during the hearings (and confrontations) of his client, if the latter wishes so, and he can ask corresponding questions. Moreover, the first hearing concerning the facts cannot start before a delay of two hours after the lawyer was informed has passed, so that counsel has sufficient time to arrive (art. 63-4-2 para. 2, 63-4-3 para. 2 Code of Criminal Procedure). Nevertheless, it is still possible to infringe this rule by a reasoned, written decision of the prosecutor, if the necessities of the investigation require an immediate hearing (*“les nécessités de l’enquête exigent une audition immédiate”*; art. 63-4-2 alinéa 3). The presence of a lawyer during the hearings and confrontations of the client can exceptionally be refused (*“à titre exceptionnel”*) for a maximum of 24 hours<sup>30</sup>, if this measure appears to be indispensable for compelling reasons caused by special circumstances of the present case, either with the objective to enable the smooth progress of urgent investigations concerning the gathering or preserving of evidence, or to prevent an imminent hazard to persons (*“apparaît indispensable pour des raisons impérieuses tenant aux circonstances particulières de l’enquête, soit pour permettre le bon déroulement d’investigations urgentes tendant au recueil ou à la conservation des preuves, soit pour prévenir une atteinte imminente aux personnes”*; art. 63-4-2 para. 4). The lawyer’s access to the transcripts of his client’s hearings can be refused for the same duration. The decision, reasoned and written, is made by the prosecutor (deferment up to 12 hours) or by the judge of liberties (deferment of 12 to 24 hours) (art.63-4-2 para. 5 and 6).

The lawyer can write down observations which are referred to in the procedure (art. 63-4-3 *in fine*). He is not allowed to refer to any of the conversations he had with the concerned person or to information he received as long as the police custody endures (art. 63-4-4 Code of Criminal Procedure).

Thus, the right to be assisted by a lawyer, as approved by the law of 14<sup>th</sup> April 2011, is a right susceptible to infringement. Its exertion can be delayed over time. If the lawyer is present, he still does not have access to the files of the procedure but only to certain documents and this access can be refused by the prosecutor or the judge. The same applies for his presence during the hearings of his client.

These different modulations of a law which is considered fundamental at European level seem to be somewhat incompatible with the rights guaranteed within the European Union by the Council of Europe.

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<sup>30</sup> The adjournment beyond 12 hours is only possible if the person would incur at least 5 years of detention (art. 63-4-2 paragraph 5).

The right to be assisted by a lawyer from the beginning of deprivation of liberty results from article 6 § 3 of the European Convention on Human Rights, in the interpretation given by the Court<sup>31</sup>, as well as from the proposal for a directive of 8<sup>th</sup> June, 2011 (art. 3 c)).

The Court of Strasbourg admitted in its judgment *Salduz* that this right can be restricted if “compelling reasons” (“*raisons impérieuses*”) “in the light of the particular circumstances of the case” (“*à la lumière des circonstances particulières de l’espèce*”; § 55) require so. This expression was almost literally adopted in article 706-88 of the Code of Criminal Procedure (*Code de procédure pénale*) in respect of the following words: the intervention of the lawyer can be delayed in consideration of compelling reasons caused by special circumstances of the present case (...), either with the objective to enable the smooth progress of urgent investigations concerning the gathering or preserving of evidence, or to prevent an imminent hazard to persons (“*l’intervention de l’avocat peut être différée, en considération de raisons impérieuses tenant aux circonstances particulières de l’enquête (...), soit pour permettre le recueil ou la conservation des preuves, soit pour prévenir une atteinte aux personnes*”). However, the reasons justifying this delay are defined more broadly than in article 8 of the proposal for a directive regarding the right of access to a lawyer in which it is stated that an infringement “*shall be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of a person*”). The European text, not being definite, requires urgency and that the danger to the person is serious. It does not additionally mention the necessities of the investigation.

Not allowing the lawyer to inspect the files of the procedure also increases the significance of interrogations, but it is understandable in the phase prior to investigation. In reference to police custody, the decisions by the European Court of Human Rights do not explicitly require that the lawyer has access to the files but it clarifies the modalities of his intervention (“*The fairness of proceedings against an accused person in custody required that he be able to obtain the whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of evidence, preparation for questioning, support to an accused person in distress, and checking of the conditions of detention*”). These are fundamental elements of the defence which must be exercised freely by the lawyer; judgment *Dayanan*, § 32<sup>32</sup>). It would seem difficult, however, to account for such assistance if the lawyer is not allowed to inspect the files. The proposal for a directive of the Commission, as regards the right to information in criminal proceedings of 22<sup>nd</sup> July, 2010, allows for every suspected or accused person the right to access the case-file himself or via his lawyer. In the case of detention, this access has to include documents which are “*relevant to the determination of the lawfulness*” of the deprivation of liberty, no exceptions provided

<sup>31</sup> See the Judgments *Salduz v. Turkey*, Grand Chamber, Application no 36391/02, 27<sup>th</sup> November, 2008, *Dayanan v. Turkey*, Application no 7377/03, 13<sup>th</sup> October, 2009, *Adamkiewicz v. Poland*, Application no 54729/00, 2<sup>nd</sup> March, 2010, *Karadag v. Turkey*, Application no 12976/05, 29<sup>th</sup> June, 2010.

<sup>32</sup> See to *Karadag v. Turkey*, 29<sup>th</sup> June, 2010.

(art. 7 1.). Are these “relevant” documents limited to the transcripts of the person’s hearings one wonders? Such a doubt must surely be permissible.

Finally, if the interrogation of a person under police custody without assistance by a lawyer is not itself against European law, the declarations obtained this way cannot motivate a conviction (European Court of Human Rights, judgment *Salduz*, § 55<sup>33</sup>; introductory article *in fine* of the Code of Criminal Procedure). However, in a judiciary which is based on the firm conviction (“intime conviction”) of judges and does not demand a very detailed justification of their decisions, it is not always easy to know of which elements the conviction is composed.

The French legislator would indeed be well advised to follow the advice given by *Nicolas Boileau* in poetic arts more than three centuries ago (1674): “Hasten slowly, and without losing heart, put your work twenty times upon the anvil” (“*Hâtez-vous lentement, et sans perdre courage, Vingt fois sur le métier remettez votre ouvrage*”).

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<sup>33</sup> See also in particular the Judgments *Yoldas v. Turkey*, Application no 27503/04, 23<sup>rd</sup> February, 2010 and *Hovanesian v. Bulgaria*, Application no 31814/03, 21<sup>st</sup> December, 2010.