IMPLEMENTATION of the JUDGMENT of SALDUZ / TURKEY

(Application No and Judgment Date: 36391/02, 27 November 2008 (Grand Chamber))

Access to Lawyer

MONITORING REPORT

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Salduz /Turkey
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Monitoring Report

Introduction

The case of Salduz v. Turkey is the first step in the significant change of case law, which has consequently changed the criminal justice process not only in Turkey but throughout Europe. The ECtHR found Turkey to be in violation for the very same reasons in over 50 other cases after the Salduz judgment. However, the passing of numerous decisions by the ECtHR against member states other than Turkey based on the same principles has lead to the creation of a ‘Salduz case law’ in Strasbourg. In the light of such judgments following the Salduz case law, many European countries have amended their laws and the European Union has drafted significant Directives on the matter. Hence, a correct understanding of the Salduz principles calls for inquiry beyond the Salduz case itself in order to prevent any misconceptions. In line with this thinking, we will summarise the Salduz case below and attempt to identify the general principles pertaining to legal assistance in the preliminary investigation phase as required by the Salduz jurisprudence. The question of whether Turkey has met the requirements stated in the 51 judgments in the Salduz group of cases can only be understood through a unified reading of the said case law and international criteria.

Facts of the Case

On May 29th 2001, the applicant, Yusuf Salduz was taken into custody on suspicion of having taken part in an unlawful demonstration in support of the PKK when he was yet seventeen years old.

1 For the full list of the 51 Salduz group of cases, see http://www.aihmiz.org.tr/?q=tr/node/131
https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH%282010%291100&Language=lanEnglish&Ver=prel0001&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

old. On the following day, the applicant was interrogated at the Anti-Terrorism Branch of the Directorate for Security in the absence of a lawyer. According to the information given in court, the applicant had been reminded of his right to remain silent. However, during the interrogation, the applicant admitted his involvement in the youth branches of HADEP (The People’s Democracy Party), he gave the names of several persons who worked for the youth branch of the Bornova District Office of HADEP, he explained that he was the assistant youth press and publications officer. He admitted that he had participated in the demonstration on 29 May 2001 organised by HADEP in support of the imprisoned leader of the PKK. He also admitted that he had written “Long live leader Apo” on a banner, which had been hung from a bridge on the day of the events. The applicant was later brought before the public prosecutor and subsequently the investigating judge. The applicant made a statement to the investigating judge, in which he retracted his statement to the police, alleging that it had been extracted under duress. After the questioning was over, the investigating judge remanded the applicant in custody.

Subsequently, the applicant and eight others were charged at the Izmir State Security Court under Article 169 of the Criminal Code and section 5 of the Anti-Terror Law. During the trial, where the applicant was represented by his lawyer, he rejected his statement to the police and stated that he had witnessed the events but had not taken part in them. In convicting the applicant, the State Security Court had regard to the applicant’s statements to the police, the public prosecutor and the investigating judge respectively. It also took into consideration his co-defendants’ evidence before the public prosecutor that the applicant had been in charge of organising the demonstrations. In the appeal, the Court of Cassation did not take into consideration the allegations that articles 5 and 6 of the Convention had been breached and upheld the decision of the first instance court.

The relevant provisions of the former Criminal Procedure Code no. 1412, in force at the time, namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had the right of access to a lawyer from the moment they were taken into police custody. Article 138 clearly stipulated that for juveniles, legal assistance was obligatory. However, according to section 31 of Law no. 3842, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the state security courts.

Following recourse to domestic courts, the restriction on an accused person’s right of access to a lawyer in proceedings before the state security courts as per Law no. 4928 was lifted. According to the Criminal Procedure Code, which entered into force in 2005, all suspects and defendants have the right of access to one or more lawyers from the moment they are taken into police custody and at all stages of the investigation and proceedings (art. 149/1). The appointment of a lawyer is obligatory if the person concerned is a minor.

Yet, a maximum of three lawyers may be present during the investigation stage. (art. 149/2)
The ECtHR Judgment

The ECtHR references certain texts of the Council of Europe, The United Nations and the European Union and examines whether article 6 (3) (c) of the Convention was violated when there was intervention on the applicant’s right to a lawyer in police custody. The said article is as follows:

‘(3) Everyone charged with a criminal offence has the following minimum rights:

(c) 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;’

In its judgment, the Chamber held that there had been no violation of Article 6 § 3 (c) of the Convention. In that connection, it pointed out that the applicant had been represented during the trial and appeal proceedings by a lawyer and that the applicant’s statement to the police was not the sole basis for his conviction. According to the Chamber, the applicant had had the opportunity of challenging the prosecution’s allegations under conditions which did not place him at a substantial disadvantage vis-à-vis his opponent.

The Grand Chamber initially examined the issue with respect to general principles. Firstly, the Court held that article 6 is engaged even before a case is sent for trial. The right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. In this respect, such safeguards in the Convention are designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”

The Court noted the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. Obtaining the assistance of a lawyer during the

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5 Article 14 of the International Covenant on Civil and Political Rights, Paragraphs 5 and 7 of the UN Committee against Torture conclusions and recommendations to Turkey dated 27 May 2003 (CAT/C/CR/30/S); Paragraph 13 of the General Comment 2 of the Committee against Torture dated 24 January 2008 (CAT/C/GC/2) http://www.ihop.org.tr/dosya/BB/CAT-Genel_Yorum-No02.pdf

investigation stage is a safeguard for the accused who often finds himself in a particularly vulnerable position at that stage of the proceedings; the presence of a lawyer ensures the right of the accused to remain silent, his right not to incriminate himself and for his protection against ill treatment. Therefore, any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time.

The Court found that in order for the right to a fair trial to remain sufficiently “practical and effective” Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6.

The ECtHR, in applying the general rules to the present case, also noted that not only did the İzmir State Security Court not take a stance on the admissibility of the applicant’s statements made in police custody before going on to examine the merits of the case, it also used the statement given to the police as the main evidence on which to convict him, despite his denial of its accuracy. Although the applicant had a chance to retract his statement at later stages of the proceedings, and although the judgment was not passed solely on the police statement, the ECtHR stated that in either the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The absence of a lawyer while he was in police custody irretrievably affected his defence rights.

Concurring Opinions
In the Salduz case, the Court passed a unanimous decision. However, in order to better understand the general measures called for in the Salduz case, it is important to note that although the judges have voted unanimously, some have concurring opinions based on a different reasoning. Judge Bratza stated that the fairness of criminal proceedings under Article 6 requires that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention and that any restriction to access is sufficient for the violation of Article 6.

The concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen further clarify the issue. According to this opinion, the fairness of proceedings against an accused person in custody also requires that he be able to obtain the whole wide range of services specifically

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7 A summary translation of the judgment was made by the government, however the concurring opinions were not included in the translation: http://www.inhak.adalet.gov.tr/ara/karar/yusufsalduz.pdf
associated with legal assistance. This includes discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on. The legal principle to be derived from the judgment is therefore that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence. Failure to allow that possibility, amounts to a violation of Article 6 of the Convention.

**Post-Salduz Case Law**

Following the Salduz judgement, similar judgments were passed against Turkey and other states. In these judgments, the following can be underlined as principles that developed the Salduz case law:

- **a.** Access to legal assistance in police custody is a right not only for minors but for everyone.\(^8\)

- **b.** As in the Salduz case, the systematic deprivation of people of their right to a lawyer during police custody where they are to be tried by the state security court is against the spirit of the Convention.\(^9\)

- **c.** In cases where a defence lawyer is not compulsory, it is possible for the accused to waive this right. However, the waiver must be such that it leaves no room for suspicion and must be protected by minimum safeguards proportionate to its significance.\(^10\) The existence of a form where the applicants have checked and signed the relevant boxes thereby waiving their right to a lawyer may not be sufficient by itself. In addition, it is necessary to issue a separate waiver for criminal procedures other than police interrogation and any such waiver must be clear and specific. For example, even if the person has waived his right during interrogation, his right to a lawyer must be reminded him once again during the confrontation.\(^11\)

- **d.** In some of the judgments they passed after the Salduz case, the Court used the wording legal assistance in custody rather than legal assistance during interrogation.\(^12\)

- **e.** Other decisions state that the right to a lawyer is not a safeguard limited only to interrogation. A very brief meeting with a lawyer, even if held before

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\(^8\) Eg., Aba v. Turkey, no. 7638/02 24146/04, 03.03.2009; Adalı and Kılıç v. Turkey, 25301/04, 1.12.2009; Gürsel v. Turkey, no. 22088/03, 6.10.2009.

\(^9\) Eg. Amutgan v. Turkey, no. 5138/04, 03.02.2009, para. 18.

\(^10\) Yunus Akaş and toher v. Turkey, no. 24744/03, 20.10.2009, para. 43.


\(^12\) Aba v. Turkey, no. 7638/02 24146/04, 03.03.2009, p. 9; Arzu v. Turkey, no. 1915/03, 15.9.2009, p. 46; Tağa and others v. Turkey, no. 71864/01, 7.7.2009, p. 35; Çimen Işık v. Turkey, no. 12550/03, 16.7.2009, p. 12; Gülçer and Aslım v. Turkey, no. 19914/03, 16.6.2009, p. 12
the interrogation, is not sufficient to meet the standards of the Convention.\textsuperscript{13} An opportunity to obtain legal assistance must be provided during other criminal procedures in addition to interrogation. For instance, failure to provide legal assistance during identification/confrontation\textsuperscript{14}, reconstruction of events\textsuperscript{15} will amount to a violation of the Convention. This requirement was expressed clearly in the case of Savaş v. Turkey.\textsuperscript{16} In the same way, in the case of Mehmet Şerif Öner, the applicant remained silent during his interrogation yet was obliged to undergo an identification procedure where the complainants identified him. Subsequently, the entire case was built around this identification. The ECtHR states that lack of legal assistance at this stage is a violation of article 6 of the Convention.\textsuperscript{17}

Implementation of Article 46
Individual and General Measures

In all cases in the Salduz group, except for one, the applicants were taken into custody between the years 1993 and 2001. According to the ECtHR case law, retrial is the individual measure to be implemented in the case of persons whose rights under article 6 of the Convention have been violated due to failure to be brought before an independent and impartial tribunal. In this regard, article 311 (1) (f) of the Criminal Procedure Code sets forth that 'In cases where a sentence is determined, by a final decision of the European Court of Human Rights, to be in violation of the Convention on Human Rights and Freedoms, or its protocols, and that the sentence rests on violations of the same, an application for a retrial can be made within one year as of the date of the final decision of the ECtHR.' However, paragraph 2 of the same article states that paragraph (1) sub-paragraph (f) is applicable only to decisions of the ECtHR finalised by 4.2.2003 and the decisions passed on cases the applications of which were made to the ECtHR after 4.2.2003. The Salduz case fits this description and a retrial was granted thereby lifting the sentence and all ensuing conditions. However, since most of the other applicants’ decisions were finalised after 4.2.2003, they were not able to benefit from the retrial clause.\textsuperscript{18} This limitation, which is not particular to the Salduz case and which prevents the retrial of cases in violation of

\textsuperscript{13} Fatma Tunç v. Turkey (no.2), no. 18532/05, 13.10.2009, p. 14
\textsuperscript{14} Yunus Aktaş and others v. Turkey, no. 24744/03, 20.10.2009, p. 52; İbrahim Öztürk v. Turkey, no. 16500/04, 17.2.2009, p. 6
\textsuperscript{15} Soykan v. Turkey, no. 47368/99, 21.4.2009, p. 11. Ahmet Arslan v. Turkey, no. 24739/04, 22.9.2009, p. 8 and 10; Tağaç and others v. Turkey, no. 71864/01, 7.7.2009, p. 11 and 12; Here, there is an absence of legal assistance in both the identification and the reconstruction procedures.
\textsuperscript{16} Savaş v. Turkey, no. 9762/03, 8.12.2009, p. 67.
\textsuperscript{17} Mehmet Şerif Öner v. Turkey, no. 50356/08, 13.0.2011, p. 21.
\textsuperscript{18} For Turkish see http://www.aihmiz.org.tr/?q=tr/node/131; for English: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=salduz&StateCode=&SectionCode=
article 6, was very recently repealed by Article 21 of Law 6459 Amending Certain Laws on Human Rights and Freedom of Expression, also popularly known as the Fourth Judicial Package. The said article brings a provisional second article to the Criminal Procedures Code. Accordingly:

"Provisions of paragraph 2 of article 311 of this Law shall not apply to final decisions of the European Court of Human Rights that are being monitored by the Council of Europe Committee of Ministers as of 15.6.2012 and where it has been determined that a sentence has been passed in violation of the Convention on Human Rights and Fundamental Freedoms or its optional protocols. Persons in this situation can apply for retrial within three months as of the enforcement date of this article."

As per this provision, retrial is made possible for all pending cases in the Salduz group. Following this amendment, in the case of Güneş v. Turkey where the Court previously passed a decision for retrial but where the applicant could not formerly make such an application, the ECtHR found the application to be inadmissible stating that the applicant should be able to apply for a retrial as per the new arrangement in the legislation.19

However, it is questionable whether this method is truly effective. In the above-mentioned Mehmet Şerif Öner v. Turkey case20, the ECtHR found a violation of article 6 of the Convention because access to a defence lawyer had not been made available to the applicant. The ECtHR stated that even if the applicant had used his right to remain silent, the decision against the applicant had been based on the identification made in the absence of a defence attorney. The response given by the Izmir 8th Assize Court to the applicant, who applied for retrial in an attempt to enforce the ECtHR judgment shows that this particular factor was not taken into consideration whatsoever. The Assize Court totally disregarded the shortcoming at the stage of identification and following from the fact that the applicant had used his right to remain silent during the interrogation, rejected the applicant’s demand to have a retrial stating that the allegations put forward in the application for a retrial would not have any effect on the previously passed decision.21 Yet, the identification procedure, which was the sole basis for the decision, had been carried out in the absence of a lawyer in violation of the Salduz principles after which no measures had been taken to compensate for the unlawful practice. If trials conducted with disregard to the Salduz principles are denied retrial in such a manner, the right to retrial will be deprived of all meaning.

The general measures taken after the decision are discussed below in detail.

20 See above note 17.
The Process Before the Committee of Ministers

The Salduz group of judgments are subject to supervision by the Committee of Ministers in accordance with standard procedure. Because of the reasons explained above, the Committee of Ministers has expressed that they await a reply from the government with respect to the decisions for which a retrial has not been granted. Regarding the general measures, the Committee of Ministers was presented with the amendments detailed below.

Different from other cases, for the first time, an NGO has submitted their opinion to the Committee of Ministers regarding the case of Salduz v. Turkey. In their report submitted on February 2012, the Open Society Institute Justice Initiative requested that the supervision of the execution of the Salduz judgments be subject to enhanced procedure rather than standard procedure. The Open Society Institute states that the amendments made after the Salduz judgment are in alignment with the standards of the Convention on paper, yet study results show that these statements are not met in practice. The study written by Elveriş, Jahić and Kalem entitled ‘Alone in Court’ (Mahkemede Tek Başına) shows that prior to 2007 only 7.3% of suspects had access to a lawyer during their interrogation by the law enforcement and that in 74.2% of cases resulting in a conviction, the defendants were not able to benefit from the services of a lawyer at any stage. In the light of this and other scientific studies, the Open Society Institute draws attention to the fact that although the right to a lawyer has been prescribed by law in Turkey for many years, there is not much development in practice and that only a small number of people are able to benefit from this right. According to the Justice Initiative, the government has not carried out any significant studies on the matter. The Justice Initiative has stated that the legal amendments of 2003 and 2005 are ineffective and of a cosmetics nature and that they fall short of eliminating the causes of violations established in the Salduz judgment. In their response to these claims, the government emphasized that the legal changes detailed below are sufficient and that the study ‘Alone in Court’ was based on a period prior to such legal amendments and cannot therefore be used to justify claims that the legal changes are insufficient. In their explanations, the government gave as an example the ECtHR’s inadmissibility decision in the case of Başar v. Turkey (17880/07). In the said decision, the ECtHR found the application inadmissible because although the applicant had the right to a lawyer under article 135 of the Criminal Procedures Code, he had waived his right.

23 İdil Elveriş/Galma Jahic/Seda Kalem (2007), Mahkemede Tek Başına (Alone in Court), (İstanbul Bilgi University Publications: Istanbul), s. 47.
24 Ibid, pp. 5.
General Measures at the National Level Following the Judgment

Legislation:
At the time of the Salduz judgement, there were a series of legislative changes in Turkey. The general measures taken following the judgment can be summarised as follows. As explained above, after the Salduz application was made, the restrictions at the State Security Courts preventing the defendant the right to a lawyer were repealed by Law no 4928. According to the Criminal Procedure Code enforced in 2005, all detained persons have the right of access to one or more lawyers from the moment they are taken into police custody and at all stages of the investigation and proceedings (art. 149/1) and the appointment of a lawyer is obligatory if the person concerned is a minor. In addition, other articles of the Criminal Procedures Code bring safeguards in access to a lawyer. According to article 147 of the Law:

The nature of the statement and interrogation

Article 147 – (1) the following shall be applicable during the statement or interrogation of the suspect or the accused:

c) The suspect or accused shall be notified that he has the right to choose a defence attorney and obtain his legal assistance. In cases where he cannot hire an attorney, and if he wishes to use the services of one, an attorney shall be appointed by the bar association.

Paragraph 4 of article 148 has brought an additional safeguard to the right to an attorney with the clause ‘Statements obtained by the law enforcement in the absence of an attorney shall not be taken as a basis for judgments other than in cases where the suspect or accused has confirmed such statements in court or before a judge.’

Finally, article 150 of the law is as follows:

Article 150 – (Amended: 6/12/2006 – 5560/21 art.)

(1) The suspect or accused shall be asked to choose a defence attorney. If the suspect or accused declares that he is not in a position to hire an attorney, an attorney will be appointed on his behalf if he so requests.

(2) In cases where any suspect or accused who does not have an attorney is a minor, disabled, speech or hearing impaired, an attorney shall be appointed on his behalf without the requirement of his request.

(3) Provisions of paragraph two shall apply in investigations and indictments requiring a lower limit of imprisonment of more than five years.

25 Yet, a maximum of three lawyers can be present during the investigation stage. (art. 149/2)
In order to determine whether the above-mentioned legal measures are sufficient as expected from the general measures deriving from the Salduz group of judgments, two separate questions must be considered:

1. Are there safeguards that allow for the effective use of an attorney throughout the investigation phase? This question is not limited to whether legal assistance was provided during the interrogation phase. An examination must be made to establish whether an attorney was present during other criminal proceedings as well as all instances that may adversely affect the suspect’s right to a fair trial.

2. An examination should be carried out to establish how the rules are applied in practice. Especially in cases where an individual waives his right to an attorney, a closer look is required to determine whether the suspect has waived such rights by his own free will.

General Problems:

The Anti-Terror Law

The Anti-Terror Law brings an important exception to the safeguards for the right to an attorney as set forth in the Criminal Procedures Code. According to article (10) (e) of the Anti-Terror Law, with respect to the offenses falling under the law, a detained suspect’s right to an attorney may be restricted for 24 hours by order of court upon the demand of the public prosecutor. Yet, the suspect cannot be interrogated during this time. It is evident that the provision does not bring an automatic restriction in offenses under the Anti-Terror Law. Yet, discussions in provinces where the anti-Terror Law is intensely implemented reveal that such a restriction is applied automatically. In all of the cases we have had access to, it has been observed that this practice has become the rule.26

The Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings27 accepts that the right to an attorney may be restricted under exceptional circumstances yet states that such restrictions have to meet certain conditions.28 These conditions are that any derogation must be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of one or more people, that no derogation may be based exclusively on the type or seriousness of the offence,

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28 Art. 8
and that there must be a limit to the duration of the restriction as much as possible and no derogation may have the effect of compromising the fairness of the proceedings. As shown by these principles, the fact that an act is deemed to be a terrorist crime is not sufficient to issue a restriction to the right of access to a lawyer. Therefore, even if the act in question is classified as a terrorist crime, the enforcement of a 24-hour restriction on the right to an attorney is in violation of the right to a fair trial in the absence of a concrete deliberation on how such access to an attorney bears the risk of violating the right to life or poses a danger to the life or physical integrity of a person and without showing the absolute necessity of the restriction. The 24-hour restriction is a violation of the right to a fair trial. As in all restrictions of rights, there must be explicit justification for the 24-hour restriction on the right to an attorney. If the restriction order is given only by reason of the offense being under the Anti-Terror Law in the absence of concrete evidence, it will amount to a violation of article 6.

The fact that the suspect’s statement is not to be taken during the 24-hour restriction period is not a sufficient safeguard on its own. Within the scope of the Anti-Terror Law, even if suspects’ statements are not taken officially, there is a probability that they can be threatened and coerced during this time. Indeed, in the Dayanan v. Turkey case, where the suspect exercised his right to remain silent, the ECtHR concluded that the absence of a statement during this period does not eliminate the violation. Because this period is one in which the suspect develops strategies for his defence and needs the assistance of an attorney to exercise other procedural rights. Even if a statement is not taken, the rule must be to refrain from circumventing access to an attorney. In addition, in those cases where a circumvention was imposed on legal assistance, it is seen that statements are in fact taken or the suspect is involved in reconstruction of events without giving a statement despite the explicit prohibition in the law.

Despite the significant amendments to the Anti-Terror Law No. 3713 brought with the Third Judicial Package no 6352 dated July 2, 2012, no changes were made to this provision. The same problems persist in offences under the Anti-Terror Law. This is yet another manifestation of the systematic circumvention of legal assistance in the state security courts as seen in Salduz and subsequent cases.

Access to a Defence Lawyer in General

In 2005, when the new Criminal Procedures Code was enforced, legal assistance was made

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29 Jasper v. UK, no. 27052/95, 16.2.2000, p. 52.
31 See. Ankara 11th Assize Court proceeding notes E. no. 2008/367, dated 02.02.2010. In this trial, the attorney demands that the statement taken during the 24-hour circumvention period and the place identification files are taken out of the case (http://www.aihmiz.org.tr/?q=node/42&vaka=163). The same court rejected the petition at later stages because it had already rejected it in the trial of 18.8.2009. (http://www.aihmiz.org.tr/?q=node/42&vaka=159)
32 See the above-mentioned decision in footnote 9.
mandatory in the case of an offence calling for an upper limit of imprisonment of minimum five years. However, due to the high costs involved, this provision was changed to a lower limit of imprisonment of 5 years. This amendment made legal assistance a service dependent on the demand of suspects with respect to many offences. As indicated above, in its response to the report of the Justice Initiative submitted to the Council of Ministers, the government stated that the study was based on the practices prior to the amendments in the Criminal Procedures Code and that there was no longer any problem of access to an attorney in Turkey. Yet, the narrowing of the practical scope of mandatory legal assistance shows that problems are in fact recurring.

Firstly, it is observed from the Inspection Reports of the Ministry of Justice that suspects are not duly reminded of their right to an attorney and even in cases where legal assistance is mandatory, no reminder had been made. Indeed, according to the projection made by Jahic and Elveriş for the Istanbul Criminal Courts in 2007, based on the data from the Criminal Procedures Attorney Services of the Istanbul Bar Association, the rate of exercising the right to legal assistance in all criminal courts is 10% at best. According to the Fourth Peer Review Report on the Criminal Justice system by Luca Perilli for the European Commission, the change in the law brought the rate of mandatory defence from 80% of the total criminal cases to as low as 20%. In First Instance Courts, this figure is as low as 3%. This study reveals that following the amendments to the CPC in 2006 whereby mandatory defence was brought for offences calling for a lower limit of imprisonment of 5 years, the rate of access to such services in 2007 has dropped to the levels seen in 2001. In other words, contrary to the claims of the government, there has been no development in criminal cases whatsoever since the Salduz judgment, and the mandatory defence system, which has been improved on paper, has not found its way into practice. As the ECtHR has expressed many times, it is not sufficient for effective remedies to exist in domestic law only in theory, they must exist in practice. However, the 2005 amendments to the CPC have not made any difference with respect to the right to defence. It is not scientific to assume that the entirety of the 90% who waived their right to a defence attorney have done so by their own will.

33 İdil Elveriş/Galma Jahic/Seda Kalem (2007), Mahkemede Tek Başına, (İstanbul Bilgi Üniversitesi Yayınları: İstanbul), s. 21-22.
36 s. 180.
37 Luca Perilli (2011), Criminal Justice System, http://www.abgm.adalet.gov.tr/pdf/CEZA%20ADALET%C4%B0%20S%C4%B0STEM%C4%B0%20HAKKI NDA%204.%20%C4%B0ST%C4%B0%C5%9EAR%C4%B0%20Z%C4%B0YARET%20RAPORU.pdf, s. 35.
38 Ibid. p. 181.
The low rate of representation by an attorney can be due to discouragement or intimidation of suspects or economic causes. Yet as it is clearly stated in the ECtHR judgments and the European Union Proposal for a Directive\(^{39}\), any waiver of the right to an attorney must rest on the suspect’s own free will expressed openly.\(^{40}\) The ECtHR accepts that an individual may waive such rights to a fair trial by his own will. Nevertheless, in order for such a waiver to be acceptable with respect to the objectives of the Convention, the waiver must be such that it leaves no room for suspicion and must be protected by minimum safeguards proportionate to its significance. At any rate, in order to be able to waive a right, the will of the individual is not sufficient; a suspect must be able to foresee the consequences of such a waiver.\(^{41}\) It is not possible to assume that so many individuals have waived this right in an informed manner despite their knowledge of the benefits of the assistance of a lawyer. Because as the ECtHR notes\(^{42}\) in the absence of a lawyer the chance of a suspect’s benefiting from other procedural rights is also very low.

The ECtHR is obliged to deliberate on cases based on concrete information. Therefore, as in the case of Başar v. Turkey, it is difficult to pass a judgment in cases where the suspect seems to have waived his right to a defence attorney. Yet, it is evident that this does not depend solely on the case before the Committee of Ministers responsible for supervising the execution of judgments. The Committee, who also supervises the general measures taken by the government, should question the government on why no significant difference is observed in practice regarding access to a lawyer despite the legal amendments. Since one cannot speak of any developments in the right to a fair trial as long as a concrete, satisfying response is not given to this question, the supervision of the Salduz group of cases should be continued.

**The Judiciary**

As stated above, the only way to determine whether the said reforms regarding access to a defence attorney have had any impact towards the desired outcomes, is to identify how the rules are interpreted in practice. Examples have been given above to show how the Salduz case law does not limit legal assistance only to the official questioning stage. According to the ECtHR, and as expressed in the European Union Proposal for a Directive,\(^{43}\) the lawyer should be have the right to be present in all procedures where the suspect is required to be present for purposes of the investigation or evidence collection. As a matter of fact, the criteria here is that an attorney should be available in all instances where there is a significant circumvention of the right to defence where the suspect is limited in his freedom. If this had not been the condition, the law enforcement would take the statement of the person without informing them of the fact

\(^{39}\) See footnote 27, article 9.

\(^{40}\) See decisions mentioned in footnotes 10 and 11.

\(^{41}\) Talat Tunç v. Turkey, no.32432/96, 27.3. 2007, p. 59; Pischchalnikov v. Russia, no. 7025/04, para. 77.

\(^{42}\) Pischchalnikov v. Russia, no. 7025/04, para. 77.

\(^{43}\) See footnote 27, article 4 (3).
that they are a suspect or charged, would extract a confession during other criminal procedures and render his right to a lawyer ineffective.\textsuperscript{44}

It is observed that in the practice in Turkey especially in some cases where the identification of persons and reconstruction of events are carried out in the absence of a lawyer, the assistance of a defence attorney is rendered meaningless during interrogation since the former proceedings also include the taking of a statement. Proceedings such as identification of persons and reconstruction of events carried out in the absence of a defence attorney are of a nature that altogether undermines all procedural safeguards guaranteed by the presence of a lawyer during the taking of statements. It is for this reason that in offences requiring mandatory defence lawyers, it is also mandatory to have a lawyer ready in identification of persons and reconstruction of events. With respect to other offences, the suspect must be reminded his right to have an attorney present at each instance of identification/confrontation or reconstruction of events. Otherwise, it will become possible for the law enforcement to obtain the information during identification where it fails to obtain it at the time of the statement. The legal safeguards in this regard are partially mandatory. Article 85 of the CPC regarding reconstruction of events and identification of scenes is as follows:

\textbf{Article 85 - (Amended by: 25/05/2005-5353 S.K./6.art)}

(1) The Public Prosecutor can have a suspect, who has given a statement regarding the charges against him, identify or reconstruct a scene. In offences falling under Article 250, paragraph 1, the superintendent of the criminal law enforcement shall also have the authority to have the suspect identify or reconstruct a scene.

(2) Provided that the investigation is not delayed, the defence attorney can also be present in the identification and reconstruction of a scene.

(3) The procedure carried out in terms of identification or reconstruction of a scene shall be recorded in accordance with Article 169.

In the article, the fact that the presence of the defence attorney is not mandatory and that it depends on whether the investigation will be delayed is problematic in itself. The procedure of reconstruction should not be carried out in the absence of a defence attorney just as in the case of statement taking. In implementation, it is observed that the procedure of reconstruction is sometimes also directly carried out by the criminal law enforcement with disregard to other safeguards. In one of the examples presented in the annex, a person’s statement was taken in the absence of a defence attorney despite the fact that the offence in question called for the mandatory commissioning of an attorney. Subsequently, a reconstruction of events was carried out in the absence of an attorney and despite a petition filed at every hearing to remove

\textsuperscript{44} Ed Cape and Zaza Namoradze (2012), Effective Criminal Defence in Eastern Europe, (Moldova: LARN), pp. 53.
this evidence from the case file, the evidence was not removed, the suspect was arrested by the court and later convicted. It is not possible for all such procedural irregularities to have been overlooked because the defence attorney has stated in detail that according to 85/1, a reconstruction could not take place without the suspect’s statement and that mandatory defence also required the lawyer to be present during such reconstruction procedures. Looking at cases from other provinces, one sees that this practice is not an exception. The Diyarbakır Assize Court has also allowed for a reconstruction in the absence of an attorney. During this procedure, it is understood that the suspect imparts pages of information incriminating both himself and the other suspects. Throughout these procedures, it is observed that although the offences in question are of a nature requiring a mandatory defence lawyer, the suspect is never reminded of his right of access to a lawyer. Moreover, in both cases in Ankara and Diyarbakır, the suspect is taken to reconstruct the scene before having made any statement as foreseen in CPC article 85. Yet according to the law, the identification of a place or reconstruction of events can only be possible if the suspect has already given a statement about the crime he is charged with. In these cases, the suspect who has remained silent during the statement taking in the law enforcement station has imparted all kinds of information during reconstruction of events.

Another example is a case where two different reconstruction reports were issued each with differing statements regarding a minor who by law is required to have a defence attorney commissioned on his behalf. Despite the fact that the case had no other evidence of the suspect’s guilt and although the defence attorney emphasized that the reconstruction had been carried out unlawfully, the suspect was arrested by the court based on the reconstruction and statement made in the absence of a lawyer.

Because of the absence of a defence attorney, the identification and reconstruction records also arise as factors restricting the right of defence. Especially in cases within the scope of the Anti-Terror Law, the law enforcement allows for the identification of suspects based on the file by persons who are confidential witnesses after which such identification becomes the most important grounds for the charges. Such testimony and identification by witnesses, which the suspect cannot challenge, also fall short of meeting the legal requirements of the identification

45 Ankara 11th Assize Court, Decision No S. 2007/1416 (http://www.aihmiz.org.tr/?q=node/42&vaka=159)
48 See. Record of Reconstruction and CD Description Records dated 30.10.2008 (http://www.aihmiz.org.tr/?q=node/42&vaka=161) and Arrest Order by the 6th Assize Court of Diyarbakır, Query No. 2008/59 (http://www.aihmiz.org.tr/?q=node/42&vaka=162)
procedure. Indeed, the Law on Police Authorities and Responsibilities Annex Article 6 sets forth that the photographs of various suspects are required to be the same size and characteristics. Yet in one of the example cases, the photographs of all the suspects are placed in the same file and identified by the confidential witness.49 It is also known that such confidential witnesses are heard during the prosecution stage in the absence of the defence attorney.50 The suspect is present in neither of these stages and in the absence of the attorney, the lawfulness and fairness of the proceedings cannot be overseen. As it is noted in the judgment in the case of Mehmet Şerif Öner v. Turkey51, the suspect must benefit from an attorney during the identification stage as well. Otherwise, it will be impossible to claim that the trial was carried out fairly.

It is also observed that the defence attorney is not present in instances where the suspect himself is asked to make an identification. A single record is kept for the identification of more than one person and no lawyer is present during such identification procedures.52 Again, in the same file, it is seen that the statement of one suspect, who is taken into custody by the police during the events, is obtained before he is even brought to the detention unit.53 In these identification records with statements, the suspect not only identifies individuals but also gives a testimony that lasts pages, regarding other suspects and the crimes alleged to have been jointly committed. This situation creates incriminating evidence for not only the persons identified but also the suspect who makes the identification. In this respect, the obligation to have a defence attorney present during interrogation becomes devoid of all meaning. Because the prosecutor or the police who are prevented from engaging in certain acts in the presence of an attorney, can freely do so in the absence of one during the identification procedure.

One other complaint is that suspects are forced to be represented by a lawyer commissioned by the bar association even in cases where they have their own lawyer. In one such incident, the defence lawyer holding a power of attorney by the suspect is told that the suspect has already been appointed a lawyer and that this lawyer will perform his duties is striking.54 In the said case, there is a record of the law enforcement denying the suspect the right to meet with his own

49 See Confidential Witness Records of the Şanlıurfa Chief Public Prosecutor dated 23.5.2011 No. 2010/3230 (http://www.aihmiz.org.tr/?q=node/42&vaka=154);
51 See footnote 17 above
52 See Photograph Identification Record (http://www.aihmiz.org.tr/?q=node/42&vaka=164) (http://www.aihmiz.org.tr/?q=node/42&vaka=165); (http://www.aihmiz.org.tr/?q=node/42&vaka=166)
lawyer despite the presence of a Power of Attorney on grounds that the Prosecutor has not ordered it.\textsuperscript{55}

\textbf{Conclusion and Recommendations}

\textbf{To the Government}

Different from other cases, the execution of the Salduz group of judgements requires a long-term effort and the employment of various methods.

\textbf{a.} The government cannot suffice with making legal amendments. Legal amendments should yield practical results. Only a small rate of criminal cases in Turkey show the presence of a defence attorney. An examination should be carried out as to the reasons behind this and the legal and economic obstacles preventing access to an attorney should be eliminated. Authorities, especially the law enforcement should refrain from acts that deter suspects from accessing legal services. In order for all these to be made possible, the government should carry out a study on the reasons behind the low rate of presence of defence attorneys. This is a positive obligation arising out of Article 1 of the Convention.

\textbf{b.} According to Article 10 (e) of the Anti-Terror Law, with respect to the offenses falling under the law, a detained suspect’s right to an attorney may be restricted for 24 hours by order of court upon the demand of the public prosecutor. Yet, as explained above, in practice, this exception has become the rule. Therefore, even if the act in question is classified as a terrorist crime, the enforcement of a 24-hour restriction on the right of access to a lawyer is in violation of the right to a fair trial in the absence of a concrete deliberation on how such access to an attorney bears the risk of violating the right to life or brings danger for the life or physical integrity of a person and without showing the absolute necessity of the restriction. The restriction clause in the Anti-Terror Law should either be repealed altogether or should be implemented in exceptional cases in line with the purpose of the rule. Any enforcement of the clause should be justified concretely in each individual case.

\textbf{c.} The Salduz principles are not applicable only during the initial questioning. During the investigation stage, the suspect has the right of access to a lawyer in all law enforcement proceedings that may affect his right to defence. With respect to the types of offences that call for the mandatory appointment of a defence lawyer, all such proceedings should be carried out in the presence of the lawyer. In offences where a defence lawyer is optional, the suspect should be reminded of his right to a lawyer before each and every procedure. Especially in cases where the identification of a scene together with the taking of statements are done in the absence of a

\textsuperscript{55} Records kept by Attorney Işıl Turşucu, Attorney Özgür Yılmaz and Attorney Betül Vangölü Kozağaçlı. (http://www.aihmiz.org.tr/?q=node/42&vaka=158)
lawyer, the right of access to a lawyer at all stages of proceedings is rendered meaningless. Such practices should be absolutely avoided. In investigations conducted by recourse to this method, any evidence collected by this method should be removed from the file.

To The Committee of Ministers

With regard to the Salduz group of cases, the government is of the opinion that the legal arrangements of 2005 are sufficient to solve the problem. Yet, the examination we have carried out shows that there are serious problems with respect to the right to a defence lawyer.

Accordingly:

a. The Government should be questioned regarding the statistical studies they have undertaken to establish the situation on legal assistance during criminal cases. Low rates of access to a defence lawyer must be questioned.

b. In investigations carried out under the Anti-Terror Law, information should be asked about such cases in order to avoid the automatic implementation of the decision regarding a 24-hour restriction.

c. Contrary to claims, the amendments made in 2005 are not sufficient to address the problem of access to a defence lawyer during the investigation phase. It is obligatory to arrange and implement the right to a lawyer explicitly with respect to all criminal law enforcement procedures that would have an impact on the suspect’s right to defence.

d. The monitoring of the Salduz group of cases should continue until the information and arrangements listed above have been obtained.