

Request for Enhanced Supervision in *Salduz v. Turkey*

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THIS BRIEFING PAPER REQUESTS the Committee of Ministers to transfer the Grand Chamber decision of *Salduz v Turkey*, 27 November 2008, to enhanced supervision. This case discloses major structural and complex problems in Turkey's criminal justice system that have not been adequately addressed by the Turkish government, leading to grave human rights violations and repeated duplicate cases before the European Court of Human Rights.

Request for Enhanced Supervision

The Open Society Justice Initiative requests that the Committee of Ministers transfer the Grand Chamber judgment of *Salduz v Turkey*¹ to enhanced supervision. This case discloses major structural and complex problems in Turkey’s criminal justice system and requires closer monitoring and guidance from the Committee of Ministers.

The European Court of Human Rights (“ECtHR”) emphasized in the *Salduz* judgment that the right to early access to legal assistance for people accused or suspected of crimes needed to be implemented by Turkey in a practical and effective way. Although Turkey made legislative changes in 2003 and 2005, this was a largely cosmetic step that has not produced results. The ECtHR has itself observed that these legislative reforms have been ineffective. Research conducted after the legislative changes came into effect demonstrates that only 7.3 percent of suspects or accused people access legal representation and only 3.6 percent get a legal aid lawyer during the initial period of police detention. The Committee of Ministers should work closely with Turkey to ensure it takes concrete and practical steps to address the root cause of violations found in the *Salduz* judgment.

A. The Judgment

This case concerned a minor who was arrested in 2001 on suspicion of having participated in an illegal demonstration. Under the law existing at the time, people accused of offences falling within the jurisdiction of the Turkish state security courts were legislatively barred from accessing legal assistance during the initial period of police custody. He made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber of the ECtHR found that, as a general principle, *“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”*.²

The ECtHR underlined the importance of the investigation stage of criminal proceedings and noted that suspects are often in a particularly vulnerable position at that stage. The ECtHR stated that in most cases, this particular vulnerability can only be properly compensated with the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate him or herself.³

The ECtHR awarded the applicant specific damages of EUR 2,000 and stated that the most appropriate form of redress would be a retrial should the applicant so request.⁴ As for general measures, the ECtHR noted that *“although not absolute, 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 ... Nevertheless, Article 6 § 3 does not specify the manner of exercising this right.”* Although the ECtHR recalled that it is for States to choose the means by which the implement judgments and comply with their Convention obligations, it emphasized that *“the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective and that assigning counsel does not in itself ensure the effectiveness of the assistance”*.⁵

Indeed, given that the ECtHR stressed the importance of suspects being able to exercise their rights in a practical and effective manner,⁶ it is important to assess Turkey's implementation of the *Salduz* judgment by looking not just at its legislative framework, but at the reality of the criminal justice system in practice and the experience of people accused or suspected of crimes.

B. The Current Legislative Framework in Turkey

The legislative framework in Turkey has been amended during the past nine years to remove the formal barriers that restricted early access to legal assistance in *Salduz*. Legislative changes, however, are insufficient in addressing the root causes of the violations.

On 15 July 2003, by Law No. 4928, the restriction on the right to access legal assistance by people in proceedings before state security courts was lifted.⁷ On 1 June 2005, a new Code of Criminal Procedure entered into force, which further expanded the right to access legal assistance for all people accused or suspected of crimes.⁸ Under this Code, suspects and accused persons have the right to consult counsel in private before being interrogated and to have counsel present during interrogation. The new Code also provided that statements obtained by security forces in the absence of counsel shall not be taken into consideration as the basis for a conviction unless the suspect or accused confirms the statement before the judge or the Court.

Under the current legislative framework, the right to early access to legal assistance is protected by provisions that guarantee every defendant's right to be represented by a legal aid lawyer, regardless of whether he or she can afford to hire counsel.

On its face, the Turkish law now conforms to, and even exceeds, the criteria of the ECHR regarding the scope of the right to access legal assistance and legal aid. However, research conducted by the Open Society Justice Initiative, set out in section C below, demonstrates that in practice, access to justice for criminal defendants in Turkey remains a matter of serious concern. In order to properly implement the general principles of the *Salduz* judgment, Turkey must go beyond simply ensuring that there are no legislative barriers to early access to legal assistance. Turkey must take measures to guarantee that all suspects, especially indigent suspects, can exercise their rights practically and effectively.

C. Major Structural and Complex Problems Remain in Turkey

Despite the legislative changes made by Turkey in 2003 and 2005, major structural and complex barriers to early and effective access to legal assistance remain within the criminal justice system. The Justice Initiative and other organizations have conducted research over the period of 2006-2010 which reveals the many failures of the existing system.

The report *Alone in the Courtroom*,⁹ published in 2007, provides empirical evidence about the rates of access to legal assistance in Turkey. Complementing sources of data were used in order to get a complete picture of the criminal justice system, including reviews of a representative sample of case files from Istanbul courts, observations of court hearings, and interviews with lawyers, judges and prosecutors. This study found that the vast majority of suspects and accused do not get assistance from a lawyer. Only 7.3 percent of people were represented by a lawyer during the interrogation by the police, and only 3.6 percent obtained a legal aid lawyer during the investigation stage of proceedings.¹⁰ 74.2 percent of offenders who are convicted and receive a prison sentence do so without ever being represented by a lawyer at any stage of the proceedings.¹¹ This can be compared to England and Wales, where approximately 50 percent of

people arrested and detained by the police receive legal assistance during the initial investigative stage of the proceedings and in the majority of cases the assistance is through a legal aid lawyer.¹²

The government has made no attempt to understand why so many criminal defendants remain unrepresented or choose not to appoint a lawyer, despite their legislative right to do so. Independent research studies suggest several possible root causes for the lack of access to legal assistance.

- Defendants may not be aware of their right to request a lawyer. Since 1992, Turkish law has required that all suspects must be informed in writing of their rights, including the right to a lawyer, before being questioned or when taken into custody. However, a 2006 study conducted in a poor urban area of Istanbul found that 65 percent of people surveyed did not understand the statutory notification of legal rights because it was too long and the language used was too technical.¹³ Observational research published in Turkey in 2007 has shown that judges do not remind defendants of their rights and do not ask whether they have understood these rights.¹⁴ In addition, a 2008 study has shown that only 16.3 percent of the general population was aware of their right to a government-paid lawyer.¹⁵
- In addition to failing to effectively inform a person of their right to a lawyer, interviews conducted with defence lawyers in the course of research on Turkey in the 2010 study *Effective Criminal Defence in Europe* found that police use ploys such as manipulation of trust and threats or patronizing behavior to actively discourage the appointment of a lawyer before and during the first police interview.¹⁶
- Without an effective legal aid system in place, the rights of most criminal suspects to early access to legal assistance will remain purely theoretical. In a country where average monthly income per household is approximately 600 euros,¹⁷ legal aid carries great importance, especially as many criminal defendants come from disadvantaged and vulnerable groups. Problems with the current legal aid system include:
 - There is inadequate funding. Turkey's annual expenditure on legal aid is very low by international standards, amounting to less than one euro per person.¹⁸ Remuneration rates for legal aid lawyers are low and the fee scale does not take into account the complexity of the case, such as there being several co-defendants or a large amount of evidence, or the seriousness of the charges.¹⁹
 - There is inadequate structural organization. The government has delegated provision of legal aid to the local bar associations, without any central government department responsible for overseeing delivery of legal aid as a matter of policy and monitoring.²⁰ It has been clear for some time that the infrastructure of the legal aid system for criminal defendants can no longer be based on the current model. A 2009 study showed that if criminal defendants were encouraged to use their right to early access to legal assistance through the criminal legal aid schemes, without improving the scheme itself, the system would be unable to cope with increased demand.²¹ The perceived quality of legal aid services among criminal justice practitioners, including legal aid lawyers themselves, is low. Interviews with judges, prosecutors and attorneys raised concerns with the quality, competence and lack of oversight of the legal aid system.²² The government takes no role in providing quality assurance mechanisms or monitoring the delivery of legal aid services,²³ and any complaints

about the legal aid lawyer are only dealt with through the internal disciplinary mechanisms of the bar associations.

Turkey's failure to address the structural and complex barriers which remain to the proper implementation of *Salduz* has given rise to multiple repetitive judgments by the European Court of Human Rights. The Committee of Ministers has identified a *Salduz* group of judgments awaiting implementation.²⁴ There are 60 cases in this group, all of which have applied the *Salduz* decision against Turkey in cases where a person has been denied access to legal assistance. These cases raise the same structural problems as *Salduz* and the Justice Initiative considers that none of them have been adequately implemented by Turkey.

Indeed, in the case of *Saman v. Turkey*,²⁵ the ECtHR expressly noted that there were some practical problems in the implementation of *Salduz*. In this case, the applicant was arrested in 2004, after the ban on the right to early access to legal assistance had been lifted by Law No. 4928. The ECtHR stated that “*despite this amendment in the Turkish legislation... the applicant did not benefit from the assistance of a lawyer during the preliminary investigation stage*”,²⁶ in breach of Articles 6(1) and 6(3) of the ECHR. The ECtHR itself has recognized that the formal legislative reforms made by Turkey have not guaranteed a practical and effective right to legal assistance from the outset of custody.

D. Enhanced Supervision Request

The Justice Initiative is concerned that the 2003 and 2005 legislative changes in Turkey were largely cosmetic, ineffective, and did not adequately address the root cause of violations found by the Court in the *Salduz* judgment. The enhanced supervision procedure provides more opportunities for the Committee of Ministers and the Turkish government to arrive at effective and long-term solutions to the problem of lack of early access to legal assistance.

The Justice Initiative recommends that the Committee request that Turkey submit a detailed action plan demonstrating how the government intends to ensure the right to early access to legal assistance for all people accused or suspected of crimes, especially those people who cannot afford legal assistance. This action plan should go beyond simple legislative change and should address the practical, administrative and financial obstacles to full implementation of *Salduz*.

The Justice Initiative recommends that as part of this plan of action, Turkey should:

- Take measures to ensure that defendants know about their right to free legal aid and understand how they can benefit from it, including:
 - Simplifying the text of the written notification of the right to legal assistance and legal aid.
 - Training justice officials in how to explain the corresponding provisions in plain, non-legal language, and on how to address defendants in order to ensure that defendants have counsel appointed in all cases from the moment of their arrest including the first interrogation except those in which the defendant has clearly expressed a knowing and well-informed desire to proceed alone.
 - Requiring judges to engage with each defendant in open court and on the record to verify that the defendant understands that he has the right to free counsel who is independent of the prosecutor and the court, the risks of proceeding without counsel, including the possible sentence flowing from the charged offenses; and to appoint

counsel unless the defendant has made a clear, well-informed and voluntary statement that he prefers to waive his right and proceed on his own.

- Undertake a survey of defendants, including recently convicted prison inmates, to determine with greater clarity the reasons why a vast majority of defendants who are eligible for legal aid do not have representation.
- Ensure effective functioning of an emergency legal aid scheme that guarantees immediate appointment of legal aid counsels to consult detainees at police stations before they are interviewed by police and to represent them during police interrogation.
- In cooperation with the Union of Bar Associations, develop and implement minimum quality criteria for criminal legal aid and effective mechanisms for assuring the quality of free legal services.
- Look beyond the current system of legal aid provision and if necessary, alter the system. Create a focused policy, based on new ideas on how to improve accessibility and access for the most vulnerable, how to ensure quality of the service provided, and how to monitor the delivery of legal aid, while maintaining efficiency.
- Develop a more realistic budgeting and responsible needs-based planning. Identify additional funding sources to meet the growing demand for legal aid, or free up funding for legal aid by curtailing current inefficient spending. Increase the current legal aid remuneration rates so that they provide incentives for lawyers to provide effective legal assistance.
- Establish an entity (either an independent or quasi-independent executive agency or a department within the Ministry of Justice) responsible for formulating and implementing the government's legal aid policy and budget, monitoring its performance, determining legal aid needs and finding cost-effective solutions, and carrying out the recommendations set out above.

After receipt of the action plan, the Justice Initiative recommends that the Committee of Ministers request a debate on the extent to which Turkey's plans meet the practical requirements set out above which would ensure effective compliance with the ECHR *Salduz* judgment.

E. Requester

The Justice Initiative uses litigation, advocacy, research and technical assistance to promote human rights and build legal capacity for open societies. We support criminal justice reform around the world, working to expand arrest rights, establishing clear standards for legal aid, and promoting pretrial justice. The *Salduz* decision is particularly important to the work of the Justice Initiative, as early access to legal assistance can be a highly effective and cost-effective way to minimize the harm that criminal justice systems inflict on accused persons, crime victims, and broader society.

¹ *Salduz v. Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008

² *Ibid.*, para. 55.

³ *Ibid.*, para. 54.

⁴ *Ibid.*, paras. 72-3.

⁵ *Ibid.*, para. 51.

⁶ *Ibid.*, para. 55.

⁷ *Ibid.*, para. 29.

⁸ *Ibid.*, para. 30.

⁹ The research for *Alone in the Courtroom: Accessibility and Impact of Criminal Legal Aid before Istanbul Courts* was carried out under a joint project of the Istanbul Bilgi University and the Open Society Justice Initiative. Research examined more than 600 case files opened in 2000-2001 and closed before 2005, observed 173 court hearings in Istanbul courts and conducted interviews with over 75 criminal justice actors. (Istanbul Bilgi Universitesi Yayinlari: Istanbul, 2007). The report is available for download here: http://www.justiceinitiative.org/db/resource2?res_id=104076.

¹⁰ *Ibid.*, page 187.

¹¹ *Ibid.*, page 216, 238.

¹² E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Intersentia, p. 124. The Turkey chapter of the book is available here: <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=4T1475L07W4211EF1376&taal=en> and the Executive Summary is available here: http://www.soros.org/initiatives/justice/articles_publications/publications/criminal-defence-europe-20100623

¹³ G. Jahic, I. Elveris, *Pilot Study of Legal Problems and Legal Needs of Urban Istanbul*, report presented at the Annual Conference of the Law and Society Association in July 2006, Baltimore, USA.

¹⁴ See Elveris, Jahic, Kalem, *Alone in the Courtroom: Accessibility and Impact of Criminal Legal Aid before Istanbul Courts*, (Istanbul Bilgi Universitesi Yayinlari: Istanbul, 2007) p. 238.

¹⁵ S. Kalem, G. Jahic, I. Elveris, *Justice Barometer: Public Opinion on Courts in Turkey* (Istanbul Bilgi Universitesi Yayinlari: Istanbul, 2008), p. 23.

¹⁶ E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Intersentia, pp. 516-517.

¹⁷ Derived from 2007 statistics reported in Turkish Statistical Institute. (2008). *Turkey in Statistics 2008*. Ankara: Turkish Statistical Institute, p. 38. http://www.tuik.gov.tr/IcerikGetir.do?istab_id=5

¹⁸ E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Intersentia, p. 505.

¹⁹ *Ibid.*, p. 508.

²⁰ *Ibid.*, p. 506.

²¹ Dr. Galma Jahic and Idil Elveris, *Criminal Legal Aid in Turkey: An Unresolved Problem*, (Istanbul Bilgi University, May 2009) p. 20.

²² *Ibid.*, p. 508-9.

²³ E. Cape, Z. Namoradze, R. Smith, T. Spronken, *Effective Criminal Defence in Europe*, Intersentia, p.506-7.

²⁴ List of cases is available here: [https://wed.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2012\)1136&Language=lanFrench&Ver=pre10035&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogge d=F5D383](https://wed.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2012)1136&Language=lanFrench&Ver=pre10035&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogge d=F5D383)

²⁵ *Saman v. Turkey*, ECtHR, Judgment of 5 April 2011.

²⁶ *Ibid.*, para. 34.

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