

France to reform controversial interrogation practices

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Imagine that one day you are in your office, and without notice a police officer appears summoning you to his office for questioning. You are conducted to a police station and are told that you will not be able to leave for any reason whatsoever (absent a medical emergency) for 24 hours. You want to consult with a lawyer? No problem — but only for half an hour, after which the lawyer must leave and remain out of contact with you for the rest of your interrogation, which may well continue overnight and into the next day. You may be subject to a strip search without any judicial intervention. Although you have a right to remain silent, the police officer is not required to inform you of this right.

At the end of 24 hours, the police can decide to hold onto you for another 24 hours, which the local prosecutor or judge will almost invariably authorize. Again, you will have exactly one half-hour to consult with an attorney. At the end of the 24- or 48-hour period, you may well be released without any charges ever being brought. And the subject matter of your interrogation may be nothing more than a traffic offense.

Scenarios very much like this occur on a massive scale every day in France. These procedures have only recently been invalidated by the courts, and the French government has proposed reforms that are designed to cut down upon the number of such "custodial interrogations" and to offer procedural protections for them. This article will review the laws and practices as they now stand, and the promises as well as the shortcomings of the proposed law.

THE 'GARDE À VUE' PROCEDURE

Criminal investigations in France are conducted both by the investigative arms of the police forces (the "police judiciaire") or, generally for more complicated offenses including economic and international crimes, by investigating magistrates ("juges d'instruction"). Article 63 of the Code of Criminal Procedure provides that "[a] judicial police officer may, where this is necessary for an inquiry, arrest and detain any person against whom there exist one or more plausible reasons to suspect that they have committed or attempted to commit an offence." The same article goes on to note that "[t]he person so placed in custody may not be held for more than twenty-four hours. However, the detention may be extended for a further period of up to twenty-four hours on the written authorization of the district prosecutor."

Subsequent sections of the code specify certain very limited rights enjoyed by the detainee, including a right to make a single telephone call to a parent, spouse, sibling or employer, and the right to ask for an opportunity to meet with a lawyer, who must then be allowed to confer with the detainee for one half hour. The rights to make a telephone call and confer with a lawyer do not apply in certain specified categories of offenses (such as terrorism or organized crime), and can be suspended or deferred at the request of the police in exceptional cases.

Overall, a "garde à vue" interview is very much a "behind closed doors" proceeding. There is a widespread belief that heavy-handed tactics may be used by the questioners, as sometimes indicated in press interviews with detainees. The unceremonious detention of chief executive officers and other high-level corporate figures for overnight questioning is hardly unknown in France, and is often reported in the press.

Although the conduct of individual interrogations remains anecdotal, the sheer number of them is staggering. Government data show that in 2010 authorities conducted 700,000 such interrogations, or about 2,000 per day.

Approximately one-quarter were for traffic offenses.

REVIEW BY THE COURTS

Until very recently, French courts could not review the constitutionality of the garde à vue procedure, or its application in any specific case; it was only after an amendment to the French constitution in 2008 that the courts were permitted to review the constitutionality of procedures in the context of their actual application in an individual case. Just last year, three separate courts have now invalidated one or another aspect of the garde à vue procedure.

On July 30, 2010, the Constitutional Council — a specialized French court to which questions of constitutionality can be referred in certain situations — issued a sweeping decision holding that the garde à vue procedures (other than those exceptionally applicable in extreme cases such as terrorism and organized crime) were unconstitutional. The council stated that its decision would take effect in one year, thus allowing the legislature to adopt new procedures during that time. While the council left intact the more onerous provisions applicable to terrorism and organized crime cases, the "Cour de Cassation," France's highest court for reviewing criminal cases, subsequently held in another case that these provisions violate the European Convention on Human Rights. And in October 2010, the European Court of Human Rights, sitting in Strasbourg, France, ruled that the French criminal procedure violated the convention since the suspect has been put under oath in police custody, without having been told about his right to remain silent and his right not to incriminate himself.

THE PROPOSED LEGISLATION

On Oct. 13, 2010 — that is, after the ruling by the Constitutional Council but before the two others — Michèle Alliot-Marie, then the minister of justice, presented to the government legislation to replace the procedures invalidated by the Constitutional Council. The proposed law has three principal elements.

First, it is designed to cut down on the number of custodial interrogations by providing that they can occur only when the detainee is plausibly suspected of having committed an offense that itself is punishable by jail. The ministry projects that the number of garde à vue interrogations will be cut to fewer than 300,000 per year — still a significant number.

Second, the proposed legislation will eliminate strip searches during the conduct of the interrogation, at least without a specific order signed by a judge.

And third, the proposed legislation will provide not only that the detainee be informed of his or her right to assistance of counsel and the right to remain silent, but that counsel can be present during the entirety of the interrogation. It is this innovation that has attracted the most comment in France, and particularly among members of the bar.

The proposed legislation originally provided for a new procedure called an "audition libre," or "free questioning." Under this procedure, the person being questioned may give his or her consent to participate in an interview, which according to the official description will last "only as long as necessary." Implicit in the official description, however, is the apparent proposition that, unlike the custodial interrogation itself, a "consensual" interrogation will be conducted without the active participation of a lawyer. This proposed legislation was withdrawn during the course of the parliamentary debates.

EVALUATION OF PROPOSED REFORMS

The proposed reforms have been much discussed in the press and on television in France. There have been two themes in the commentary to date.

First, of course, the proposed legislation has been generally welcomed by the public as a long overdue reform, although Alliot-Marie noted that the legislation had been opposed by unions representing the police. But second, members of the criminal defense bar have expressed concern about several aspects of the proposed law.

On Sept. 28, 2010, the heads of the Paris Bar delivered a public letter to the minister of justice transmitting the formal comments of the Paris Bar on the proposed reform. Their comments include the express — and ultimately successful — demand that the "free questioning" procedure be scrapped. The bar also proposed other amendments

to the proposed legislation designed to bolster the rights of the detainee, including an assurance that a judge is always available to intervene if necessary in the actual conduct of the interrogation. This proposal would raise the threshold for garde à vue interrogations so that they can be used only for more serious infractions and limit the "exceptions" allowing for procedures for garde à vue interrogations to investigations involving terrorism and other kinds of offenses, which under the proposed legislation would not be reformed at all. In response to these and other comments, the legislators have dropped the notion of "free questioning" and are still considering other proposed amendments to the draft legislation.

The proposed legislation may be in need for major revision even before it is enacted, following a Nov. 23, 2010, decision of the European Court of Human Rights rendered in the context of a petition against France by an individual who was the subject of a police custody in 2005. The court held that supervision of police custody by the public prosecutor is inconsistent with the convention rule that requires supervision by a judge, because a French prosecutor is not independent within the meaning of the convention (a French prosecutor is appointed, and must obey orders given to him or her, by the government). However, the current project adopted by the French National Assembly on Jan. 25 kept the garde à vue under the supervision of a prosecutor.

Overall, these decisions and the promulgation of new procedures mark a significant turning point in criminal procedures in France, and bring French investigative practice significantly closer to procedures familiar to Americans, where the right of a detainee to consult with a lawyer has long been respected.

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