



The controversial use of glass-enclosed docks in the French courts

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The emergence of glass-enclosed docks in the French courts

The new Paris courthouse,^[1] which opened on 16 April 2018, is equipped with glass-enclosed docks in which the defendants are placed throughout their hearing. Large glass panes fully enclose the defendants and a narrow gap allows them to communicate with their lawyers throughout the hearing.

The competing and conflicting rationales behind the glass-enclosed docks

Over the past few years, the increase of violent incidents, altercations, insults and threats issued^[2] in tribunals and the new framework of the national anti-terrorist policies^[3] have been used to justify the use of glass docks, which were considered a necessary measure to reduce these incidents by strengthening security in tribunals.^[4]

The Minister for Justice advocated for their establishment^[5] by Order of 18 August 2016. This Order recommended two processes by which to reinforce dock security: 'the first is the glass-enclosed dock, the second is the barred dock, with glass on the sides and on the side of the judges' (translated from French).^[6]

Docks in themselves – 'closed spaces intended to accommodate defendants detained under escort'^[7] – deprive individuals, not all of which have been convicted, of their freedom of movement during the evaluation of the evidence against them.

Their nature thereby begs the question of whether their existence and the relating security considerations trump individual rights and civil liberties and, if so, whether they are justifiable.

The European discourse on the issue

At a European level, similar security measures, such as metal cages, have been condemned. Glass-enclosed docks have also been sanctioned, however, without being struck down on all fronts.

In 2014, in *Svinarenko and Slyadnev v Russia*,^[8] the European Court of Human Rights (ECHR) strongly condemned the use of cages in courts. The imprisonment of defendants in a metal cage was contrary to the requirements of Article 3 (dignity) and Article 6 section 1 (fair trial) of the ECHR, 'harming the image [of the defendants] and causing feelings of humiliation, helplessness, fear, anguish and inferiority'. The ECHR recalled that the UN Human Rights Committee had held it to be a violation of Article 7 of the International Covenant on Civil and Political Rights, on account of the degrading treatment, affecting the fairness of the trial.^[9] The presumption of innocence could also be impaired in that the 'exposure in a cage [could] convey to their judges [...] a negative image of the [defendants] as being dangerous to the point of requiring such an extreme physical restraint'. Finally, the Court did not consider that in 'present-day circumstances, holding a defendant in a cage during a trial is a necessary means of physically restraining him, preventing his escape, dealing with disorderly or aggressive behaviour, or protecting him against aggression from outside'. This rendered the object of 'humiliating and debasing the person' apparent.

The ECHR is not so clear-cut regarding glass cages, however.

In 2016, in *Yaroslav Belousov v Russia*,^[10] the ECHR considered that the use of glass-enclosed docks was not in itself humiliating enough to violate Article 3 of the ECHR. It nevertheless considered that it could be, if paired with some other form of degrading treatment, and it held that glass-enclosed docks prevented defendants from the right to an effective defence. In 2017, in *Kavkazskiy v Russia*,^[11] the European judges recalled this reasoning, pointing to the degree of humiliation.

The European Union Directive that came to the fore on 9 March 2016^[12] is hardly any clearer. Its content provides that Member States shall take appropriate precautions not to portray a defendant as guilty^[13] while bearing in mind the security considerations of the case at hand.^[14]

This Directive is thereby vague on its stance on glass-enclosed docks, in submitting their existence to a case-by-case analysis, despite the case law fast approaching a condemnation of all forms of unjustified physical restraints.

The differing national schools of thought

While some argue that glass-enclosed docks should be allowed in exceptional circumstances, many believe that the default principle must be their general prohibition.

Many defence lawyers are of the opinion that the security imperative is a pretext masking the true financial purposes of this measure, in the decrease of the number of security escorts for the prisoners.^[15]

Furthermore, Article 318 of the Code of Criminal Procedure provides a ground for arguing against the use of such enclosures, providing that the defendant must appear 'free and only accompanied by guards to prevent him from escaping'.

Following this, it appears that although a delimited space should be envisaged for the defendants in order to monitor their behaviour and ensure their presence in court, no legal provision should legitimise

the defendants being placed in a cage, especially in light of the dehumanising nature of such an enclosure.

Moreover, Article 278 of the Code of Criminal Procedure provides that the defendant 'must always be able to communicate with his lawyer freely'. A general trend of case law recognises the 'absolute right of communication', which includes the confrontation in court.^[16] A narrow gap in between the glass panes through which the defendant can speak with their lawyer may impair the right to prepare an adequate defence and the right to present evidence, and impinge upon lawyer–client privilege.

Finally, the presumption of innocence, enclosed within Article 9 of the Déclaration des Droits de l'Homme et du Citoyen, and the right to a public hearing before an independent and impartial tribunal calls for defendants to be tried free from a glass cage, in particular with regard to cases before a jury, such as proceedings before the Cour d'Assises.^[17] It is more likely that a jury will consider a constrained individual guilty than an unconstrained individual at the bar table.

As a result, there is a significant conflict between the security considerations that encouraged the French government to install glass-enclosed docks and human dignity, fair-trial rights and relating procedural safeguards. This has spurred a chain of objections from defence lawyers and bar associations and a fair amount of backtracking from the judicial authorities and the Minister for Justice.

The pushback from defence lawyers and the authorities

Following the assertiveness of defence lawyers and bar associations in challenging the use of the glass-enclosed docks, on 22 December 2017, the Minister for Justice announced that the government would interrupt the construction of glass-enclosed docks in French courts. Barred docks and cages were to be dismantled in 11 jurisdictions and the number of criminal chambers in the new courthouse equipped with glass docks reduced.^[18]

The speaker for the Chancellery added that a case-by-case analysis and improvements had to be made for secured docks, such as bench positioning and widening the gap in the glass panes to facilitate communication. He insisted that proportionality needed to be applied for every enclosed dock, weighing up the security imperatives and the conditions in which the defendants are tried.^[19]

The suggestion of widening the gap in the glass panes was considered insufficient by the lawyers, who intend to challenge the use of such docks at every trial until their complete dismantlement.^[20]

Criticisms of glass-enclosed docks are rampant. In a press release, the President of the National Council of the Bars stated that: 'The rights of the defence are constantly declining in France. [...] We will continue to mobilise public opinion on the importance of respecting the presumption of innocence and the flagging of the undignified character of appearing in a cage.'^[21]

Various interim measure applications have been submitted by a multitude of defence lawyers over the years. For example, in Grenoble in November 2015, the national lawyers union^[22] initiated legal proceedings because lawyers were forced to stand on their chairs to communicate with their clients throughout the hearing.^[23]

The dismantlement of glass-enclosed and barred docks was requested in Paris in November 2017 by the national syndicate of lawyers and joined by 21 bars.^[24] They also sought the conviction of the state for misconduct related to the impediment to the practice of the legal profession.

On 12 February 2018, the First Civil Division of the Paris Tribunal rejected the claims.^[25] The judges determined that ‘the appearance in a secure box during a criminal trial does not in itself constitute a dysfunction of the public service of justice, nor does it constitute an infringement of the rights of the defence or the dignity of the accused’. The judges condition the withdrawal on ‘the demonstration of the hindrance the cage created on the defence rights and dignified appearance at the hearing’. They also dismissed state responsibility for gross negligence for lack of an ‘effective link between the user and the procedure’, seeing as ‘the lawyer, as a justice auxiliary, cannot be considered a user’.^[26]

On 16 February 2018, the supreme administrative court Conseil d’Etat also rejected such a request from the bar syndicates – but on account of its lack of jurisdiction.^[27]

Seeing as glass docks were built largely before the Order of 18 August 2016, they pertain to the functioning of justice and not to a mere global policy of securing the courts. The head of the jurisdiction will therefore be entitled to order the defendant to be tried free from the glass enclosed dock, as the Conseil d’Etat confirmed in the aforementioned decision.^[28]

On 12 December 2017, the Cour d’Assises of Pontoise ordered an accused person out of the glass-enclosed dock at the request of the defence lawyer and the civil parties, allowing him to be present at his hearing unconstrained. The court considered that the narrow and low openings in the panes left no other option but for the accused to stand in an uncomfortable position and speak in a loud voice to communicate with his lawyer, undermining the lawyer–client privilege. The court recalled that glass docks need not be automatic and that, in this instance, the defendant’s compliant behaviour made it unlikely that he would attempt to flee.^[29]

Multiple French syndicates and orders,^[30] unfazed by the decision of February, are still unanimously refusing to accept glass-enclosed docks.

The Défenseur des Droits^[31] also issued a report stating that the glass and barred docks impact in a disproportionate manner fundamental rights of the defendants. Their systematic establishment should therefore be prohibited and defendants should not be placed in them by default.

Conclusion

It appears that defence lawyers have somewhat succeeded in fighting back against the systematic use of glass-enclosed docks for defendants on trial in criminal cases. At a time when civil liberties and fundamentals rights are often infringed upon in the name of security considerations and public order, it is imperative that the courtroom, a space in which the presumption of innocence and equality before the law should prevail, should not turn into the extension of a prison cell.

Notes

[*] Stéphane de Navacelle is a member of the New York and Paris Bars, Julie Zorrilla is a member of the Paris Bar and Sarah Reilly is a trainee at Navacelle.

[1] Palais de Justice de Paris, conceived by architect Renzo Piano.

[2] Statistics of the Ministry for Justice, featuring in M Lenhardt, ‘Val-d’Oise: l’accusé jugé hors du box vitré, une première aux assises’, 13 December 2017, available at www.leparisien.fr

(<http://www.leparisien.fr>).

[3] Plan de lutte antiterroriste 2, referenced in M Lenhardt, 'Val-d'Oise: l'accusé jugé hors du box vitré, une première aux assises', 13 December 2017; J Chevalier, 'L'installation de box vitrés suspendue par le Ministère de la Justice', 27 December 2017, Conférence des bâtonniers.

[4] T Coustet, 'Sécurisation des boxes: un dossier prioritaire pour la Chancellerie', 24 October 2017, Dalloz actualités.

[5] J Mucchielli, 'Les "cages en verre" de Nanterre devant le juge des référés', 8 December 2017, Dalloz actualités.

[6] BOMJ No 2016-08, 31 August 2016, 'Arrêté du 18 août 2016 portant approbation de la politique ministérielle de défense et de sécurité', NOR: JUST1624217A, Bulletin Officiel du Ministère de la Justice, Section 5.1.3.2.6.

[7] *Ibid.*

[8] *Svinarenko and Slyadnev v Russia* (no 32541/08), ECtHR (2014).

[9] The ECtHR also referred to the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Rules of Procedure of international criminal tribunals, in that they provide that certain instruments of restraint should only be used as a precaution against escape during a transfer, provided that they are removed once the accused appears before a court.

[10] *Yaroslav Belousov v Russia* (no 2653/13), ECtHR (2016).

[11] *Kavkazskiy v Russia*, (no 19327/13), ECtHR (2017).

[12] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, L 65/1, Official Journal of the European Union, 11 March 2016, Point No 20.

[13] *Ibid*, Art 5, para 1.

[14] *Ibid*, para 2.

[15] J Mucchielli, 'Cages en verre: l'argument sécuritaire est un leurre', 16 January 2018, Dalloz actualités.

[16] Eg, Cour de Cassation, Criminal Division, 15 May 1985.

[17] Cour d'Assises is the criminal trial court with first and appellate jurisdiction to hear cases involving defendants accused of felonies or crimes and is the only French court that has jury trials.

[18] M Babonneau, 'Box vitrés du TGI de Paris : les négociations achoppent, le blocage des audiences est annoncé', 13 April 2018, Dalloz actualités.

[19] *Ibid.*

[20] *Ibid.*

[21] T Coustet, 'Le TGI rejette les demandes de retrait des boxes vitrés', 12 February 2018, Dalloz actualités.

[22] *Syndicat des Avocats de France*.

[23] A Portmann, 'Des avocats contre le bocal judiciaire des assises de Grenoble', 6 November 2015, Dalloz actualités.

[24] A Portmann, 'Box sécurisés dans les salles d'audience, l'Etat assigné pour faute lourde', 15 November 2017, Dalloz actualités.

[25] T Coustet, 'Le TGI rejette les demandes de retrait des boxes vitrés', 12 February 2018, Dalloz actualités.

[26] *Ibid.*

[27] T Coustet, 'Box vitrés : le Conseil d'Etat décline sa compétence', 19 February 2018, Dalloz actualités; CE Ord Réf 16 February 2018, No 417944.

[28] *Ibid.*

[29] M Lenhardt, 'Val-d'Ois: l'accusé jugé hors du box vitré, une première aux assises', 13 December 2017; Arrêt de rejet de mise en liberté et ordonnant l'extraction du dispositif sécurisé, Cour d'Assises du Val d'Oise, 12 December 2017, Affaire 17-0007, Arrêt no 92/2017.

[30] Ordre des avocats parisiens, Association des avocats pénalistes (ADAP), Syndicat des avocats de France (SAF), l'Union des jeunes avocats (UJA) and Conférence du stage.

[31] The Défenseur des droits is an independent institution that ensures that France abides by citizens' human rights and civil liberties, issues non-binding reports and offers legal recourse notably in cases of discrimination and unfair treatment before the law.