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# Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries

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**ABSTRACT**

This article traces the path from the decision of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* to custodial legal assistance reforms in France, Scotland, Belgium and the Netherlands, and to the recent decision of the Irish Supreme Court in *DPP v Gormley*. The article attempts to flush out the central role of the ECtHR in effecting national criminal justice reform, while paying attention to considerable variations in national responses. It discusses the thesis that when the ECtHR articulates its rules clearly, as it has arguably done in the *Salduz* line of cases, it can lead contracting parties to accept its position, even where this might require a significant readjustment of national law and practice. The article also brings into focus the Irish Supreme Court's strong demonstration of common law comparativism, which influenced the outcome in *Gormley* at least as significantly as Strasbourg jurisprudence itself. This remarkable cosmopolitan vision is contrasted with the Supreme Court's simultaneous unawareness of other *Salduz*-generated reforms in Europe. The article concludes that comparative law should have an important role to play in shaping national responses to Strasbourg jurisprudence and facilitating its acceptance by contracting parties.

**KEYWORDS**: right to legal assistance, police custody, fair trial, comparative law, harmonisation, Article 6 European Convention on Human Rights, *Salduz v Turkey*

## 1. INTRODUCTION

In *DPP v Gormley and DPP v White*, the Irish Supreme Court recognized 'a right to early access to a lawyer after arrest' and a 'right not to be interrogated without having had an opportunity to obtain [legal] advice'.[1] *Gormley* is the latest link in the chain

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1 [2014] IESC 17 at para 9.13. This article will discuss the appeal of Raymond Gormley. Only sporadic reference will be made to the separate but linked appeal of Craig White, where the police obtained bodily samples for forensic testing after the suspect had requested the presence of a solicitor but before the solicitor concerned arrived. Contrary to Gormley's appeal, where the Supreme Court found that a suspect is

of radical Strasbourg-inspired reforms of the right to custodial legal assistance in Europe. The seminal unanimous decision of the Grand Chamber of the European Court of Human Rights (ECtHR or 'the Court') in *Salduz v Turkey*,[2] which was a major influence for *Gormley*, had already led to, or set in motion at least, reforms of custodial legal assistance in France, Belgium, Scotland and the Netherlands. Like Ireland, these countries had long resisted giving full effect to the right of access to a lawyer in police interrogations. Scotland and Belgium were going so far as denying suspects the right to consult with a lawyer before interrogation, while suspects in France and the Netherlands were entitled to a brief consultation with a lawyer *prior to*, but not *during*, questioning.[3] Irish jurisprudence was recognizing access to a lawyer as a constitutional right,[4] but did not 'require that advice from a requested solicitor actually be made available to the relevant suspect prior to questioning'[5] and rejected the possibility of having a lawyer present during questioning.[6]

In undertaking a contextual study of reforms of custodial legal assistance in Europe, this article will offer evidence of the central role of the ECtHR in effecting change in national jurisdictions. At the same time, it will highlight considerable variations in national responses to *Salduz*, and will argue that these illustrate that cosmopolitan influences for reform are mediated by competing judicial and legislative agendas, local resistance and a variety of other political, institutional and economic factors. The article will use these observations as a platform to discuss, and then propose qualifications to, the thesis that when the ECtHR articulates its rules clearly, it can lead contracting parties to accept its position. Reflecting on the Irish Supreme Court's striking demonstration of common law comparativism in *Gormley*, the article will also offer some thoughts on the role that comparative law should play in shaping national responses to Strasbourg jurisprudence.

## 2. STRASBOURG JURISPRUDENCE AND NATIONAL REFORMS OF THE RIGHT TO CUSTODIAL LEGAL ASSISTANCE

To explore Strasbourg's role in reforms of the right of access to a lawyer in Europe, I will provide a sketch of the state of custodial legal assistance before and after

entitled to prior legal advice in cases of interrogation, in relation to White's appeal the Court held that there is no such entitlement in cases of forensic testing. Though the case of *White* merits attention, it is the case of *Gormley* that is of particular comparative interest for the analysis of similar jurisprudence and ensuing legal reforms in the other European legal systems discussed in this article.

2 Application No 36391/02, Merits and Just Satisfaction, 27 November 2008.

3 See generally Brants, 'The Reluctant Dutch Response to *Salduz*' (2011) 15 *Edinburgh Law Review* 298; Spencer, 'Strasbourg and Defendants' Rights in Criminal Procedure' (2011) 70 *Cambridge Law Journal* 14; Questiaux, 'Much Ado About Justice' (2011) 15 *Edinburgh Law Review* 432; Committee against Torture, Follow-up replies from the Government of Belgium to the Concluding Observations of the Committee against Torture, 28 March 2011, CAT/C/BEL/CO/2/Add.1, at para 74; Dorange and Field, 'Reforming Defence Rights in French Police Custody: A Coming Together in Europe?' (2012) 16 *International Journal of Evidence and Proof* 153; Verhoeven and Stevens, 'The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect' (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 69; Giannoulopoulos, ' "North of the Border and Across the Channel": Custodial Legal Assistance Reforms in Scotland and France' [2013] *Criminal Law Review* 369.

4 See *DPP v Healy* [1990] 2 IR 73.

5 *Gormley*, supra n 1 at para 5.7.

6 See *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390; and *JM v Member in Charge of Coolock Garda Station* [2013] IEHC 251.

*Salduz* in the five European countries that will be compared in this article. It will first be necessary to offer a brief account of *Salduz* and its progeny, and a more detailed analysis of the most recent demonstration of their effect, namely the Irish Supreme Court's decision in *Gormley*.

### A. *Salduz* and its Progeny

*Salduz* represents a major re-evaluation of the ECtHR's position on the importance of 'the investigation stage for the preparation of the criminal proceedings'.[7] The suspect in *Salduz* was a minor of 17-years-of-age who had been interrogated at an anti-terrorism branch of the Turkish police in the absence of a lawyer, making several admissions about his involvement in the suspected offences. The case was first examined by a Chamber of the ECtHR, which found no violation of the right to fair trial, mainly on the basis that the applicant had had legal representation during the trial and appeal proceedings, his statement was not the sole basis for conviction and he had had the opportunity of challenging the prosecution's allegations. The fairness of the trial had, therefore, not been prejudiced by the lack of custodial legal assistance.[8] This finding was in line with the pre-*Salduz* approach of assessing fairness with regard to the entirety of the proceedings.[9] The Grand Chamber's decision in *Salduz* departed from this approach altogether, holding that Article 6(1) of the European Convention on Human Rights[10] (ECHR or 'the Convention') requires that 'as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police'[11] and that '[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'[12] The Court rejected the argument that the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects occurring during police custody.[13]

The ECtHR provided quick confirmation of this new approach in a series of Chamber judgments. In *Panovits v Cyprus*,[14] it reiterated that 'Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation',[15] and then considerably extended the scope of the application of the right to legal assistance in *Dayanan v Turkey*, which mandated that a suspect should be assisted by a lawyer 'as soon as he or she is taken into custody . . . and not only while being questioned', and that he should be able to 'obtain the whole range of services specifically associated with legal assistance'.[16] The right

7 *Salduz*, supra n 2 at para 54. But see Ashworth, who notes that '[i]n one sense, the judgment can be seen as a continuation of a development [by the ECtHR] of the right to access to legal advice': Ashworth, 'Case Comment – Salduz v Turkey: Human Rights – Article 6 – right to fair trial' [2010] *Criminal Law Review* 419 at 420.

8 *Salduz v Turkey* Application No 36391/02, Merits and Just Satisfaction, 26 April 2007, at paras 23–24.

9 See *Salduz*, supra n 2 at para 48.

10 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

11 *Salduz*, supra n 2 at para 55.

12 Ibid.

13 Ibid. at para 58.

14 Application No 4268/04, Merits and Just Satisfaction, 11 December 2008.

15 Ibid. at para 66.

16 Application No 7377/ 03, Merits and Just Satisfaction, 13 October 2009, at para 32.

of access to a lawyer was seen as extending beyond the right to legal *advice*, to include a wider notion of legal *assistance* that applies during the entire interrogation phase and not simply prior to, or during, the questioning of the suspect.[17] The Court likewise found a breach of the right to fair trial in *Pishchalnikov v Russia*, where the suspect had been questioned in the absence of a lawyer in the first two days of interrogation, though he had specifically asked to be assisted by a lawyer.[18] The Court held that the authorities should have offered the suspect the opportunity to retain a counsel even if the one originally requested by him was unavailable.[19] The Court concluded that the lack of legal assistance had irretrievably affected the right to a fair trial,[20] and that an accused 'who had expressed his desire to participate in investigative steps only through counsel, should not be subject to further interrogation by the authorities until counsel has been made available to him'.[21] Finally, in *Brusco v France,* the ECtHR removed any doubts about the lawyer's presence at questioning, by holding that the defendant has the right to be assisted by a lawyer from the beginning of his detention *as well as during questioning*.[22]

The *Salduz* line of jurisprudence continues to evolve at a very fast pace[23] and to exert considerable influence in European countries. *Gormley* is the last of radical developments in this area. After presenting the case, I will demonstrate that it reflects a trend of breathing new life into the right to custodial legal assistance in those European jurisdictions that had long failed to recognize a role for lawyers at the police station.

### B. *Salduz* Strikes Again: *DPP v Gormley*

The appellant in *Gormley* had requested a solicitor shortly after being arrested and being notified of his rights, and had provided the police with the names of two solicitors. The gardaí (officers of the Irish national police) made efforts to locate either one of the two solicitors. One of them contacted the Garda station less than an hour later, to confirm he would soon arrive at the station. But the gardaí did not wait for the solicitor and started the interview immediately after he made contact with them.[24] It is in the course of this interview that the suspect made a number of

17 For a discussion of the distinction between the right to legal advice and the right to legal assistance, see Leverick, 'The Right to Legal Assistance During Detention' (2011) 15 *Edinburgh Law Review* 352 at 354.

18 Application No 7025/04, Merits and Just Satisfaction, 24 September 2009.

19 Ibid. at para 74.

20 Ibid. at para 91.

21 Ibid. at para 79.

22 Application No 1466/07, Merits and Just Satisfaction, 14 October 2010, at para 45. See also *Boz v Turkey* Application No 2039/04, Merits and Just Satisfaction, 9 February 2010; and *Adamkiewicz v Poland* Application No 54729/00, Merits and Just Satisfaction, 2 March 2010. In *Navone and Others v Monaco* Applications Nos 62880/11, 62892/11 and 62899/11, Merits and Just Satisfaction, 24 October 2013, at para 79, the ECtHR observed that it had on many occasions specified that the right to legal assistance during police detention should be particularly understood as assistance 'during questioning', citing the examples of *Karabil v Turkey* Application No 5256/02, Merits and Just Satisfaction, 16 June 2009, at para 44; *Ümit Aydin v Turkey* Application No 33735/02, Merits and Just Satisfaction, 5 January 2010, at para 47; and *Boz v Turkey* Application No 2039/04, Merits and Just Satisfaction, 9 February 2010 at para 34.

23 See generally Choo, *The Privilege against Self-Incrimination and Criminal Justice* (2013) at 84–6.

24 The appellant made the request for a solicitor at 2.15 p.m., and the solicitor contacted the Garda station at 3.06 p.m. to inform them he would attend the station 'shortly after' 4 p.m. or 'as soon as possible after'

inculpatory admissions which were deemed admissible in trial. The Supreme Court was thereupon faced with the question whether commencement of the questioning should be postponed to enable the solicitor to attend at the Garda station or whether simply contacting the solicitor vindicates the suspect's right to legal assistance.

Until *Gormley* was decided, the right of access to legal assistance was being narrowly interpreted as a right to *reasonable* access only[25] and was therefore of 'limited practical effect'.[26] The gardaí's '*bona fide* attempts to comply with [the suspect's] request [for legal assistance]' seemed to satisfy this requirement, unless it could be demonstrated that the gardaí had made a conscious and deliberate attempt to deprive the suspect of the services of his solicitor.[27] But the Irish Supreme Court said in *Gormley* that the Constitution's mandate that a person should not be tried save 'in due course of law'[28] encompassed 'the right not to be interrogated without having had an opportunity to obtain such advice'.[29] This specifically derived from the right against self-incrimination[30] and was 'an important constitutional entitlement of high legal value'.[31] *Gormley* now provides 'an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender the requested advice'.[32] The Court emphasized that, '[a]t a minimum', the right of access to a lawyer while in custody 'would be significantly diluted if questioning could continue prior to the arrival of the relevant lawyer'.[33] The Court also recognized that 'there are many issues of detail which surround the precise extent of such a right'[34] and that the right is 'potentially subject to exceptions',[35] but it then went on to explain that these would be 'extreme exceptions where the lawyer just does not arrive within any reasonable timeframe',[36] and added that this would be 'a matter to be debated if and when a case with those facts actually comes before the Court'.[37]

4 p.m. The appellant's interview started at 3.10 p.m. The solicitor arrived at the station at 4.48 p.m.: *Gormley*, supra n 1 at paras 3.1–3.2.

25 See Section 5 Criminal Justice Act 1984; and *DPP v Madden* [1977] IR 336.

26 Campbell, 'The Constitutional Right to Legal Advice after Arrest', 7 March 2014, available at: human-rights.ie/civil-liberties/the-constitutional-right-to-legal-advice-after-arrest/ [last accessed 24 August 2015]. Heffernan notes that the practice was 'extremely restrictive', as there was no duty to inform the suspect of the right to legal assistance and 'there could be no meaningful enjoyment of the right unless the suspect was independently aware of his entitlement and expressly invoked it'. After *DPP v Healy*, supra n 4, the duty to notify the suspect was no longer in doubt, which meant that the Irish position became 'considerably more protective', but there were still important concerns over 'the additional steps, if any, that the gardaí [had to] take to facilitate access': Heffernan, 'The Right to Legal Advice, Reasonable Access and the Remedy of Excluding Evidence' (2011) 1 *Criminal Law and Procedure Review* 111 at 113.

27 *DPP v Buck* [2002] 2 IR 268 at 269–70. See also *DPP v Conroy* [1986] IR 460.

28 Article 38.1 Republic of Ireland Constitution.

29 *Gormley*, supra n 1 at para 9.13.

30 Ibid.

31 Ibid. at para 9.14.

32 Ibid. at para 9.2.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid. at para 9.10.

37 Ibid.

*Salduz* played a key role in the Irish Supreme Court's transition from the 'reasonable access' test to mandating that questioning could not commence or continue before the arrival of a lawyer. The Court took as its point of departure the 'general principles' established in *Salduz*, citing extensively from the decision of the Grand Chamber,[38] the ECtHR's decisions which later reiterated and further developed these principles,[39] as well as *Cadder v HM Advocate*, in which the UK Supreme Court substituted the *Salduz* line of jurisprudence for the pre-existing regime of police interrogation in Scotland.[40] The first question that the Irish Supreme Court asked in *Gormley* was whether the entitlement to a trial in due course of law also encompassed an entitlement to access legal advice before interrogation. Establishing that this was the position taken by ECtHR jurisprudence, the Court responded in the affirmative.[41] This opened the way to examine the question central to *Gormley* of whether this entitlement also carried with it 'an entitlement not to be interrogated after such access is requested and before access to such a lawyer is obtained'.[42] Noting that this was indeed the 'consistent international position',[43] which the ECtHR had also adopted, the Court took the radical step of prohibiting the continuation of questioning before legal advice being obtained.[44] This was required, the Court concluded, to compensate for the particular vulnerability of the suspect after arrest, which was the core reasoning behind *Salduz*.[45]

Strasbourg's key influence in *Gormley* also becomes evident when contrasted with the conclusion in the linked appeal of *DPP v White*. The Court explained there that, according to ECtHR case law, the taking of forensic samples without the benefit of legal advice did not amount to a breach of the right to a fair trial.[46] This meant that a distinction could be drawn between recognizing the right to prior legal advice in cases of police interrogation—which derived directly from Strasbourg jurisprudence—and rejecting the right in cases of forensic testing, in view of the fact that such an extended application of the right to legal assistance could not be supported by the ECHR.[47]

### C. Before *Salduz* in France, Scotland, Belgium, the Netherlands and Ireland

Resistance to recognition of the right to custodial legal assistance in France is a well-documented fact.[48] I have sketched elsewhere how systemic opposition to providing

38 Ibid. at paras 6.1–6.3, citing *Salduz*, supra n 2 at paras 50–55 and 62.

39 Ibid. at paras 6.4–6.5, citing notably *Dayanan v Turkey*, supra n 16 at para 32; and *Panovits v Cyprus*, supra n 14 at paras 72–73.

40 Ibid. at para 6.6, citing *Cadder v HM Advocate* [2010] UKSC 43.

41 Ibid. at paras 8.1–8.8.

42 Ibid. at para 9.1.

43 Ibid.

44 Ibid. at para 9.2.

45 Ibid. at para 9.9.

46 See notably *Saunders v United Kingdom* Application No 19187/91, Merits and Just Satisfaction, 17 December 1996; and *Boyce v Ireland* Application No 8428/09, Admissibility, 27 November 2012.

47 *Gormley*, supra n 1 at paras 10.1–10.13.

48 Hodgson's work is testament to this. See generally Hodgson, 'Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?' (2002) 6 *International Journal of Evidence and Proof* 1; 'Codified Criminal Procedure and Human Rights: Some Observations on the French Experience' [2003] *Criminal Law Review* 165 at 173; *French Criminal Justice: A*

suspects with access to legal advice has spanned the French legal landscape for the last 20 years at least,[49] and have pinpointed important similarities with historic resistance to the right to legal advice in Scotland.[50] Here it suffices to note that despite the many attempts at legislative reform,[51] suspects in France were until the enactment of the Law of 14 April 2011 not entitled to have a lawyer present when questioned by the police.[52] Similarly, in Scotland, it was only in 2010 that the UK Supreme Court forced, with *Cadder v HM Advocate*,[53] a break with a 30-year history of legislation[54] and authoritative line of jurisprudence[55] approving

> the fact that a suspect, detained for six hours in police custody, but not charged, did not have the right to legal assistance during that period and, although the police had the right to put questions to the detainee, he had no right to legal advice, including advice about whether or not he should answer such questions.[56]

Lord Rodger's historic analysis in *Cadder* brings to the fore the main reasons underpinning this quite idiosyncratic position,[57] which was 'intended to give the police—and therefore the prosecution—an enhanced possibility of obtaining incriminating admissions from the suspect which [could] then be deployed in evidence at his trial'.[58]

In Belgium, prior to *Salduz*, legislation provided for legal assistance only after interrogation by the investigating judge.[59] This meant that suspects were deprived of any access to a lawyer for the whole 24-hour period of interrogation by the police or even on the most solemn occasion of examination by the investigating judge

*Comparative Account of the Investigation and Prosecution of Crime in France* (2005) at 39; and 'Making Custodial Legal Advice More Effective in France' (2013) 92 *Criminal Justice Matters* 14. See also Field and West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process' (2003) 14 *Criminal Law Forum* 261 at 284; and Vogler, 'Reform Trends in Criminal Justice: Spain, France and England & Wales' (2005) 4 *Washington University Global Studies Law Review* 631 at 634.

49 Giannoulopoulos, 'Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance' (2013) 24 *Criminal Law Forum* 291 at 297–302.

50 Giannoulopoulos, supra n 3 at 371–2.

51 See, for example, Loi n° 93-1013 du 24 août 1993 modifiant la loi n° 93-2 du 4 janvier 1993 portant réforme de la procédure pénale; and Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes (Law of 15 June 2000 reinforcing the presumption of innocence and victims' rights).

52 Loi n° 2011-392 du 14 avril 2011 relative à la garde à vue (Law of 14 April 2011 on the *garde à vue*).

53 Supra n 40.

54 See Section 3 Criminal Justice (Scotland) Act 1980, consolidated by Section 15 Criminal Procedure (Scotland) Act 1995.

55 See, for example, *Paton v Ritchie* [2000] JC 271, [2000] SLT 239; *Dickson v HM Advocate* [2001] JC 203, [2001] SLT 674; and *HM Advocate v McLean* [2009] HCJAC 97, [2010] SLT 73.

56 McCluskey, 'Supreme Error' (2011) 15 *Edinburgh Law Review* 276 at 276.

57 *Cadder v HM Advocate*, supra n 40 at paras 74–92.

58 Ibid. at para 92. For an informative summary of the Scottish position pre-*Cadder*, see Blackstock, 'The Right to Legal Assistance in Scotland' (2013) 92 *Criminal Justice Matters* 12. The idiosyncratic character of the Scottish position becomes even more evident when one contrasts it with developments south of the border, where the right to legal consultation and right to have a lawyer present during questioning were implemented nearly 25 years prior to them being enacted into Scottish law: see Giannoulopoulos, supra n 3 at 383.

59 Article 20 Loi du 20 juillet 1990 relative à la détention préventive (Law of 20 July 1990 on pre-trial detention).

preceding the issuance of an arrest warrant.[60] This practice of entirely isolating the suspect when at the police station appears to have been so embedded in the Belgian legal culture that even the *Cour de cassation*, the highest court in the land, originally went so far as to consider that it was compatible with the *Salduz* jurisprudence, by adopting the 'overall fairness of the proceedings' argumentation that had been explicitly rejected by *Salduz* itself.[61] In choosing an arguably more resourceful defence of the national legal practice, the *Cour d'assises* (mixed criminal tribunal) in Liège reached the same conclusion, by pointing out that Belgian law provided the suspect with alternative procedural guarantees that compensated for the absence of a lawyer during custodial interrogation.[62] The decision mirrors the opinion of the Scottish High Court of Justiciary in *HM Advocate v McLean*, where the practice of providing the suspect with no access to a lawyer for a period of up to six hours was strongly defended by the highest jurisdiction in Scotland on the premise of guarantees otherwise available to secure a fair trial.[63] This defence of the status quo was eventually seen as flawed in both jurisdictions,[64] yet still clearly demonstrates how, until *Salduz*, no one seemed to think that questioning the suspect without access to legal assistance could actually be in breach of the right to fair trial. From this viewpoint, Lord Hope's observation in *Cadder* that it was 'remarkable that, until quite recently, nobody [in Scotland had] thought that there [had been] anything wrong with this procedure'[65] applies *a fortiori* to Belgium, which prior to *Salduz* endorsed possibly the most restrictive interpretation of the right to legal assistance in Europe.

60 'The man who appears before the investigating judge is alone, he does not have the right to a lawyer', noted Cécile Thibaut in an amendment to the Bill reforming custodial legal assistance: see Document législatif n° 4-1079/2, Proposition de loi modifiant l'article 1er de la loi du 20 juillet 1990 relative à la détention préventive, afin de conférer de nouveaux droits, au moment de l'arrestation, à la personne privée de liberté.

61 Arr. Cass. P.09.0304.F, 11 March 2009. This was in line with pre-*Salduz* Belgian *Cour de cassation* jurisprudence: see, for example, Arr. Cass. P991585N, 14 December 1999. See also Sénat de Belgique, Commission de la Justice, Rapport 'Les suites de l'arrêt Salduz', Audition de M. Timperman, avocat général près la Cour de cassation, 2 March 2011, at 30. Cf. Arr. Cass. P.10.0914.F, 15 December 2010, where the Court found a violation of Article 6 ECHR as a result of the suspect making incriminating statements in the absence of a lawyer.

62 Cour d'assises de Liège, 30 March 2009, JLMB 2009/19 at 898.

63 Supra n 55 at para 31.

64 In Belgium, the *Conseil Supérieur de la Justice* said in a legal opinion in June 2009 that it was 'convinced of the restricted and often theoretical character of the rights [that were currently] guaranteed by [Belgian criminal] procedure': Conseil Supérieur de la Justice, Avis sur la proposition de loi modifiant l'article 1er de la loi du 20 juillet 1990 relative à la détention préventive. As far as Scotland is concerned, the UK Supreme Court opined in *Cadder* that '[t]he guarantees otherwise available [were] entirely commendable', but, at the same time, 'in a very real sense . . . beside the point': *Cadder v HM Advocate*, supra n 40 at paras 50 and 66.

65 *Cadder v HM Advocate*, ibid. at para 4. Leverick reinforces this point, by observing that Scotland had more specifically failed to take note of the conclusions of the Royal Commission on Criminal Procedure in England and Wales on the right to legal assistance. Published shortly after the Scottish provisions originally came into effect, the Commission's report was critical of similar provisions in England and Wales and opened the way for the introduction there of the right to legal assistance with the Police and Criminal Evidence Act 1984: Leverick, 'The Supreme Court Strikes Back' (2011) 15 *Edinburgh Law Review* 287 at 292.

By contrast, the Dutch Code of Criminal Procedure provided for assistance by a lawyer of the suspect's choice[66] and entitled the suspect to be assisted by a lawyer when questioned by the investigating judge.[67] But Dutch jurisprudence had generally interpreted these provisions to mean no right to legal assistance prior to, or during, police interrogation.[68] Police interrogation was also preceded by a 'temporary arrest' phase, lasting a maximum of six hours, during which the Code of Criminal Procedure provided for no intervention of a lawyer.[69] In an analysis of the response of the Netherlands to *Salduz*, Brants exposed Dutch hostility towards legal assistance as firmly rooted in the inquisitorial understanding of the suspect as 'primarily a source of information' and the prosecution service as the institution 'in charge of the police' that 'can be trusted to also take the suspect's pretrial interests into account'.[70] If the 'inquisitorial resistance' explanation is right (and similar experiences in France and Belgium offer comparative support to such a finding),[71] then it must also provide a significant explanation for the Netherlands' historic neglect of the need for greater protections for the suspect in this field. Brants provides an account of resistance and complacency in the face of miscarriages of justice, while underlining the dearth of criticism from indigenous academic and professional sources.[72] Despite all this, at the time of *Salduz*, the Netherlands was, perhaps surprisingly, taking its first steps towards greater recognition of suspects' rights at the police station, notably by putting in place a trial project whereby, exceptionally, suspects could be assisted by a lawyer in interrogations for unlawful killings.[73]

The pre-*Gormley* limitations of the Irish position on 'reasonable access' to a lawyer have already been sketched above. Here it can be added that a 'reasonableness' standard also applied to the duration or number of consultations permitted, once a solicitor's presence at the police station has been secured, exacerbating the uncertainty surrounding the exercise of the right to legal assistance in practice.[74]

66 Article 28 Code of Criminal Procedure (the Netherlands). See also Spronken and Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, European Commission Report, Directorate General – Justice, Freedom and Security (2005) at 73.

67 Article 186 Code of Criminal Procedure (the Netherlands).

68 See Brants, supra n 3 at 300; Blackstock *et al.*, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (2014) at 109; and Brants, 'What Limits to Harmonising Justice' in Colson and Field, *EU Criminal Justice and the Challenges of Legal Diversity* (forthcoming 2016). In its 2009 Concluding Observations on the Netherlands, the UN Human Rights Committee noted that in the Netherlands 'a person suspected of involvement in a criminal offence has no right to have legal counsel present during police questioning', and recommended that 'full effect [should be given] to the right to contact counsel in the context of a police interrogation': Human Rights Committee, Concluding Observations regarding the Netherlands, 28 July 2009, CCPR/C/NLD/CO/4, at para 11.

69 Prakken and Spronken, 'The Investigative Stage of the Criminal Process in the Netherlands' in Cape *et al.* (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (2007) 155 at 168.

70 Brants, supra n 3 at 299. See also Brants, 'What Limits to Harmonising Justice', supra n 68.

71 On France, see Giannoulopoulos, supra n 49 at 324–6. On Belgium, see Fermon, Verbruggen and De Decker, 'The Investigative Stage of the Criminal Process in Belgium' in Cape *et al.* (eds), supra n 69, 29 at 48.

72 Brants, supra n 3 at 300–1.

73 Ibid. at 301.

74 Report of the Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, July 2013, available at: www.justice.ie/en/JELR/

The analysis of Justice Hardiman in the separate concurring judgment in *Gormley* brings to the surface similar concerns, such as in relation to the overwhelming conditions of police custody that undermine the suspect's resolution to see a solicitor or the proliferation of non-specialist solicitors giving advice on complex areas of criminal law.[75] All this must also be seen against the backdrop of the statutory power to draw adverse inferences from 'silence' in custodial interrogations in Ireland, which further highlights the flaws inherent in the pre-*Gormley* position there.[76] More importantly, like all of the countries mentioned above, Ireland had long deprived suspects of the right to have a lawyer present during questioning.[77] *Gormley* deferred judgment on this matter, but opened the way for the reform of this crucial aspect of custodial legal assistance.

### D. After *Salduz*

*Salduz* caused legal earthquakes in all of the countries examined above, even if some were less powerful than others. The Scottish government was the first to react. Following the Supreme Court's strict application of *Salduz* in *Cadder*, it rushed legislation through the Scottish Parliament that recognized suspects' right to have a private consultation with a solicitor before any questioning begins and at any other time during such questioning, but did not specifically prescribe a right to have a lawyer present when questioned by the police.[78] The police *may* afford the suspect access to a lawyer during interrogation, but there is nothing in the relevant Act that prescribes a duty to do so.[79] The legislation was enacted in October 2010,[80] leading to considerable criticism and debate coming especially from Scottish scholarly circles, protesting an inappropriate interference by the Supreme Court with unique domestic elements of the Scottish criminal justice system and pinpointing the collateral risk of a diminution of other rights of the suspect.[81] Since then, the Scottish government has appointed Lord Carloway to undertake a review of key elements of criminal law

Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf [last accessed 24 August 2015].

75 *Gormley*, supra n 1.

76 Sections 28–32 Criminal Justice Act 1997. See also Sweeney, 'The Questioning of Criminal Suspects in Ireland' (2015) 25 *Irish Criminal Law Journal* 37 at 42.

77 *Lavery v Member in Charge, Carrickmacross Garda Station*, supra n 6.

78 Section 15A(3) Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

79 See Chalmers and Leverick, ' "Substantial and Radical Change": A New Dawn for Scottish Criminal Procedure?' (2012) 75 *Modern Law Review* 837 at 846.

80 The Bill for this Act was passed by the Scottish Parliament on 27 October 2010 and received Royal Assent on 29 October 2010.

81 See generally Ferguson, 'The Right of Access to a Lawyer' [2009] *Scots Law Times* 107; Ferguson, 'Repercussions of the *Cadder* Case: The ECHR's Fair Trial Provisions and Scottish Criminal Procedure' [2011] *Criminal Law Review* 743; McCluskey, supra n 56 at 276; White and Ferguson, 'Sins of the Father? The "Sons of *Cadder*" ' [2012] *Criminal Law Review* 357; and Ferguson and Raitt, 'A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report' [2012] *Criminal Law Review* 909. See also Ferguson's and White's brief rejoinder to Giannoulopoulos, supra n 3 at 384; and the comment on *Cadder* in *Scottish Criminal Law*, which starts with the observation that '[o]ne of the many interesting aspects of this decision is that it overrule[d] the view of a total of 15 Scottish High Court judges and three appeal courts': 'Case Comment: *Cadder v HM Advocate*' [2010] *Scottish Criminal Law* 1265 at 1307.

and practice,[82] and has introduced a Bill into the Scottish Parliament that takes forward and develops Lord Carloway's recommendations.[83] The Bill provides for a 'right to have a solicitor present while being interviewed'.[84]

France followed suit only a few months later, with the Law of 14 April 2011, which, for the first time, afforded suspects the right to be assisted by a lawyer when questioned by the police.[85] Passing this legislation was the final act of a long reform process that the government had initiated much earlier—half-heartedly, it must be said—and that only found momentum as a result of French courts' enthusiastic reception of *Salduz* and the cases that followed it. In fact, the French government had originally settled for solutions that were going much less far than those embraced by Strasbourg,[86] and it is fair to argue that it was only under the burden of pivotal decisions applying *Salduz*—first by the *Conseil constitutionnel* (Constitutional Council),[87] then the *Cour de cassation* (the French 'supreme court')[88]—that the government was forced to change direction.[89]

The Belgian Law of 13 August 2011[90] mirrors the legislation enacted in France, providing the suspect with the right to consult confidentially with a lawyer from the beginning of the interrogation and before the first questioning by the police[91] as well as the right to be assisted by a lawyer during questioning.[92] *Salduz* 'served as the detonator' for this radical development, observed the *Collège des procureurs généraux* (the body that represents prosecuting officials in Belgium).[93] The *Collège* sought to

82 The Carloway Review, Report and Recommendations, 17 November 2011, available at: www.scotland.gov.uk/Resource/Doc/925/0122808.pdf [last accessed 24 August 2015].

83 Criminal Justice (Scotland) Bill 2013.

84 Section 24(2) Criminal Justice (Scotland) Bill 2013.

85 Supra n 52.

86 For example, giving the suspect the opportunity to meet with a lawyer for 30 minutes only after 12 hours of interrogation, coupled with continuous legal assistance during questioning in cases where the interrogation would be extended beyond the initial 24-hour time limit: see Roujou de Boubée, 'L'assistance de l'avocat pendant la garde à vue' (2010) *Recueil Dalloz* 868; and Avant-projet du future Code de procédure pénale, version du 1er mars 2010, available at: www.justice.gouv.fr/art_pix/avant_projet_cpp_20100304.pdf [last accessed 24 August 2015].

87 Decision No 2010−14/22 QPC of 30 July 2010, available in English at: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201014_22QPCen201014qpc.pdf [last accessed 24 August 2015].

88 Crim 19 octobre 2010, Bull crim 163; Crim 19 octobre 2010, Bull crim 164; Crim 19 octobre 2010, Bull crim 165; Crim 4 janvier 2011, n° 10-85.520, *Recueil Dalloz* 2011, 242, obs Léna; Crim 18 janvier 2011, n 10-83.750, *Recueil Dalloz* 2011, 381; Crim 16 février 2011, n 10-82.865, *Recueil Dalloz* 2011, 953; Crim 15 avril 2011, 4 arrêts (n P 10-17.049, F 10-30.313, J 10-30.316 et D 10-30.242), *Recueil Dalloz* 2011, 1080; *Recueil Dalloz* 2011, 1128, interview Roujou de Boubée; *Jurisclasseur pénal* 2011, 17, 483, Détraz.

89 See Giudicelli, 'Le Conseil constitutionnel et la garde à vue: "Puisque ces mystères nous dépassent, feignons d'en être l'organisateur" ' [2011] *Revue de science criminelle et de droit pénal comparé* 139; and de Lamy, 'L'avancée des garanties en matière de garde à vue ou la consécration d'un basculement de la procédure pénale vers la phase policière' [2011] *Revue de science criminelle et de droit pénal comparé* 165. See, in detail, Giannoulopoulos, supra n 49 at 311–21.

90 Loi du 13 août 2011 modifiant le Code d'instruction criminelle et la loi du 20 juillet 1990 relative à la détention préventive afin de conférer des droits, dont celui de consulter un avocat et d'être assistée par lui, à toute personne auditionnée et à toute personne privée de liberté.

91 Article 4 of the Law of 13 August 2011 adding Article 2bis, para 1 to the Law of 20 July 1990.

92 Article 4 of the Law of 13 August 2011 adding Article 2bis, para 2 to the Law of 20 July 1990.

93 Circulaire n° 8/2011 du Collège des procureurs généraux près les Cours d'appel, 23 November 2011, at 16.

fill in the gap in the existing legislation by issuing provisional guidance that was going some way towards providing the suspect with the right to legal assistance.[94] The *Association des juges d'instruction* (association of investigating judges) and the *Conseil d'État* (Council of State) likewise put pressure on the government to rectify the situation, though they adopted narrow interpretations of *Salduz* and the solutions deriving therefrom.[95] The effect of *Salduz* was more immediately reflected in some lower courts' responses, as they refused to base convictions on confessions obtained in the absence of a lawyer from custodial interrogation[96] (and this despite the fact that the *Cour de cassation* had found Belgian legislation allowing this to be compatible with Article 6 of the ECHR),[97] as well as in the initiatives undertaken by Bar Associations across the country to provide legal assistance wherever local judicial authorities so permitted.[98] In this climate, legislative reform was inevitable, and though the government had originally attempted to avoid giving full effect to the *Salduz* jurisprudence (first by proposing that legal assistance should only be provided after eight hours of interrogation had elapsed,[99] then by insisting that, in a first phase of the reform, there should be no right to the presence of a lawyer during questioning),[100] in the end it 'conceded' both rights. The fact that the legislation of August 2011 has come to be widely known as *'loi Salduz'* ('Salduz legislation')[101] speaks for itself about the influence of the ECtHR in effecting a 'fundamental' and 'revolutionary' criminal justice reform in Belgium, to borrow the words of the Minister of Justice who introduced the relevant Bill in the Belgian Parliament.[102]

The Netherlands offers an illustration of a more moderate, though still not finalized, response to *Salduz*. In contrast to Scotland, France and Belgium, the Dutch government has still today—nearly seven years after *Salduz*—not enacted legislation giving effect to the latter. A new Bill, drafted following publication of the European Union (EU) Directive on the right of access to a lawyer,[103] is currently pending

94 Circulaire n° 7/2010 du Collège des procureurs généraux près les Cours d'Appel, 4 May 2010; and Circulaire n° 15/2010 du Collège des procureurs généraux près les Cours d'Appel, 14 July 2010.

95 For example, the *Conseil d'État*, in a legal opinion issued on 19 April 2011, pointed out the lack of clarity in the jurisprudence of the ECtHR, advising the government to wait for further clarification, while proposals by the *Association des juges d'instruction* only went as far as to advocate a confidential meeting with a lawyer prior to, but not during, interrogation by the police, and giving investigating judges the discretion to allow the presence of the lawyer in interrogations undertaken by them: see respectively Conseil d'État, Rapport annuel 2010–11, Avis 49.413/AG, 19 April 2011, at 52; and Sénat de Belgique, supra n 61, Exposé introductif du Ministre de la justice, at 6.

96 Liège, 6e Chambre, 15 septembre 2010 confirming Correctionnelle Liège 14 avril 2010.

97 Supra n 60.

98 Sénat de Belgique, supra n 61, Exposé de M Chevalier, président de l'Ordre des barreaux francophones et germanophones, at 68–9.

99 See Document parlementaire, Sénat 2008–09, 4-1079/1.

100 See Document parlementaire, Sénat 2010–2011, 5-663/1.

101 See, for example, Service de la politique criminelle, Évaluation de la 'loi Salduz', available at: www.dsb-spc.be/web/index.php?option=com_content&task=view&id=152 [last accessed 24 August 2015].

102 Sénat de Belgique, supra n 61 at 8.

103 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1. Article 3 of the Directive recognises the right of suspects to have access to a lawyer without undue delay, and to meet in private and communicate with the lawyer representing them, including prior

before the Lower House (House of Representatives) for approval, but there is still a lot of uncertainty as to when the parliamentary process will be concluded.[104] The Dutch Supreme Court's approval of the pre-*Salduz* status quo provides an explanation for the Netherlands' continued reluctance to give effect to the right to legal assistance. In a much-awaited decision handed down in June 2009, the Court recognized that *Salduz* implied a right to prior consultation, to be informed of that right and 'to be able within reasonable limits to exercise it', but not a right to be assisted by a lawyer during interrogation, save for the interrogation of juveniles.[105] The Supreme Court explained that it had to defer to the government the design of specific rules on legal assistance, and that, 'in expectation of new legislation, it could [only] rule on the minimum standard apparently required'.[106] The legal vacuum left by the government's reluctance to legislate and the Supreme Court's adoption of a restrictive interpretation of the *Salduz* jurisprudence (to the extent that this had evolved by 2009) was filled, to some degree, by binding instructions issued by the prosecution service.[107] However, these not only did not provide for the presence of a lawyer during interrogation, but also qualified consultation rights according to the seriousness of the offence in question and the age of the suspect. Similar qualifications were made to receiving legal aid, being notified of the right to legal assistance and having the ability to waive the right.[108] A Bill introduced in the Dutch Parliament in April 2011 was going further than that, providing *inter alia* for the presence of a lawyer during interrogation regarding offences punishable by a maximum of no less than six years imprisonment, but the Bill was abandoned.[109] In recent, more dramatic developments, first the Attorney-General gave legal advice to the Supreme Court approving the presence of the lawyer during questioning, then the Supreme Court opined that the right to legal assistance must be regulated by law and that, if no legislation is forthcoming, it might have to rule differently in future cases, giving recognition to the right.[110] The EU Directive seems to have finally brought the Netherlands closer to extending the scope of the right to legal assistance

to questioning, and, more importantly for present purposes, the right for their lawyer to be present and participate effectively when they are questioned by the police. The Directive goes as far as give suspects the right for their lawyer to attend particular investigative or evidence-gathering acts such as identity parades, confrontations and reconstructions of the scenes of the crime.

104 It is now believed that the Netherlands might wait until the transposition deadline of November 2016 before enacting the Bill into law. I am thankful to Chrisje Brants and Kelly Pitcher, experts in Dutch criminal procedure, for discussion on this point. See also Brants, 'What Limits to Harmonising Justice', supra n 68. On the Directive 2013/48/EU, see generally Van Puyenbroeck and Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60 *International and Comparative Law Quarterly* 1017.

105 HR 30 June 2009, NJ 2009, 349. See Verhoeven and Stevens, 'The Lawyer in the Dutch Interrogation Room: Influence on Police and Suspect' (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 69 at 70.

106 Brants, supra n 3 at 302.

107 See Blackstock, supra n 68 at 109.

108 See Brants, supra n 3 at 303.

109 Groenhuijsen and Kooijmans, *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective* (2012) at 77.

110 See Leeuw, 'Access to a Lawyer in the Netherlands: Does Judicial Restraint Lead to ECHR Non-Compliance?', 26 June 2014, available at: www.fairtrials.org/press/guest-post-access-to-a-lawyer-in-the-netherlands-does-judicial-restraint-lead-to-echr-non-compliance/ [last accessed 24 August 2015].

to include the presence of the lawyer during questioning, though it must be stressed that the Bill that will give it effect comes with many strings attached, subjecting the exercise of the right to various exceptions.[111]

Finally, in Ireland, as already discussed, *Salduz* and other international jurisprudence eventually drove the Supreme Court to strike the vague 'reasonable access' test into oblivion and prohibit any questioning prior to the arrival of the lawyer. Even more dramatic was the shift to allowing suspects to have a lawyer present during questioning. Since the issue had not arisen on the facts of *Gormley*, the Supreme Court refrained from deciding it, intimating, however, that the solicitor's presence was integral to the right to legal assistance.[112] Then, only two months after *Gormley*, the Director of Public Prosecutions issued a directive to the Garda Siochána—and the Department of Justice informed the Law Society accordingly— to the effect that if suspects ask for the assistance of a lawyer during questioning the gardaí should accede to their request. The most significant change of Irish criminal procedure in the past 30 years had *Salduz* and ECtHR jurisprudence written all over it.[113]

## 3. VARIATIONS IN NATIONAL RESPONSES

These modern transformations of custodial legal assistance in Europe provide ample demonstration of the ECtHR's drastic influence on national legal systems,[114] and confirm academic analyses of Strasbourg's power to effect reform in areas where the balance of local powers—political, professional or institutional—may have long deprived the national legal system of the capacity to venture forward in imaginative, bold ways.[115] All five countries analysed above have, under Strasbourg's undeniable

111 Brants, 'What Limits to Harmonising Justice', supra n 68.

112 The Court again relied on ECtHR jurisprudence, in addition to other international jurisprudence, to state that 'the entitlements of a suspect extend to having the relevant lawyer present': *Gormley*, supra n 1 at para 9.10.

113 See Daly and Jackson, 'The Criminal Justice Process: From Questioning to Trial' in Healy *et al.* (eds), *Routledge Handbook of Irish Criminology* (forthcoming 2016); and Robinson, 'Key Changes to Criminal Law Get the Silent Treatment', *Irish Times*, 19 May 2014. Mark Kelly, the Director of the Irish Council of Civil Liberties (ICCL), noted in an ICCL press release on the day *Gormley* was delivered that it was 'highly significant that the Supreme Court ha[d] also drawn attention to European Court of Human Rights case law that "irretrievable harm" to the fairness of a trial can result if a person does not have a lawyer present during police questioning' and that '[t]he Government should heed the Supreme Court's clear call for law reform in this area, by changing the law to require that a lawyer be present when people in custody are questioned by members of An Garda Síochána': ICCL, Press Release, 'Supreme Court Sends Government Clear Message on Fair Trial Reforms', 6 March 2014, available at: www.iccl.ie/news/2014/03/06/supreme-court-sends-government-clear-message-on-fair-trial-reforms.html [last accessed 24 August 2015]. It must also be noted that the Department of Justice and Equality was considering the possibility of introducing a scheme providing for the presence of a lawyer during interviews since at least January 2013. When 'prompted by emerging international jurisprudence'—ECtHR jurisprudence and the EU Directive on the right of access to a lawyer—it established a Working Group to advise on this issue. The Group concluded that revisions could be made to the existing Garda Station Legal Advice Scheme to allow Ireland to align itself with ECtHR jurisprudence, even in case the Government decided not to opt into the Directive: see Report of the Working Group, supra n 74 at 22.

114 See also Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 *New Criminal Law Review* 611 at 662.

115 See generally Delmas-Marty, Leçon inaugurale au Collège de France, *Études juridiques comparatives et internationalisation du droit* (2003) at 22. See also Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (2010) at 73–4; Helfer, 'Redesigning the

influence, come out of a protracted period of isolationism in the field of suspects' rights to introduce—or, at least, take important steps towards—reform long seen as providing no fit with the national legal culture. This is a good point of departure when assessing the ECtHR's role in the construction of a new landscape of procedural rights in Europe. But important variations in the national responses can also be located, and these lend themselves to a deeper analysis of the diverse ways in which the Convention's influence may manifest itself in different European countries.

A first point worthy of consideration relates to the urgency with which the five legal systems discussed above have responded to *Salduz*. Scotland, France and Belgium have all shown reasonably quick reflexes to the ECtHR's jurisprudence, introducing legislation with a difference of only a few months between them. An immediate legislative response was seen in all of them as the direct and inevitable outcome of the Court's jurisprudence. The Scottish government resorted to 'emergency' legislation,[116] despite the profound impact that this was likely to have on thousands of cases that were ongoing, awaiting trial or held in the system pending the hearing of an appeal.[117] The Belgian Minister of Justice spoke with similar urgency and conviction in the Belgian Parliament, accepting that 'the *Salduz* jurisprudence [was] a given and imposed on [Belgium]'.[118] *Salduz* was perceived in exactly the same way in parliamentary discussions in France, all the more so after the ECtHR found a breach of Article 6 of the ECHR in *Brusco v France*.[119] The impact of the reform in both Belgium and France was anticipated with the same level of concern that existed in Scotland, particularly due to the number of cases that would be put in peril and the complications arising from having to set up an effective system of legal assistance within very strict deadlines.[120] The Netherlands, on the other hand, has still not legislated the right to have a lawyer present during custodial interrogation, though, paradoxically, it was the only one of the above legal systems which had experimented with application of this right prior to *Salduz*. The fact that a Bill is only now being examined in the Dutch House of Representatives means that the

European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125; Rozakis, 'The Particular Role of the Strasbourg Case-Law in the Development of Human Rights in Europe' (2009) 57 *Nomiko Bima* 20; Roberts and Zuckerman, *Criminal Evidence*, 2nd edn (2010) at 704. Waters specifically locates the transformative power of the ECHR in its enabling domestic courts to defer less to the executive branch and majority views: Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 *Georgetown Law Journal* 487 at 520.

116 See Scottish Parliament, Official Report col 29574, 27 October 2010, cited by Stark, 'The Consequences of *Cadder*' (2011) 15 *Edinburgh Law Review* 293 at 294.

117 As acknowledged by the Supreme Court in *Cadder v HM Advocate*, supra n 40 at para 4.

118 Sénat de Belgique, supra n 61 at 4. This message was echoed by many legal experts participating in the works of the parliamentary committee examining the consequences of *Salduz*. See indicatively Sénat de Belgique, ibid. at 31, 41 and 56.

119 Supra n 22. See also Commission des lois constitutionnelles, Compte rendu n° 25, Session ordinaire de 2010–11, 9 December 2010.

120 In relation to France, see generally Alix, 'Les droits de la défense au cours de l'enquête de police après la réforme de la garde à vue: État des lieux et perspectives' (2011) *Recueil Dalloz* 1699; and Pradel, 'Procédure pénale: Septembre 2010 – août 2011' (2011) *Recueil Dalloz* 2231. On Belgium, see Beys and Smeets, 'L'avocat chez les "flics": Le loup dans la bergerie ou l'agneau dans la guelle du loup?' in Guillain and Wustefeld (eds), *Le rôle de l'avocat dans la phase préliminaire du procès pénal*, Collection du Jeune Barreau de Charleroi (2012) at 89.

country's delayed response to *Salduz* was second only to that of Ireland. Before *Gormley*, the effect of *Salduz* had been virtually invisible there, while the government has still today not introduced a Bill dealing with these matters. These temporal variations may, of course, be due to coincidence—for example, an appropriate case reaching the national 'supreme court'—but they may also reveal the different understandings that may exist in different legal systems as to giving the Convention immediate effect in practice.

Asking 'to what extent'—and not just 'when'—the national legal system gives effect to Convention jurisprudence can offer a far more revealing illustration of the diverse ways in which the latter exercises its influence in national legal systems. The preceding analyses on the right to have a lawyer present *during* questioning provide evidence of such divergence. Even where suspects are given access to a lawyer during questioning, important variations exist as to the lawyers' role there. Thus, while French and Belgian legislation, and now the Bill pending before the Dutch House of Representatives, rigorously restrict lawyers to a passive, non-adversarial role during questioning (specifically enumerating actions that can be undertaken by them while prohibiting others),[121] in Scotland it was felt that the role of the lawyer in providing advice did not need to be set in legislation.[122] In theory, this allows for the adoption of a more adversarial attitude during interrogation, but, possibly, also gives the police *carte blanche* to restrict the lawyers' ability to actively represent their clients in interview. Scotland also differs from France, Belgium and the Netherlands in that it does not regulate the duration and frequency of private consultations with a lawyer (consultation lasts a maximum of 30 minutes in the three Continental systems).[123] On the other hand, consultations in Scotland seem to invariably take place *via* telephone, as documented by an important recent empirical study.[124]

121 The French Law of 14 April 2011 forbids the lawyer from asking any questions before the police have finished interviewing the suspect and gives the police the right to block the lawyer from asking any questions even at the end of the interview, if the questions are seen as potentially damaging for the investigation. The police are also entitled to put an immediate end to the interview, at any time, for the ambiguous reason of facing a difficulty: see Article 63-4-3 Code de procédure pénale, as inserted by Article 8 of Law of 14 April 2011. The prosecution service circular bringing precision to the Belgian legislation of August 2011 specifically prohibits the lawyer from making a defence speech (*plaidoirie*), entering into discussions with the police, speaking to his client or whispering something into his ear: Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 59. The Dutch Bill giving effect to *Salduz* and the EU Directive likewise provides for many exceptions such as 'temporary derogation' of the ability to exercise the right to legal assistance, limiting the lawyer to particular interventions and allowing him to ask 'questions only at the beginning and the end of the police interview': see Brants, 'What Limits to Harmonising Justice', supra n 68.

122 The Carloway Review, supra n 82.

123 Regarding France, see Article 63-4 Code de procédure pénale, as inserted by Article 7 of Law of 14 April 2011. Regarding Belgium, see Article 4 of Law of 13 August 2011 adding Article 2bis, para 1 to Law of 20 July 1990. Regarding the Netherlands, see the prosecution service binding instructions, cited by Brants, supra n 3 at 303. In Belgium, in addition to the 30-minute consultation prior to questioning, the suspect also has the right to request once that the questioning be interrupted in order to consult privately with his lawyer for a maximum duration of 15 minutes: see Article 4 of Law of 13 August 2011 adding Article 2bis, para 2 to Law of 20 July 1990.

124 See Blackstock, supra n 68 at 127. See also Nicholson, 'Rights under Question' [2010] *Journal of the Law Society of Scotland*, available at: www.journalonline.co.uk/Magazine/55-11/1008872.aspx [last accessed 24 August 2014].

Moreover, in France, Belgium and the Netherlands, the police are obliged to delay the questioning of the suspect *only for a period of two hours* from the moment contact has been made with the lawyer.[125] The Bill currently examined by the Dutch House of Representatives goes as far as to give the police the power to question the suspect immediately after arrest in the absence of counsel or to decide not to admit the lawyer into the interrogation room in exigent circumstances.[126] In Scotland, there is no fixed rule on how long the police must wait before they can question the suspect, but the Carloway Review considered that 'one hour' in urban areas and 'two hours' in rural areas would be acceptable.[127] In Ireland, on the other hand, *Gormley*'s effect is that there can be no questioning until the solicitor arrives at the police station. No time limit applies there.[128]

To take another example of variations in national responses, in France, despite the significant advances achieved with the April 2011 legislation, the lawyer can still be excluded from interrogation for 48 hours in relation to organized crime offences, and a whole 72 hours in investigations relating to terrorism and drug trafficking.[129] Similar exceptions are not encountered in the other countries examined in this article. Of even more concern is the fast-growing practice of affording no legal assistance to suspects voluntarily attending the police station. This is now the position in France in relation to both voluntary attenders and persons who are not yet suspected of the commission of an offence, and this with the blessing of the *Conseil constitutionnel*.[130] In Belgium, depriving suspects not detained by the police of legal assistance—or of mere consultation rights, in less serious offences[131]—was seen as a compromise needed for the right to legal assistance to be indeed recognized in cases where the suspect *is* detained by the police. Allegedly this was needed to avoid organizational and budgetary complications that would otherwise arise.[132] Even more curious is the

125 Regarding France, see Article 63-4-2 Code de procédure pénale, as inserted by Article 8 of Law of 14 April 2011. Regarding Belgium, see Article 4 of Law of 13 August 2011 adding Article 2bis, para 1 to Law of 20 July 1990. Regarding the Netherlands, see the prosecution service binding instructions, cited by Brants, supra n 3 at 303.

126 See Articles 28e(1)–28e(4) Kamerstukken II, 2014–2015, 34157, nr. 2 (herdruk). The explanatory memorandum emphasizes that the application of Article 28e is meant to be exceptional: Kamerstukken II, 2014–2015, 34157, nr. 3 (tweede herdruk) at 37. I am grateful to Kelly Pitcher for her translations of relevant parts of the Bill and the memorandum.

127 The Carloway Review, supra n 82 at paras 6.1.29–6.1.32.

128 In Scotland, *Gormley* could be seen as providing support for the solution adopted by the Criminal Justice (Scotland) Bill 2013, which mandates that 'a constable must not begin to interview the [suspect] until the [suspect's] solicitor is present'. This makes redundant any reference to a period after which the police can initiate questioning without a solicitor being present, save for 'exceptional circumstances'. See sections 24(3)(a) and 24(4) Criminal Justice (Scotland) Bill 2013.

129 Article 706-88 Code de procédure pénale.

130 Decision No 2011-191/194/195/196/197-QPC of 18 November 2011, at para 20. See generally Matsopoulou, 'Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution' (2011) *Recueil Dalloz* 3034; and Bachelet, 'Admission, sous réserve, de l'audition libre dans l'enquête préliminaire', 11 July 2012, available at: revdh.org/2012/07/11/admission-sous-reserve-de-laudition-libre-dans-lenquete-preliminaire/ [last accessed 24 August 2015].

131 All offences punished with a maximum sentence of less than one year imprisonment and all road traffic offences, including involuntary manslaughter resulting from a traffic accident, even though this is punishable by a maximum of five years imprisonment: see Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 14.

132 See Circulaire n° 8/2011 du Collège des procureurs généraux, ibid. at 33.

fact that, in the Netherlands, voluntary attenders are actually presumed to have consulted a lawyer before attending the police station and are therefore afforded no further right to consultation.[133] Scotland, on the other hand, provides voluntary attenders with the same right to have access to a solicitor as those who are detained at the police station.[134] Such divergence cannot be taken lightly, as possible police over-reliance on 'voluntary attendance' could undermine the effect of *Salduz* rights reserved for later stages of the process.[135] It must be noted here that, though *Salduz* itself may have not directly addressed the issue of voluntary attenders' right to legal assistance, post-*Salduz* jurisprudence has accepted that the right may be activated even before arrest or the first interrogation, even outside the police station,[136] and even where the police may have examined the suspect as a witness.[137] The rule devised by Strasbourg may not be as clear in relation to consultation rights or the right to have a lawyer present during interrogation (a proper case has not reached the Court yet), still one might have reasonably expected to find fewer variations here; the Court takes as its main premise that a person interrogated at the investigation stage finds himself in a vulnerable position, and that, in most cases, only the assistance of a lawyer can properly compensate for it.[138] This is all the more so where the person concerned is questioned at the police station, and there is much to say about 'voluntarily' attending the police station and having the 'freedom' to leave, in the context of such questioning.[139]

The above shows that despite the unquestionable influence of the *Salduz* stream of cases on national jurisdictions, *Salduz* rights have been given effect to different degrees there. For the most part, this reflects national resistance to fully adopting these rights, and this despite Strasbourg pronouncing itself with sufficient clarity in this area. This becomes even more obvious when one looks at post-*Salduz* organization of legal assistance in practice, such as in relation to the provision—and remuneration levels—of legal aid, the efficient functioning of duty lawyer schemes, the operation of police station training schemes for lawyers and police officers alike or the physical organization of police consultations in a manner that would guarantee their confidentiality.[140] These variations make *Salduz* an interesting case study of the acceptance of Strasbourg jurisprudence in national jurisdictions.

133 HR 20 December 2011, LJN BU3504, cited by Blackstock, supra n 68 at 110.

134 Section 15A Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

135 The French practice of voluntary attendance is rightly seen as an effort to introduce through the back door the old regime of custodial interrogation without legal assistance (*garde à vue 'à l'ancienne'*): see generally Boudot and Grazzini, 'La réforme de la garde à vue à l'épreuve de la pratique'(2012) *Actualité Juridique Pénal* 512 at 515.

136 *Aleksandr Zaichenko v Russia* Application No 39660/02, Merits and Just Satisfaction, 18 February 2010.

137 *Brusco v France*, supra n 22.

138 *Salduz*, supra n 2 at para 54.

139 *Pishchalnikov*'s description of what is going on at the police station is timely here. The Court pointed out how the suspect may be 'surrounded by the police and prosecution authorities, experts in the field of criminal proceedings, who are well-equipped with various, often psychologically coercive, interrogation techniques which facilitate, or even prompt, receipt of information from an accused': *Pishchalnikov v Russia*, supra n 18 at para 86.

140 An important empirical study of suspects' rights in England and Wales, France, the Netherlands and Scotland, conducted in the period 2011–13, has brought to light important shortcomings as to the

## 4. *SALDUZ* AS A PARADIGM OF ACCEPTANCE OF STRASBOURG JURISPRUDENCE IN CONTRACTING PARTIES?

In a recent *Criminal Law Review* article, Jackson and Summers used *Salduz* as a paradigm drawing support for the thesis that 'when the ECtHR articulates clear rules and a coherent rationale for its approach, it can win acceptance for its position even when this may have far-reaching consequences for national law'.[141] The article contrasted Strasbourg's success in gaining acceptance for its position on custodial legal assistance in the United Kingdom and Switzerland (the two comparative points of reference in the article)—as a direct result of *Salduz* setting clear rules and having a coherent rationale—with Strasbourg's failure to advance its thesis on confrontation (in the same legal systems), precisely because the relevant jurisprudence lacked a coherent rationale and was not providing national courts with clear rules.[142] Though not applicable to confrontation evidence, the analysis in the preceding sections offers a useful opportunity to scrutinize the *Salduz* part of Jackson's and Summers' argument. At an empirical level, developments in the five systems examined here conform with Jackson's and Summers' observations about the effect of *Salduz*. In these European systems, Strasbourg has *in principle* gained acceptance for its position on custodial legal assistance. There is also evidence that where this was not immediately so, it was specifically grey areas of *Salduz* that may have fuelled resistance or given rise to a more reluctant approach.[143] But here it is as well to draw attention to the variations in the national responses sketched above. These considerably influence the application of *Salduz* rights in practice, to a degree that variations cannot be dismissed as routine or insignificant. Seen from this angle, the argument that clarity gains acceptability may need to be qualified. Variations in national responses signify

effective implementation of *Salduz* rights in practice: see Blackstock et al., supra n 68 at 435–9, 448–50 and 454–6. Beys and Smeets report that in some police stations in Belgium consultations are taking place behind a glass partition, that police officers can visually observe the interactions between suspects and lawyers and that many lawyers refuse to participate in legal aid schemes due to serious complications with remuneration: see Beys and Smeets, supra n 120 at 108 and 117. Similar problems have been encountered in France: see Seelow, 'Rien n'est prêt pour la "nouvelle" garde à vue', *Le Monde*, 15 April 2011.

141 Jackson and Summers, 'Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence' (2013) *Criminal Law Review* 114 at 115.

142 With regard to the reception of ECtHR jurisprudence in England and Wales, the argument can be seen in combination with Dennis' observation that English courts have not accepted Strasbourg's jurisprudence on evidential matters uncritically, where they have found it 'wanting in terms of clarity, consistency or coherence': Dennis, 'The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333 at 337.

143 In Belgium, for example, *Salduz's* interchanging references to 'the assistance of a lawyer' and 'access to a lawyer' (*Salduz*, supra n 2 at paras 54–55) gave rise to contrasting interpretations as to its precise effect: a 'minimalist' interpretation, according to which access to a lawyer did not go any further than a right to consultation *prior* to questioning, and a 'maximalist' interpretation, which also encompassed the physical presence of the lawyer *during* questioning. The controversy at the national level was resolved when the ECtHR specified in *Brusco v France* (supra n 22) that the suspect has the right to be assisted by a lawyer during questioning, which provides a good illustration of the strength of the argument developed by Jackson and Summers. See Beernaert, 'La jurisprudence européenne *Salduz* et ses répercussions en droit belge' in Guillain and Wustefeld, supra n 120, 45 at 45–6. Lack of clarity in *Salduz* also 'helped' the Supreme Court in the Netherlands and the 'Working Group' in Ireland to read the relevant jurisprudence as not necessarily providing a right to have a lawyer present during questioning: see HR 30 June 2009, supra n 105; and Report of the Working Group, supra n 74 at 2.

variable degrees of acceptance. Despite its clear rationale, *Salduz* was not adopted with the same urgency or enthusiasm across different European countries, and there remain important differences as to the extent to which the right to have a lawyer present during questioning in particular has been written into national legislation. Divergent attitudes also come to the fore when one distinguishes between the responses of national courts and those ultimately provided by national legislation. As previously discussed, the Belgian *Cour de cassation* originally considered that national legislation, which was not even recognizing a right to consultation, was *Salduz*-compliant,[144] the Dutch Supreme Court has still today not given full effect to *Salduz*,[145] while the *Conseil constitutionnel* substantially delayed making the *Salduz* rights applicable in France.[146] Similarly, before *Cadder*, the High Court of Justiciary in Scotland held, post-*Salduz*, that Scottish law was not in breach of the Convention.[147] Finally, shortly before *Gormley*, the High Court of Ireland confirmed the Supreme Court precedent that there was no right to have a lawyer present during questioning, and this despite first considering ECtHR jurisprudence on the matter.[148] In other words, irrespective of its alleged clear rules and rationale, *Salduz* failed, on these occasions, to gain judicial acceptance in the way eventually achieved through legislation or subsequent judicial extrapolations on the matter. The variable adoption of *Salduz* in these European countries does not necessarily agree with the observation that clear rules and a coherent rationale will gain ECtHR jurisprudence acceptance in contracting parties.

The above observations take nothing away from the specific comparative analysis undertaken by Jackson and Summers, which has shown important commonalities in the responses of the UK and Switzerland to ECtHR jurisprudence in conforming to *Salduz* and resisting Strasbourg's rulings on confrontation. But they do highlight the need, and opportunity, to situate such analysis in a wider context of the diverse factors that determine national responses to Strasbourg jurisprudence. Jackson and Summers allude to this need by noting how the desire to defend legal tradition has been the main source of resistance to Strasbourg's approach on confrontation.[149] The argument that when Strasbourg articulates clear rules and a coherent rationale for its approach, it can enhance adherence to Convention jurisprudence, is surely convincing. For one thing, it appeals to intuition, for another, it finds support in much of the comparative analysis undertaken here. But, by the same token, it is difficult to see how such a *Court-centred explanation* of acceptance of ECtHR jurisprudence could possibly stand alone, in isolation from *contracting party-centred explanations* of acceptance of (or resistance to) such jurisprudence. By Court-centred explanations I mean those that may offer an account of acceptance mainly by

144 Supra n 60.

145 Supra n 108.

146 The *Conseil constitutionnel* did not immediately repeal the custodial interrogation provisions it found unconstitutional, giving the Parliament an 11-month deadline to remedy the situation: see supra n 87 at para 30.

147 *HM Advocate v McLean*, supra n 55.

148 *JM v Member in Charge of Coolock Garda Station*, supra n 6 at para 27. The High Court considered *Salduz* and *Panovits*, but failed to examine *Brusco*.

149 Jackson and Summers, supra n 141 at 115.

reference to the actions of the Court, such as in its bringing precision and coherence to its jurisprudence or in its pursuing a more active dialogue with national supreme courts and national judges. Contracting party-centred explanations may focus, on the other hand, on indigenous forces shaping national responses to the Court's jurisprudence. These contracting party-centred explanations may, for instance, locate acceptance primarily in the national jurisdiction's cosmopolitan attitudes or, conversely, link resistance with the perceived need to defend the national legal tradition against external influences.[150] They may reveal a pragmatic approach to the relationship with Strasbourg[151] or bring to the surface simple logistical considerations relating to the ability of the contracting party to accommodate the European jurisprudence in practice.[152] Seen from this angle, Jackson's and Summers' analysis can help the Court be more vigilant in elaborating precise rules and a coherent rationale for its approach—and perhaps even incorporating a reflection on the type of practical measures needed to ensure their effective implementation in practice—precisely when it hands down innovative judgments on controversial areas of criminal justice, where a common European position may have not yet fully crystallized and where national resistance may thus be likely to slow down, if not seriously obstruct, acceptance of the Court's positions.[153] Of course, while such an approach will be welcome

150 For example, Bjorge interpreted *Horncastle* [2009] UKSC 14 as a manifestation of the Supreme Court's 'exceptionalist' approach to ECtHR jurisprudence, which he contrasted with the 'internationalist' approach adopted by the same Court in *Cadder*: see Bjorge, 'Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*' [2011] *Public Law* 475. Lord Hope explained the different outcomes in *Cadder* and *McLean* as a result of the 'difference of approach between the two courts to the Convention' and 'its effect on the domestic system': Lord Hope of Craighead, 'Scots Law Seen from South of the Border' (2012) 16 *Edinburgh Law Review* 58 at 73. In an analysis of the Belgian response to *Salduz*, Beernaert located in the country's attachment to the inquisitorial legal tradition its reluctance to legislate a fully ECHR-compliant right to legal assistance, despite wide recognition of the 'mandatory' effect of *Salduz*: Beernaert, supra n 143 at 66–7.

151 In *Cadder*, the Supreme Court made much of the fact that *Salduz* was 'a unanimous decision of the Grand Chamber', which was 'a formidable reason for thinking that [it] should follow it': *Cadder v HM Advocate*, supra n 40 at para 46. Writing extrajudicially, Lord Hope specified that, in contrast to an appropriate case like *Horncastle*, where the Supreme Court would ask the Strasbourg Court 'to "think again" on a particular point', *Cadder* was a case where 'no amount of dialogue with Strasbourg would result in a change of view on its part'. Interestingly, such pragmatism by the Supreme Court was largely the result of Strasbourg having based *Salduz* on a principle 'strongly embedded in the European jurisprudence' (the privilege against self-incrimination), which left 'no room for a decision based on expediency'. Lord Hope's analysis provides much support to the thesis developed by Jackson and Summers: see Lord Hope of Craighead, ibid. at 74.

152 In Belgium, it was argued that affording the right to legal assistance to all suspects, even when they were not detained by the police, would not be possible for logistical reasons, and that the reform should be implemented at different stages, prioritizing the more serious cases where the suspect was detained by the police first: see Circulaire n° 8/2011 du Collège des procureurs généraux, supra n 93 at 17. The *Conseil constitutionnel* referred to the need to put in place a system that 'could in practice be organised in a satisfactory way', which militated against expanding the scope of the right to legal assistance to include less serious offences: Conseil constitutionnel, Decision No 7/2013 of 14 February 2013, at para B.23.3.

153 As Judge Kovler explains, it is precisely when the ECtHR 'adopts a novel approach without the basis of an existing consensus' that the question of its acceptability in national and international courts becomes 'of particular importance': Kovler, 'The Role of Consensus in the System of the European Convention on Human Rights' in ECtHR, *Dialogue Between Judges* (2008) 11 at 19, available at: www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf [last accessed 24 August 2015]. Conversely, an 'emerging European consensus' or 'common understanding' can be a convincing justification for judicial creativity

by those wishing to see higher levels of harmonization of European criminal procedures, it will no doubt cause further alarm to those who already perceive the Court's recent jurisprudence in this area as an indication of its willingness to 'aggrandise' its jurisdiction and impose uniform rules across contracting parties.[154]

Pausing for a moment of reflection on the above, it must be stressed that reception of Strasbourg jurisprudence relating to Article 6 of the ECHR must also now be seen in conjunction with developments at the EU legislation level, notably in relation to efforts undertaken towards establishing common procedural standards for the rights of the defence in EU Member States. The recent adoption of the Directive on the right of access to a lawyer in criminal proceedings[155]—a development that was substantially accelerated by *Salduz* and that aims to solidify the effect of the latter in national law[156]—speaks volumes about the emerging synergies between ECtHR jurisprudence and EU legislation.[157] One can only speculate here, but the EU's embryonic engagement with procedural rights might lead the ECtHR to be more prescriptive in laying down procedural rules in the future. The Court might see the fast-developing interaction with the EU as an opportunity to accelerate reception of its judgments in the EU members of the Council of Europe; the clearer and more coherent the rules that its jurisprudence articulates, the more effectively they could inform national implementation of relevant directives. Conversely, there is significant scope for these directives to influence further development of Strasbourg jurisprudence in this area.[158] The EU's new emphasis on procedural rights might also create a well-meaning competition with Strasbourg for the 'most effective system' for the protection of procedural rights. The Court might look at the example of the Netherlands, where a perceived lack of clarity in the *Salduz* jurisprudence has permitted the country to sit on the fence until the Directive on the right of access to a lawyer finally left no room to manoeuvre away from legislating the right to have a

by the ECtHR, as submitted by Ashworth: see Ashworth, 'A Decade of Human Rights in Criminal Justice' [2014] *Criminal Law Review* 325 at 335.

154 See generally Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, available at: www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf [last accessed 24 August 2015].

155 Directive 2013/48/EU, supra n 103.

156 See Hodgson, supra n 114 at 656.

157 The perplexing negotiations that preceded the adoption of the new Directive on the right of access to a lawyer provide good indication of the challenges inherent in this process, but also of the opportunities for the harmonization of fair trial standards across the EU. For a detailed discussion of the background of, and reactions to, the adoption of the EU Directive, see Anagnostopoulos, 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?' (2014) 4 *European Criminal Law Review* 3. For the interactions between *Salduz* and the Directive, see Jackson, 'Cultural Barriers on the Road to Providing Suspects with Access to Lawyers' in Colson and Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity* (forthcoming 2016).

158 This process has already started. In *A.T. v Luxembourg* Application No 30460/13, Merits and Just Satisfaction, 9 April 2015, at para 87, the ECtHR drew, for the first time, on the Directive on the right of access to a lawyer, when reaching the important conclusion that the lawyer's presence during questioning will not suffice for the right to fair trial to be respected, and that national legislation must also provide for private consultation with a lawyer prior to the beginning of the interrogation. In *Zachar and Čierny v Slovakia* Applications Nos 29376/12 and 29384/12, Merits and Just Satisfaction, 21 July 2015, the Court relied on the Directive on the right of access to a lawyer and the Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1, when finding that a waiver of the right to custodial legal assistance had not been effective.

lawyer present during questioning. A ECtHR in potential 'competition' with the Court of Justice of the EU might be influenced by relevant directives to become much more prescriptive when handing down judgments in this area in the future in order to reduce the variability of national interpretations and increase the level of adherence to its jurisprudence. Jackson's and Summers' inquiries as to how the Court can gain acceptance for its positions become even more timely when examined against the backdrop of these developments.

At this point, we can broaden the angle of vision even further, beyond the EU Directive, to also give consideration to the relationship between ECtHR jurisprudence and comparative law. We need to go back to *Gormley* for that purpose.

## 5. COMMON LAW COMPARATIVISM AND STRASBOURG JURISPRUDENCE

Even more noteworthy than the wide reading of the right to legal assistance in *Gormley* is the Supreme Court's strong demonstration of legal cosmopolitanism in this case. In considering the proper approach to the Irish Constitution, the Court reviewed not just the case law of the ECtHR, but 'also the constitutional jurisprudence of the superior courts of other jurisdictions which have a similar constitutional regime to [Ireland]',[159] more specifically that of the 'supreme courts' of the United States, Canada, Australia and New Zealand. This makes *Gormley* an exceptional case study of the effect of common law comparativism on the constitutional interpretation of the right to legal assistance, and offers a demonstration of the usefulness of this comparative methodological tool in getting legal experts 'to grips with the dynamic, multi-level, cosmopolitan legal environments which constitute today's reality'.[160] In *Gormley*, the Irish Supreme Court first established the ECHR baseline requirements for the respect of the right to legal assistance, notably access to a lawyer before and during questioning.[161] But to determine the more specific issues raised by Gormley's appeal—in particular whether, granted the right to early access to a lawyer, the police also had to postpone questioning to enable the lawyer to arrive at the police station—the Court extended its analysis beyond a simple examination of relevant Strasbourg jurisprudence. Particular attention was thus paid to the US Supreme Court's historic decision in *Miranda v Arizona*, which held, among other things, that 'the interrogation must cease immediately if it has already commenced and can not [sic] resume until the suspect has had an opportunity to consult with a lawyer'.[162] Emphasis was also placed on the Canadian Supreme Court's decision in *R v Sinclair*, which read into the constitutional right to retain and instruct counsel without delay[163] 'a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel',[164] as well as on the existence in New

159 *Gormley*, supra n 1 at para 2.13.

160 Roberts and Hunter, 'Introduction – The Human Rights Revolution in Criminal Evidence and Procedure' in Roberts and Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (2012) 1 at 5–6.

161 *Gormley*, supra n 1 at paras 6.1–6.7.

162 Ibid. at para 7.1. See *Miranda v Arizona* 384 U.S. 436 (1966).

163 Section 10(b) Canadian Charter of Rights and Freedoms.

164 *R v Sinclair* [2010] 2 SCR 310 at para 27, discussed in *Gormley*, supra n 1 at para 7.4.

Zealand of a similar 'duty to refrain from taking any positive or deliberate step to elicit evidence from the detainee until he or she has had a reasonable opportunity to consult with counsel'.[165] Note was also taken of a similar practice in Australia despite noting slight variations between different states and even though in theory there is no right to have a lawyer attend at a police station there.[166] A 'clear international view' was then derived from this jurisprudence, and this was 'consistent with the jurisprudence of the ECtHR'.[167] It was precisely on this combined view emerging from Strasbourg and comparative common law that the Irish Supreme Court based its conclusion that the defendant in this case

> did not have a trial in due course of law by reason of the fact that a material element of the evidence on foot of which he was convicted was evidence obtained during questioning which occurred after he had requested legal advice and before that legal advice had been obtained.[168]

Such cosmopolitan legal thinking provides a fine illustration of the potential for imaginative legal interpretation inherent in the symbiosis of Strasbourg jurisprudence with that of superior courts in other jurisdictions, in Europe and beyond.

Equally remarkable is the fact that the Supreme Court's cosmopolitan logic in interpreting the Constitution in *Gormley* went hand in hand with a powerful rhetoric for the adoption of a proactive internationalist approach to legal reform. The issue in question was 'not one which could reasonably be said to have taken the authorities by surprise',[169] noted Justice Clarke, delivering the opinion of the Court. 'The likelihood that the State would be required' to legislate the right to legal assistance could 'hardly come as a surprise', he repeated;[170] reform had 'been on the agenda for a sufficient period of time',[171] stemming from national constitutional jurisprudence,[172] 'the well established jurisprudence of the ECtHR'[173] as well as 'the jurisprudence of courts, whose judgments on like issues the Irish courts frequently regard as persuasive, for quite some time'.[174] With specific regard to *Salduz*, Justice Clarke noted that the decision had been 'delivered in 2009 [sic] and the possibility that such a view might be taken . . . must have been clear for some time before that'.[175]

165 *R v Taylor* [1993] 1 NZLR 647, discussed in *Gormley*, ibid. at para 7.7.

166 *Gormley*, ibid. at para 7.6.

167 Ibid. at para 7.11. It must be explained here that, when reviewing relevant ECtHR case law, the Irish Supreme Court peculiarly made no reference to *Pishchalnikov v Russia*, which had raised very similar issues to those examined in *Gormley* and where the ECtHR had found that, even in the event that the lawyer originally requested is unavailable, the investigating authorities should contact another lawyer or appoint a legal aid lawyer to ensure that the suspect is offered legal assistance: see *Pishchalnikov v Russia*, supra n 18 at paras 74–75. Reference to *Pishchalnikov* would have reinforced the Supreme Court's view that the jurisprudence of the ECtHR was consistent with the international position on this matter.

168 Ibid. at para 9.17.

169 Ibid. at para 9.5.

170 Ibid. at para 9.7.

171 Ibid.

172 Ibid. at paras 7.5–7.6.

173 Ibid. at para 9.7.

174 Ibid. at paras 9.8–9.9.

175 Ibid. at para 9.5. The judgment was delivered on 27 November 2008.

He concluded from all this that if reform had not happened yet, it was the State which should accept responsibility. One could hardly imagine a more urgent call to the Irish government to now introduce legislation conforming with *Gormley*. One could, more generally, hardly imagine a more dynamic approach to interpreting national constitutions in accordance with international law, or a stronger commitment to the comparative method. *Gormley* also sheds light on Jackson's and Summers' thesis on the acceptance of ECtHR jurisprudence in contracting parties. Perhaps where Strasbourg judgments lack the clear rules and coherent rationale that Jackson and Summers aspire to, comparative law could afford contracting parties an effective methodological tool to tackle areas of complexity. This would not benefit contracting parties only, but also the Court itself, as the dialogue between them would be enriched, and potentially facilitated, by reflection on examples from foreign legal cultures.

For all its exceptional attention to foreign and international law, *Gormley* is, however, unduly restricted in the comparative law angle that it adopts. There is no doubting the logic of the Supreme Court in looking into the practice of constitutional courts with roots in the same legal culture as it, but it still is surprising that the various *Salduz*-inspired European reforms discussed in this article were completely under its radar. In reality, what this means is that while attempting to interpret *Salduz* and its progeny, the Irish Supreme Court has been oblivious to, or perhaps unwilling to take into consideration, recent or even simultaneous European attempts to apply the same jurisprudence. The same could be said with reference to the EU Directive on the right of access to a lawyer, which the Court has also neglected (or wilfully ignored). One could argue here that it might be unreasonable to expect the Supreme Court of Ireland to be aware of legal reform in, for instance, Belgium or the Netherlands, and that the force of the linguistic and cultural (civil law) barriers to common law understandings of constitutional interpretation should not be underestimated,[176] but this *de facto* agnosticism argument surely diminishes in force when viewed against the backdrop of European Union developments in which Ireland actively participates. Ironically enough, it was the Irish Presidency of the Council of the EU that secured agreement with the European Parliament on the Directive.[177] These observations are a useful reminder of the complex ways in which legal cosmopolitanism manifests itself in the emerging global landscape. The Irish Supreme Court took into account the pronouncements of Australian courts, where there is not even a right to legal assistance at the police station, but showed no awareness of the extensive reform of custodial legal assistance currently under way in the common law system of Scotland, the much-discussed—including in English academic scholarship—recent reforms in the continental system of France or a bold Directive aiming to strengthen defence rights across the EU. Even in the event that this was only due

176 For an analysis of the differences in linguistic and cultural influence of the common law and civil law traditions at the level of international criminal justice, and the lack of interest in, or accessibility of, civil law sources: see Bohlander, 'Languages, Culture, Legal Traditions and International Criminal Justice' (2014) 12 *Journal of International Criminal Justice* 491.

177 See Department of Justice and Equality, 'Enhanced Rights for Accused Persons Agreed by Irish Presidency', 28 May 2013, available at: www.justice.ie/en/JELR/Pages/PR13000209 [last accessed 24 August 2015].

to coincidence, and even if *Gormley* generally showcases a remarkably internationalist approach to legal interpretation that is in line with observations about 'the growing importance of comparative legal method in an era of cosmopolitan legality',[178] the preceding analysis is also revealing of the idiosyncrasies of modern legal systems' cosmopolitan attitudes.

## 6. CONCLUDING THOUGHTS

Strasbourg jurisprudence had a striking impact on those European countries that, prior to *Salduz*, were still not recognizing the right of access to a lawyer in custodial interrogation. Belgium, France, Scotland, the Netherlands and now Ireland have all given effect to the right to legal assistance—or taken significant steps in this direction—under the compelling influence of the *Salduz* jurisprudence. However, important variations can also be identified in the acceptance of *Salduz* in these countries. Such variations adversely affect the application of *Salduz* rights in practice and offer a demonstration of variable degrees of acceptance of ECtHR jurisprudence in Europe. We must also consider *Salduz*'s quite unequivocal message, which provides a useful prism for further exploration of the thesis that when ECtHR case law rests on a coherent rationale and provides contracting parties with clear rules, it can lead them to accept its position. Jackson and Summers made this claim *inter alia* by treating *Salduz* as a paradigm of acceptance of ECtHR jurisprudence. But here it was shown that, despite *Salduz*'s clear rules and rationale, this seminal jurisprudence has not been accommodated everywhere with the same level of urgency or commitment to giving the newly recognized rights full effect. This is not to doubt the intuitive force in Jackson's and Summers' argument, or the empirical evidence that they offer, but rather to highlight how their analysis presents an important opportunity to view the Court-centred explanation of acceptance that they provide in combination with other, contracting party-centred explanations of acceptance. Viewed from this wider angle, the issue of the accommodation of Strasbourg jurisprudence in national jurisdictions becomes one that calls into question as much the actions of the ECtHR as it does those of the Member States. This naturally points to the need for a more cosmopolitan approach to applying the ECHR. Contracting parties must strive to obtain a better understanding of the reasons that underpin the development of particular jurisprudential influences coming from Strasbourg. By articulating clear rules and a coherent rationale, the Court will accelerate this process, and so will the contracting parties' own ability to look sideways to other countries' reception of such influences. Conversely, the Court needs to develop a deeper understanding of the local factors that may be hindering (or, by contrast, accelerating) the harmonic reception of its jurisprudence in contracting parties.[179]

178 Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials? (2011) 11 *Human Rights Law Review* 213 at 229.

179 See generally Bratza, 'The Relationship Between the UK Courts and Strasbourg' [2011] *European Human Rights Law Review* 505. See also Rozakis, 'The European Judge as Comparatist' in Markesinis and Fedtke (eds), *Judicial Recourse to Foreign Law: A New Source of Inspiration* (2006) 338 at 348–53; Kerr, 'The Conversation between Strasbourg and National Courts – Dialogue or Dictation?' (2009) 44 *Irish Jurist* 12; and ECtHR, *Dialogue between Judges*, supra n 153. The wide-encompassing survey of comparative law undertaken in *Taxquet v Belgium* Application No 926/05, Merits and Just Satisfaction, 16

An excellent manifestation of such cosmopolitan legal thinking applied in practice is the Irish Supreme Court's decision in *Gormley*. The decision put forward an interpretation of the national constitution that was simultaneously the product of Strasbourg jurisprudence and common law comparativism, while also promoting a robust internationalist approach to legal interpretation and law reform. In relying on this internationalist approach to strengthen suspects' rights, and in exhibiting a deep understanding of the realities of custodial interrogation, the decision shows the way forward in what will no doubt be a long process of establishing common procedural safeguards for the rights of the defence in Europe. When called to give effect to Strasbourg jurisprudence or the Directive on the right of access to a lawyer, Member States now have a unique range of national and international experiences to draw upon.[180] The Irish Supreme Court performed this exercise to a very high standard as far as ECtHR jurisprudence and the experience of important common law jurisdictions is concerned. Its curious omission of *Salduz*-inspired reforms in other European countries only serves as a reminder of the idiosyncrasies and inherent challenges of cosmopolitan legal thinking.

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November 2010, offers strong evidence of the emergence of such cosmopolitan legal thinking at the ECtHR. According to Roberts, *Taxquet* demonstrates 'the ECtHR's new-found enthusiasm for a more systematic and methodologically sophisticated approach to comparative legal analysis': Roberts, ibid. at 229.

180 Belgium, France and Scotland provide such illustrations of surveying other European jurisdictions in the post-*Salduz* process of legislative reform. See, for example, Sénat, 'La garde à vue', Les documents de travail du Sénat – Série législation comparée, 2009, no LC 204. This report by the French *Sénat* preceded the 2011 legislation and reviewed police interrogation practice in Belgium, Denmark, England and Wales, Germany, Italy and Spain. In Belgium, the *Conseil supérieur de la justice* took into account, in its June 2009 legal opinion (supra n 64 at 6–8), the law of the Netherlands and France. In *Cadder* the UK Supreme Court paid attention to the comparative materials referred to in Justice's written intervention to the Court on reforms in Belgium, France, the Netherlands and Ireland: *Cadder v HM Advocate*, supra n 40 at para 49. This fast-evolving laboratory of European reforms also attracts the attention of observers outside Europe, and has the capacity to inform reform in their respective foreign jurisdictions: see, for example, Hock Lai, 'The Privilege against Self-Incrimination and Right of Access to a Lawyer: A Comparative Assessment' (2013) 25 *Singapore Academy of Law Journal* 826.