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The Challenge of Universal Norms: Securing Effective Defence Rights Across
Different Jurisdictions and Legal Cultures

JACQUELINE HODGSON*

This article considers the contribution of comparative empirical research in the shaping of best practice norms for custodial legal advice, and in helping to address the challenges faced by those responsible for their implementation. It traces the role of European Court of Human Rights decisions and of European Union Directives in developing transnational norms to strengthen suspects' right to legal assistance prior to and during police questioning. Recognising the variety of ways in which these norms are translated into the national context, and so their differential impact in practice, it considers the value of comparative empirical and socio-legal research in helping to develop appropriate legislative and training measures that take account of factors such as the intersecting roles of legal actors; the different ways that roles and responsibilities are shared out in different legal systems and traditions; and the practical arrangements in place that serve to facilitate or inhibit the effectiveness of custodial legal advice in practice. In all of this, there is a tension between the framing of transnational norms in a way that is sufficiently universal to attract support, without being so broad as to lack any transformational force; and sufficiently detailed to ensure that core protections are respected in the process of implementation, without imposing a set of legal requirements that are too rigid and difficult to absorb into diverse processes of criminal justice.

INTRODUCTION

Taking the example of custodial legal advice, this paper considers the contribution of comparative empirical research in the shaping of transnational best practice norms, and in understanding and helping to address the challenges faced by those responsible for their implementation. It traces briefly the roles of the European Court of Human Rights (ECtHR) and the European Union (EU) in developing the parameters of standards designed to strengthen suspects' rights in police custody, before considering the contribution of comparative empirical research in helping to define and to translate legal norms into practices that are effective on the ground. Comparative studies play an important part in this process, providing accounts of the structure and functioning of different legal systems. However, where these rest on descriptive and formal accounts, grounded in the text rather than the practice of law, their value is limited. I argue that a comparative, socio-legal empirical approach provides a deeper knowledge and understanding of the ways that legal systems operate, comparing roles and procedures, and exploring what motivates and constrains the daily practices of legal actors in different jurisdictions. By learning from the

* *School of Law, University of Warwick, Coventry CV4 7AL, UK*
Jackie.Hodgson@warwick.ac.uk

experiences of different jurisdictions in this way, we are better able to shape the development of reforms and to offer suggestions for effective implementation across different processes of criminal justice.

The discussion draws on my own experience as a socio-legal and comparative researcher, conducting observational fieldwork, focus groups and interviews across several jurisdictions, over several decades. England and Wales and France formed the initial comparative focus of my research,¹ with later studies more explicitly oriented towards improving the procedural rights and protections in place for suspects across a range of jurisdictions and identifying the conditions under which they might be adopted elsewhere. Two particular empirical studies are discussed here: *Inside Police Custody* and *Interrogating Young Suspects*. These were collaborative, cross-country studies funded by the European Commission, designed to identify and understand best practices in order to inform the development of effective EU-wide procedural protections for adult and juvenile suspects and accused persons.²

DIFFERENT WAYS OF COMPARING

Conducting legal research across different jurisdictions provides useful baseline information for any study that aims to identify, understand or develop transnational best practices. When assessing the safeguards provided for suspects, for example, our starting point might be whether or not different jurisdictions make legal provision for suspects to have access to a lawyer whilst in police custody. However, a simple yes/no response is of limited value. Going beyond a relatively static, multi-country collection of information, actively to compare the nature of provision across systems, provides a richer understanding. It enables researchers to adjust the categories of enquiry in the light of what is known about different jurisdictions, and so gather additional types of information about what is absent as well as what is present. So, we might compare whether the suspect is able to request their own lawyer or has one assigned to them; whether the law provides for consultation in private and if this is time limited; whether they are able to have a lawyer present during the police interrogation. A comparative background, as well as approach, helps ensure that the right questions are asked in this process, providing a more detailed and nuanced picture of the law in different jurisdictions. Comparing in this fashion, thinking about why certain features are present or absent in different systems also causes us to think about the roles that legal actors could or should play. Understanding the French or Belgian prosecutor's responsibility for

¹ See especially, J. Hodgson *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (2005)

² J. Blackstock et. al., *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (2014); M. Vanderhallen et. al., *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (2016). In addition to conducting research studies, I have also been involved in a range of EU impact assessments of new and existing measures such as legal aid, legal advice, pre-trial detention and the impact of Brexit on criminal justice co-operation.

the police investigation (including detaining and questioning suspects), highlights the absence of any external pre-trial supervisory function relating to the police detention and questioning of suspects in England and Wales, for example. This in turn causes us to consider how far the defence role, in addition to representing the interests of the accused, can or should play a part in holding the police to account during the detention of the suspect – whether in England and Wales or elsewhere.

However, when thinking about learning from elsewhere in the development of universal norms and best practices, we need to go beyond the comparison of legal texts and processes to understand whether and how legal norms and safeguards translate into the everyday practices of law and the experiences of suspects. Comparative work that is also qualitative and empirical is able to explore the legal and occupational cultures that drive or challenge behaviour, as well as the impact of wider policy and economic structures within which criminal practice operates, and the broader legal traditions that shape contemporary criminal justice.³ Working in this way enables a deeper understanding of concepts and terms, and of the ways that they find meaning within different legal traditions. This perspective is crucial in understanding what might enable or constrain the success of transnational norms, ensuring that reforms are not falsely anchored in ideal-types and misleading assumptions. The effectiveness of procedural protections in practice also depends on the nature of other safeguards and procedures, and the ways that they intersect. For example, the presence of a lawyer to advise suspects in police custody in France was for many years considered unnecessary, because, it was claimed, the structure of judicial supervision in place rendered the initial police interrogation unimportant.⁴ Empirical research has demonstrated the ineffectiveness of such supervision,⁵ and the *Conseil constitutionnel* has recognised the importance of the initial police enquiry, which in many cases represents the evidence in the case.⁶ Framing legal procedures around these kinds of claims risks leaving unprotected those detained and questioned as suspects.

This more empirical approach to comparative study also embeds a reflexivity, or mirroring, into the research methodology.⁷ Early on in my comparative career, I had cause to re-evaluate the roles played by court actors in England and Wales, after observing French trial hearings. In France, the judge questioned the

³ On the influence of empirical research in criminal justice more broadly, see J. Hodgson and Y. Mou, 'Empirical Approaches to Criminal Procedure' in *The Oxford Handbook of Criminal Process*, eds. D.K. Brown, et al. (2019).

⁴ Great emphasis has been placed on the effectiveness of judicial supervision as a means of controlling or overseeing the police investigation, but in practice, this operates as a relatively weak safeguard. See Hodgson, *op. cit.*, n. 1.

⁵ See for example, Hodgson, *op. cit.* n. 1.

⁶ Decision No. 2010-14/22 of 30 July 2010. See discussion in https://blogs.warwick.ac.uk/jackiehodgson/entry/reforming_the_french/

⁷ See R. Rogowski, 'The Art of Mirroring. Comparative Law and Social Theory', in *Challenges to European Legal Scholarship – Anglo-German Essays*, eds. G. Wilson and R. Rogowski (1996) 213.

accused directly, asking whether she understood, and inviting her to comment on the charges and the evidence of any witnesses, even where the accused had made a clear admission. This dialogue with the defendant and the concern to understand her motivation in offending, were in stark contrast to the courtroom process in England and Wales. Defendants pleading guilty in the magistrates' court said almost nothing beyond identifying themselves and acknowledging the charges. Any attempt to speak was silenced and the defence lawyer implored to 'manage' her client. Although the verdict was that of the court, it depended entirely on the work of the defence lawyer. The magistrates made no effort to ensure the accused understood the charges, nor that any admission was made in a voluntary and informed way. The idea that a guilty plea represented a finding of the court, now seemed to me somewhat artificial. To a large extent, the defence lawyer was relied upon to carry out the work done by judicial questioning in France. This illustrates the very different ways that jurisdictions characterise and understand the judicial role in practice, reflecting legal cultural norms that may not be apparent from the study of a single jurisdiction or the text of the law alone. A comparative understanding of these kinds of practices can also be important when thinking about the likely effectiveness of transnational norms once they are enacted and adopted within different procedural traditions.

THE CHALLENGE OF DEVELOPING UNIVERSAL FAIR TRIAL NORMS

In the development of transnational legal norms, there is a difficult balance to be struck between something that is sufficiently broad and open textured to attract the support of a variety of jurisdictions, whilst also sufficiently detailed to ensure consistent and effective implementation in practice. Universality tends towards broadly defined standards that can be applied flexibly through interpretive techniques such as the ECtHR's margin of appreciation doctrine; effectiveness tends towards more prescriptive norms but which also take account of how things work on the ground, of the drivers and constraints that work to promote or to undermine the wider objectives of legal norms. Europe is made up of a wide variety of legal traditions and cultures and there is not a one size fits all model of criminal justice and procedure. The more detailed the transnational legal normative framework, therefore, the harder it is to ensure a good fit across large numbers of legal systems and the greater the risk that some jurisdictions will experience it as the imposition of a model that is alien to their legal norms, cultures and practices and so resist its implementation. A more general and less detailed framework, however, that sets a broadly defined benchmark, is unlikely to achieve standards that are comparable across jurisdictions. Instead, it will be implemented in ways that reflect more strongly the values and norms of individual states, risking the dilution of core elements of the legal norm and so the rights and safeguards it is designed to protect.

This tension between a broader more abstract approach and more detailed prescription characterises to some extent the differences between the approach of the ECtHR and its broad requirements of fair trial under Article 6 of the European Convention on Human Rights (ECHR), and the EU's more detailed and prescriptive norms around procedural safeguards for suspects and accused

persons. It also reflects the nature of the different tasks facing the two institutions – one a court developing broad principles for transnational application through interpreting and applying legal standards in individual cases, and the other a legislative structure with its own political reform agenda around the strengthening of mutual trust between states to facilitate greater criminal justice co-operation. As a court, the ECtHR is responsive, rather than proactive; it does not control the nature of the cases that come before it. It does not select the issues it wishes to develop, but rather, its jurisprudence derives from decisions about the specific legal arrangements and practices of individual states, and whether they comply with the ECHR, or whether the applicant has not received a fair trial because of the state's failings either in a particular case, or systemically. The principles that can then be taken forward and applied in subsequent cases and across other states, are expressed in necessarily broad terms, in order to allow for the different ways in which criminal procedures are organised.

The EU, on the other hand, acts on its own social and political agenda, legislates measures through its own institutions (themselves made up of representatives from all Member States) and is able to craft them to suit the needs of those Member States to some extent. The various processes that precede and feed into legislation – such as research, negotiation and the conduct of impact assessments – are able to anticipate some of the pitfalls of implementation and so, although detailed and prescriptive, the resulting measures are likely to have greater buy in from states. However, whether emanating from the EU or the ECtHR, the success of these norms in effecting change, also depends on the will of those responsible for their implementation both through legislation and on the ground. The different ways that this might happen are well illustrated by the example of custodial legal advice.

In recent years minimum standards have been set both by the ECtHR and the EU in relation to procedural safeguards for suspects in police custody. First, we have seen reinterpretation by the ECtHR of the right to a fair trial under Article 6 §3(c) ECHR so as to include the right of suspects questioned in police custody to legal advice and assistance. Subsequently the EU has sought to use first Framework Decisions and then Directives to set minimum standards of procedural protections for suspects and accused persons. The aspiration in both cases has been to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁸ State willingness to implement these rights has varied but one of the variables has been the origin of the legally prescribed norms. EU Directives seem to have had some significant advantages over ECtHR case-law in effectively establishing transitional prescriptions.

Recognising the need for procedural protections for suspects, including access to legal assistance, the EU published a Green Paper in 2003, later followed by a

⁸ *Imbrioscia v. Switzerland* 24 November 1993, Series A no. 275, para 36. Also EU Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, Art. 3 para 1.

draft Framework Decision in 2004.⁹ Minimum standards for the protection of accused persons were considered necessary in order to counterbalance the various police and judicial co-operation measures focusing on investigation and prosecution, and the European Arrest Warrant in particular. The Framework Decision did not seek “to duplicate what is in the ECHR but rather to promote compliance at a consistent standard.”¹⁰ It included the suspect’s right to be informed of her rights, to an interpreter, to consular assistance, and what turned out to be the most controversial of all the measures, her right to legal advice and assistance. Although based on Article 6 ECHR guarantees, and so reflecting a more precisely articulated account of existing obligations, the measure met with considerable opposition and was finally abandoned when agreement on the right to custodial legal advice could not be reached. European states were not ready to agree on detailed provisions that would bind them into common standards of protection, especially concerning suspects’ access to a lawyer.

Then came the landmark ECtHR case of *Salduz v. Turkey* in 2008, which set out the right to custodial legal advice deriving from Article 6 ECHR: without access to legal advice prior to and during police interrogation, an admission obtained under police questioning would not be admissible.¹¹ This set the bar higher than previously and for the first time, required suspects to have their lawyer present during questioning, from the first police interrogation.¹² It also signalled a different approach from the Court in respect of the right to a lawyer during police custody and interrogation. There was less room for the margin of appreciation, through which, taking account of the differences between states’ legal traditions, different ways of achieving the same level of protection are understood to comply with ECHR standards. Neither was custodial legal advice weighed up with other protections to determine whether, overall, there had been a fair trial as had been the Court’s practice. In other words, subsequent safeguards would not remedy the initial breach. The court recognised that the suspect is especially vulnerable in the early stages of the investigation, particularly where national courts attach consequences to the attitude of the suspect – to answer questions, or to remain silent, for example – and the

⁹ The Green Paper was entitled *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union* Brussels, 19.2.2003, COM(2003) 75f, followed in 2004 by the draft *Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*.

¹⁰ Draft Council Framework Decision, COM (2004) 328 final, Explanatory Memorandum, para. 9. Note that the EU legislative framework was different at this time. Framework Decisions have been dropped and Directives are now used for criminal measures.

¹¹ *Salduz v. Turkey* (36391/02) 27 November 2008.

¹² Although recognising the right to consult a lawyer before police interrogation (*Averill v. United Kingdom* (36408/97) 6 June 2000) and the necessary counterbalance to police pressure during questioning that a lawyer might provide (*Magee v. United Kingdom* (28135/95) 6 June 2000), before *Salduz*, the Court had not interpreted Article 6 ECHR to include the right to have a lawyer present during police interrogation.

evidence obtained often determines the charges brought and frames the nature of the trial. The damage done by questioning a suspect without a lawyer and gaining an admission could not be undone, therefore, by providing a lawyer, or any other safeguard, later in the process. The right to a lawyer during police questioning was considered by the Court to be fundamental to the right to a fair trial: “The 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.”¹³

Here was a clearly spelled out and reasoned transnational norm, building on existing jurisprudence around suspects’ right to legal assistance. However, many countries chose not to consider themselves bound by the decision, finding reasons to distinguish it from their own procedure.¹⁴ It was addressed to Turkey not them; it concerned a juvenile not an adult; it was a terrorism investigation, not an ordinary criminal investigation. Jurisdictions found ways to disregard or undermine the decision, and in many instances, change was only brought about as a result of litigating the issue in the ordinary and constitutional courts. Understanding the nature of jurisdictions’ resistance and the variety of ways in which countries understood themselves to be compliant with the principles set out in *Salduz* tells us much about how we might learn from the expectations of different systems and how we might fashion such norms in ways that are more likely to be effective in practice.

In Scotland, for example, the High Court of Judiciary ruled that the existing arrangements limiting the access to a lawyer to pre-interrogation advice were *Salduz* compliant, given the other safeguards in place. It was only following the Supreme Court decision *Cadder* that presence during police questioning was permitted.¹⁵ In France, prior to *Salduz*, suspects were not permitted to have their lawyer present during police questioning and the lawyer-client consultation was limited to 30 minutes. While *Salduz* resulted in the lawyer

¹³ *Salduz*, op. cit., n. 11, para 55.

¹⁴ It is interesting to compare here the US case of *Miranda v. Arizona* 384 US 346 (1966) in which the US Supreme Court held that statements made by the suspect under police questioning were only admissible if the accused had been provided with access to a lawyer before and during police interrogation, had been told of their right to silence and understood these rights. Any waiver must be shown to be voluntary. Myers has argued that the institutional limitations to enforcing this right are due in part to its origin as a Supreme Court decision. First, courts are better at defining and enforcing negative rights, rather than positive ones. Second, courts are more suited to enforcing process than accuracy, so as their concern with accuracy increases they impose more process requirements. And finally, courts do not have budgets or enforcement powers, limiting their ability to police the effectiveness of the right to counsel in practice. See discussion in R. Myers, ‘Adversarial Counsel in an Inquisitorial System’ (2011) 37 *North Carolina J. of International Law and Commercial Regulation* 411

¹⁵ *Cadder v. Her Majesty’s Advocate* [2010] UKSC 43. Lord Hope commented that it was “remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure.” id., para. 4.

being permitted to be present during interrogation, she was required simply to observe, unable to assist the suspect in any way.¹⁶ In the Netherlands, making provision of custodial legal advice was a more radical step, as there was not statutory right for those detained either to speak with a lawyer, or to have a lawyer present during police questioning. *Salduz* prompted a reform that allowed suspects a 30-minute consultation with a lawyer, but only juvenile suspects, not adults, were permitted to have their lawyer present during questioning.¹⁷ This unevenness in when and how the suspect could access legal assistance undermines the fair trial protections of Article 6 ECHR that apply to all states in the Council of Europe.¹⁸ States enact the minimum degree of change they consider necessary to ensure compliance, often believing that the safeguards and procedures they have in place mitigate the need for anything more. In this way, local legal cultures are preserved and transnational safeguards are sidelined. A stronger pre-trial defence role is associated with more adversarial procedure and so we might expect more inquisitorial traditions to resist the presence of the lawyer more strongly than their adversarial counterparts, but the story of these reforms shows that this appears not to be the case. Rather, we see a more general antipathy towards strengthening the rights of the accused, reflecting a broader, more universal crime control ideology shared by police and prosecutors.¹⁹

The EU returned to the matter of procedural protections for suspects and accused persons, but this time a different approach was taken in the 2009 Roadmap adopted by the Council. Instead of placing all safeguards in a single measure so that they would stand or fall together, a step-by-step approach was taken, separating out the various rights and protections to be agreed upon individually.²⁰ The importance of the safeguards in the overall framework of EU criminal justice co-operation, and as an integral part of the mutual trust and recognition that underpins this, was emphasised, as was the interlinking nature

¹⁶ Previously, suspects could consult with a lawyer prior to police questioning, but could not have her present during interrogation. Neither were suspects informed of their right to silence. See further, J. Hodgson, 'The detention and interrogation of suspects detained in police custody in France: a comparative account' (2004) 1 *European Journal of Criminology* 163.

¹⁷ The process of reform was initiated prior to *Salduz*, with a pilot study allowing lawyers to be present in serious criminal cases. See J. Blackstock et al., op. cit., n. 2, p. 99.

¹⁸ See also D. Giannouloupoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Advice in Five Countries' (2006) 16 (1) *Human Rights Law Review* 10

¹⁹ There is already some concern that the ECtHR has rowed back from the more robust terms of *Salduz*, finding 'compelling reasons' that justified restricting access to legal assistance. See *Ibrahim and others v UK*, 50541/08, 50571/08, 50573/08, 40351/09, 13 September 2016; *Simeonovi v Bulgaria*, 21980/04, 12 May 2017.

²⁰ For discussion of the wider context of these early measures and the Roadmap, see, J. Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 *New Criminal Law Rev.* 611.

of the measures. The decision in *Salduz* served as a positive backdrop against which to consider these new measures, but it was recognised that this alone would not produce sufficient or consistent levels of protection for suspects. The right to interpretation and translation was relatively uncontroversial and was the first Roadmap measure to be formally adopted as an EU Directive, in 2010. The right to information in criminal proceedings followed in 2012 and the Directive on the right of access to a lawyer was finally adopted in October 2013, more than two years after it was first adopted in draft form and requiring eight trilogues before its formal adoption.²¹ As an EU Directive, the measure was more detailed and more prescriptive than the terms of the ECtHR decisions in *Salduz* and subsequent case law, setting out when advice should be available, that it should enable the practical and effective exercise of defence rights, may only be derogated from exceptionally and more specifically, that suspects should be able to consult privately with their lawyer and have them present and able to participate in police questioning.²² And unlike the jurisprudence of the ECtHR, there is no margin of appreciation: the measure aims to harmonise the laws of Member States in order to achieve universal and consistent standards.²³ The response of states to the *Salduz* decision was also instructive in anticipating aspects of the safeguard that may be unclear, or on which states may need clear guidance. Comparative research provided important insights and an evidence base for the Directive's impact assessment, as well as informing the debate around the provision of custodial legal advice, and research continues to be a means of monitoring the effectiveness of implementation in practice.

COMPARATIVE RESEARCH AND TRANSNATIONAL NORMS

As European jurisdictions were developing greater pre-trial defence rights, spurred on by the *Salduz* jurisprudence, and the EU was embarking on its programme of reform through the Roadmap, the European Commission funded a range of projects around police and judicial co-operation, designed to provide a richer understanding of processes of criminal justice and to ensure the effectiveness of the planned reforms. This included the four-country study that resulted in *Inside Police Custody*. Earlier empirical research into the introduction of a statutory right to custodial legal advice in England and Wales under section 58 of the Police and Criminal Evidence Act 1984 had demonstrated that there were a range of other changes that needed to happen in order to ensure that the right was effective in practice – that suspects were able to request and receive legal assistance and that legal advice was provided by suitably qualified and

²¹ As expected, given the history of the draft framework decision, it was the right to legal assistance that posed the greatest challenge to Member States' legal procedures and the balance of protections and this is why so many discussion sessions were required.

²² *Op. cit.*, n. 8.

²³ The Directives are cumulative and interdependent. The right to a lawyer is of little use without some information on the charges, for example, or an interpreter if the suspect does not speak or understand the language of the criminal proceedings.

experienced lawyers.²⁴ Building on this and other research,²⁵ this empirical observational study sought to understand pre-trial safeguards from the perspectives of the two principal legal actors responsible for their successful implementation – police and lawyers. Focusing on the key safeguards that the EU was seeking to legislate through the Roadmap, our researchers carried out fieldwork in England and Wales, France, the Netherlands and Scotland over a total of 78 weeks, collecting case file data and observing police and lawyers as they went about their daily work in police custody.²⁶ In addition to the final publication, at the Commission’s request we prepared an advance report on our preliminary findings in order to inform the final stages of discussion and negotiation for the Directive on legal assistance. In this way, the research was able to feed directly in to the latter stages of the legislative process.

Interrogating Young Suspects came about in the same way. This was a five-country study, which collected data from closed files and conducted focus group interviews with police, lawyers, appropriate adults and young people who had experience as suspects.²⁷ The jurisdictions studied were Belgium, England and Wales, Italy, the Netherlands and Poland. Both projects were collaborations across several jurisdictions and included legal comparativists, researchers and practitioners from different countries. The socio-legal, empirical and comparative nature of the projects sought to avoid accounts based solely on the text and rhetoric of law, or on ethnocentric understandings of procedures.

In both research studies, the breadth of the team’s background and experience embedded a reflexive comparative structure into the projects from the outset as legal processes, actors and functions were reflected on and unpicked in the initial design of the proposal and the later process of cross-jurisdictional analysis. By adopting a thematic or transversal approach, team members worked across all jurisdictions, focusing on particular topics rather than jurisdictions. For example, how the suspect’s treatment on arrest affected her behaviour and treatment in custody; the importance of offence gravity; whether the police saw the young person primarily as a child or as a suspect; or the role of the lawyer. This approach also brought benefits in the early stages of the projects, feeding back into the process of generating our research questions and whether we had a sufficiently precise common language to identify transnational norms and good practices. Our understandings of terms such as child, charge, judge or prosecution were not the same.

²⁴ See A. Sanders et al., *Advice and Assistance at Police Stations and the 24-hour Duty Solicitor Scheme* (1989); M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence* (1993); M. McConville et al., *Standing Accused* (1994). Also, M. McConville et al., *Case for the Prosecution* (1991).

²⁵ Re France see Hodgson, op. cit., n.1. Also S. Field and A. West, ‘Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process’ (2003) 14 *Criminal Law Forum* 261.

²⁶ Data was collected on 368 cases and at the close of observations, 94 interviews were conducted. 44 interviews were with police and 50 with lawyers. See Vanderhallen and Hodgson in Vanderhallen et al., op. cit., n. 2, ch. 2 for a discussion of the project methodology.

²⁷ id.

This reflexivity, as a process of comparing understandings of terms and descriptors, provided important insights into the workings of legal systems and the effectiveness of safeguards and procedures. For example, the Dutch prosecutor provides some independent oversight of police detention, but our understanding of the value of this altered when we learned from the *Inside Police Custody* fieldwork that the ‘assistant prosecutor’, despite her title, is not part of the professional prosecution service, but a senior police officer. As well as clarifying the nature of the role, this underlined for us the importance of ensuring that the lawyer played an effective and independent role, despite claims of prosecutorial oversight. Seeing things through the eyes of others also caused us to re-examine and question some of the assumptions we had of our own legal systems. In England and Wales, for example, we often think of the extensive opportunities for the suspect to consult with her lawyer and to have her present throughout the police detention and interrogation as a strength within the adversarial tradition. But to the outside observer, the detention and interrogation of suspects remains a broadly inquisitorial process, as the accused has no right to participate in or influence the investigation, has little statutory right to information about the evidence and the police are not accountable to, or overseen by, any form of judicial figure during this period.

There were also interesting differences in approach observed in *Interrogating Young Suspects*. In Poland, the treatment of young people was generally under the jurisdiction of the family judge, rather than the criminal law regime, reflecting a welfare model of juvenile care that relied more on the attributes of the individual as a judge, than a more process-driven system of legal procedural safeguards. At first, this seemed a benevolent model that sought to avoid the criminalisation of children and young people. However, although characterised in paternalistic terms, this welfare model carried many of the hallmarks of a penal process and was experienced as such by young suspects. Much was left to the individual discretion of the judge, police questioning was employed and criminal-type sanctions were imposed, but without the due process safeguards of criminal process, such as legal representation, leaving young people in a worse position than if they had faced criminal charges.²⁸ Looking at the process from the perspective of the protection of the young person, we challenged the welfarist claims of this approach: when thinking comparatively about functions and guarantees, it is the characteristics of the process and function that are more significant than the labels attached to them.

When drawing on best practices to inform the development of transnational standards for the protection of the accused, we naturally turn to the role of the defence lawyer. Charged with representing the interests of accused persons and suspects, she is a key player. However, the picture is more complex and universal standards and practices are hard to agree on. The role of the defence is not understood in the same way across jurisdictions because the roles of other legal actors, such as prosecutors and judges, intersect differently with that of the defence lawyer. In the party-centred adversarial tradition of criminal procedure

²⁸ Vanderhallen et. al., op. cit., n. 2, ch. 7

in England and Wales, safeguarding the rights of the accused is understood to be the responsibility of the defence lawyer. French criminal procedure reflects a very different, more centrally organised investigation model, in which a judicial officer (the prosecutor or the *juge d'instruction*) is responsible for guaranteeing the rights and liberties of the individual, but also for the conduct of the enquiry, ensuring the investigation of evidence that both inculcates and exculpates the suspect. The defence has historically enjoyed a more limited function, because aspects of the defence lawyer's role in England and Wales were understood in France to fall within the responsibility of the judicial officer in charge of the case. Because of the protections assumed to be provided by this model of judicially supervised investigations, before *Salduz*, the role of the defence lawyer in France had been restricted to pre-interrogation advice and even this was widely and fiercely opposed when first introduced.²⁹ The lawyer is now permitted to be present during the suspect's interrogation, but responsibility for overseeing the conduct of the investigation remains with the prosecutor and the lawyer's role is understood and designed to complement more than challenge this structure of authority.³⁰ This means that the lawyer's role is constrained in different ways in France, compared with England and Wales, or Scotland.

The varying expectations of different legal traditions explain in part the nature of the resistance to legal norms, such as those that seek to strengthen the defence role, but comparative research has shown that the responses of criminal justice actors are not always grounded in particular criminal justice models or practices. Across different procedural traditions, criminal justice is regarded in binary, mutually exclusive terms, dividing into investigation and prosecution on one side, and defence on the other; into crime control and due process. Police culture dictates that officers are at best cautious towards the expanding role of the lawyer during police custody and in many instances, see the defence function as antithetical to the effectiveness of the investigation, the rights of victims and of achieving justice. In neither the adversarial nor inquisitorial-type jurisdictions do officers buy into the idea that the defence might help to ensure the fairness of the process or the reliability of the evidence, nor that the defence case might play an important role in establishing the truth.³¹ This lack of belief in the value and legitimacy of defence participation at the investigative stage means that in both adversarial or inquisitorial type procedures, the police are likely, initially, to resist any expansion of the lawyer's role, and, consciously or unconsciously, to engage in rights avoidance strategies that seek to ensure that suspects do not take up their right to legal assistance.

²⁹ For a discussion of the development of these early reforms see Hodgson, *op. cit.*, n. 1, pp. 131-41.

³⁰ See also Field and West, *op. cit.*, n. 25.

³¹ As one police officer put it: "It's obstructing justice and that's fine if that's what they want to do but I do have a philosophical problem with defence solicitors because I think they mostly know that about 80% of people that get arrested are guilty. They get a lot of them off and I don't think it's an honourable profession at all." Blackstock *et. al.*, *op. cit.*, n. 2, pp. 345-6.

In France (in the 1990s) and the Netherlands (following *Salduz* and with the prospect of the Directive making provision for access to a lawyer), the nature of the police resistance to custodial legal advice was identical to that observed in police stations in England and Wales in the 1980s and 1990s. Officers sought to dissuade suspects from exercising their right to custodial legal advice by omitting to tell suspects that there was no charge to instruct a lawyer; by telling suspects that if they had nothing to hide, they would not need a lawyer; and most successful of all, by claiming that a lawyer would delay things considerably and result in the suspect spending longer in police custody.³² Following *Salduz*, it was unsurprising, therefore, that proposals to strengthen the right to custodial legal advice by allowing the lawyer to be present during the police interrogation of the suspect would not be well received. In Belgium, police officers seemed to attach little importance to the mandatory requirement that juvenile suspects be represented by a lawyer. They were often questioned by the police without a lawyer present, sometimes because there may not have been a lawyer immediately available, but also because many officers were unaware that legal assistance is mandatory for juveniles – this was not a norm that they were motivated to implement.³³

When first confronted with the prospect of lawyers coming into the police station and advising suspects, officers in France, England and Wales and the Netherlands also characterised the lawyer's role in similar terms – they described them as not being of any real value, of benefitting suspects over victims and of undermining criminal investigations. Officers recognised that the main benefit, especially in more serious cases, was in providing legitimacy to the investigative process and so protecting it from later challenge. In systems where investigative responsibility is shared between police and prosecutors, prosecutors have tended also to identify strongly with police ideologies and resist the expansion of the lawyer's role for the same kinds of reasons as officers.³⁴ It is when due process reforms are first introduced that they are experienced as most threatening and disruptive; once police and prosecutors become accustomed to the lawyer's role, however, and see that it has less impact on the investigative process than they feared, this hostility fades.³⁵ It is perhaps

³² Blackstock et. al., op. cit., n. 2, ch. 6. For earlier research on custodial legal advice in England and Wales, including the rights avoiding practices of police, see McConville and Hodgson, op. cit., n. 24. Release from police custody is the primary concern of most suspects. See also L. Skinns 'I'm a Detainee Get Me out of Here' Predictors of Access to Custodial Legal Advice in Public and Privatized Police Custody Areas in England and Wales' (2009) 49 *Brit. J. of Criminology* 399.

³³ Vanderhallen et. al., op. cit., n. 2, p. 336.

³⁴ So concerned were French prosecutors that lawyers would be able to see their client for 30 minutes, 20 hours after the suspect had been placed in detention, that a number of them burned their codes of criminal procedure outside the Ministry of Justice in protest. See generally, Hodgson, op. cit. n. 1, pp131-41.

³⁵ The presence of the lawyer will help to ensure that safeguards and fair practices are respected, as well as providing an opportunity to construct the defence. However, fears that it would restrict the investigation, primarily through suspects remaining silent, have proved ill-founded.

for this reason that Scottish police did not exhibit the same degree of hostility: Scottish lawyers almost always provided only telephone advice and so had little impact on the interrogation.³⁶

In order to be effective, reforms around custodial legal advice also need to take account of the nature and motivations of police practices so that officers buy in to the importance of safeguards and are prevented from engaging in systematic rights avoidance behaviours. Legislative reform alone is unlikely to succeed in this. Legal guidelines and codes of practice can make clearer the detailed implementation of norms as they should operate at the national level, but training is likely to be more effective in changing attitudes and behaviours. As part of the *Inside Police Custody* project, we produced a training framework and piloted the joint training of police and lawyers, in order to bring the insights from research to bear on the daily practices of both sets of professionals.³⁷ In this way, they were able to explore what implementation of procedural rights meant in practice and how they could best facilitate this. Research has demonstrated the resistance to reform that follows even domestically-driven changes. An understanding of the purpose of rights and the development of skills to enable police and lawyers to deliver and facilitate them is therefore especially important in the context of transnational reforms, where changes may present greater challenges to existing practices and attitudes.

Understanding and shaping lawyers' behaviour is more complex, as they do not occupy the same professional space in all jurisdictions. Here too, training has proved valuable in demonstrating the practical skills required to make rights effective. As the accused's representative, we might expect the lawyer's ideology to be strongly oriented towards acting in the interests of her client, yet even in the more party-centred adversarial tradition of England and Wales, research revealed the dominance of a professional culture that often subordinated the interests of the client to wider managerial pressures or profit motives.³⁸ PACE provided the suspect with a statutory right to legal assistance before and during police interrogation, free at the point of delivery, but in practice, lawyers failed to provide effective legal assistance. Police station advice is very different from the kinds of work in which lawyers had traditionally been involved, be it conducting legal research, courtroom advocacy or taking proofs of evidence in the firm's offices. Representing suspects in police custody is a 24-hour service, on police territory, requiring lawyers to react quickly, often with little information on which to base advice. This can be experienced as a hostile environment in contrast to the more formal and familiar rituals of court and requires lawyers to

³⁶ Scottish lawyers told us that they always advise silence and this could be done just as easily over the telephone. Blackstock et. al., op. cit., n.2, pp. 287-90.

³⁷ J. Blackstock et. al., *Inside Police Custody: Training Framework on the Provisions of Suspects' Rights* (2014).

³⁸ McConville et. al., op. cit., n. 24. We may have more sympathy with lawyers' behaviour being governed by costs in the current climate of austerity, but at the time of *Standing Accused*, legal aid rates were at their peak, but still lawyers downgraded criminal work in ways that maximized their profit, whilst leaving the client poorly served.

conceive of their role in a different way and to develop new skills in order to represent detainees as well as defendants. However, lawyers were unwilling to adapt, preferring to outsource much of their police station work to junior or unqualified staff. This was addressed not by further legal regulation, but through innovative new ways of training and a system of accreditation linked to the system of public financing of legal aid, which improved significantly the quality of custodial legal advice provided by solicitors and their representatives.³⁹

In France, a more traditional conception of the autonomous legal profession still prevails. Lawyers' work is more generalised than in England and Wales, where lawyers will typically practice in a single area of law, such as crime.⁴⁰ This makes it less surprising that suspects may be attended by an *avocat* who practises criminal law, or one who works in family or civil litigation.⁴¹ Like England and Wales, the profession is self-regulating and takes responsibility for its own standards of training, but the culture of the profession and its much smaller dependence on legal aid, make it unlikely that it would agree to delegation to paralegals, or to linking training and quality standards with the provision of legal aid payments. This may limit the ability of lawyers to meet the demand of custodial legal advice moving forward.

In jurisdictions such as France and the Netherlands, the defence advocate occupies a different professional and legal space from her counterparts in England and Wales. Historically, the pre-trial role of the lawyer has been subordinate to that of the prosecutor and judge, even as it has gradually expanded. This subordinate relationship is still felt in the greater control that police and prosecutors have over the lawyer's access to her client and the limited extent to which she can engage actively in defence building during the crucial initial stages of the investigation while the suspect is being detained and questioned in police custody.⁴² In contrast to the narrow ways in which lawyers in England and Wales chose to interpret their role in providing custodial legal advice in the 1980s, French lawyers have recognised the limited scope of the role that is afforded them by the law and the resulting risk that the provision of minimal defence rights to suspects in police custody serves more to legitimate the investigation than to safeguard the rights of accused persons. The right for lawyers in France to be present during police interrogations was hard fought and lawyers continue to push back against their limited role, which requires them to

³⁹ L. Bridges and S. Choongh, *Improving Police Station Legal Advice: The Impact of the Accreditation Scheme for Police Station Legal Advisers* (1998).

⁴⁰ See L. Karpik *French Lawyers: A Study in Collective Action 1274 to 1994* (1999); Field and West, *op. cit.*, n.25, and discussion in J. Hodgson, *op. cit.*, n.1, pp114-6.

⁴¹ Blackstock et al., *op. cit.*, n. 2, pp265-7.

⁴² This is despite France's apparent commitment to the principle of *contradictoire* (the requirement that the accused should have the opportunity to know of, and to respond to, the accusations against her – not only at trial, but also during the investigation, bail hearings etc. – also incorporating the notion of equality of arms) and the constitutional court's acknowledgement that the evidence gathered during police detention and questioning is often determinative of the case outcome. *Op. cit.*, n. 6.

remain passive, not interrupt questioning and to only ask questions at the end of the interrogation. Some hoped that this would lead to the introduction of the principle of *contradictoire* during the investigation phase,⁴³ but this has been rejected.⁴⁴ French lawyers strive for a greater role during this early phase of investigation, but are legally circumscribed in what they are permitted to do.

Lawyers in England and Wales were slow to develop their custodial function in professional terms, but a combination of training and self-regulation linked to the structure of remuneration led to real improvements. Now, the barriers to more effective legal assistance for suspects are inadequate evidence disclosure and the financial constraints imposed through fixed fee payments that incentivise lawyers to spend less time attending suspects in police custody. There is a danger here of appearing to satisfy fundamental rights and safeguards. The introduction of a weak right to legal assistance can place suspects in a worse position than if they had no lawyer at all, as they are credited with a benefit that they never had, making subsequent challenge of any irregularities more difficult, as was apparent in some of the early appeal decisions following PACE, in which courts refused to exclude evidence obtained through oppressive questioning because a lawyer had been present.⁴⁵

The early experiences in England and Wales underline the challenge that the introduction of the right to custodial legal advice can pose for lawyers, as well as police. Professionals need to prepare for these new demands and roles, and to adjust their expectations so that they work to give effect to, rather than undermine, reforms. Although almost always in favour of extended rights for suspects and accused persons, lawyers may not immediately appreciate the importance of the role that they play in police custody – providing legal advice, but also ensuring the legality of detention, the conditions of custody, that the suspect understands her rights and how to exercise them, and so on. Or, they may not anticipate the shift in work patterns that 24-hour availability requires and so be ill-prepared to meet increased demand. As police station advice has been introduced across jurisdictions, the high demand that 24-hour availability places on lawyers has resulted in different responses.

In England and Wales, many solicitors delegated police station advice work to clerks paid well below legal aid rates, enabling solicitors to avoid going to police stations at night but also making them a considerable profit, whilst suspects were poorly served and often received nothing that might properly be termed legal assistance. In France and the Netherlands, the criminal bar is not large and

⁴³ See e.g. A. Dorange and S. Field, 'Reforming defence rights in French police custody: a coming together in Europe?' 16 *International J. of Evidence and Proof* 153.

⁴⁴ See, e.g. J. Beaume (2014) *Rapport sur la procédure pénale* at pp. 59, 70.

⁴⁵ The most infamous example is perhaps *Paris, Abdullahi and Miller* [1993] 97 Cr. App. Rep. 99. The lack of information disclosure makes some lawyers skeptical about the value of custodial legal advice, especially in serious cases, where the suspect will be questioned by the *juge d'instruction*, with full access to the dossier of evidence at that point.

lawyers have responded to the demands of attending suspects in police custody by widening the pool of duty lawyers available to suspects, through the inclusion of inexperienced, newly qualified, or non-criminal law practitioners. The arrangements put in place depend to an extent on the culture of the local Bar, with some providing extensive training and attempting to match cases with expertise in juvenile work or European Arrest Warrants, for example. For many lawyers, the opportunity to advise suspects in police custody presented an opportunity to boost their income. The presence of a lawyer, even a civil or family law practitioner, may provide a basic safeguard against ill-treatment, someone who can explain basic rights, and a check on the conduct of the interrogation and the accuracy of the record, but a non-criminal lawyer can provide only limited assistance in checking the legality of the arrest and detention, beginning work on the defence case, or making representations around bail and alternative forms of case disposal.⁴⁶ Furthermore, discontinuous representation is the norm. Police station advice is regarded as a stand-alone task, something that the profession must provide but with no expectation that the suspect will continue to instruct the same firm. This arrangement reflects a passive model of defence assistance that does not seek actively to engage with the accused's case in the ways anticipated by ECtHR case law or the EU Directive.

The Directive itself, however, does leave room for a range of practices in the delivery of custodial legal advice. The Directive stipulates, for example, that effective legal assistance requires the suspect to have her lawyer present during, as well as prior to, police questioning, removing the ambiguity claimed by some states post-*Salduz*. But framed as they are in the Directive, these norms cannot control for other factors that impact on the effectiveness of legal assistance such as the size of the criminal bar or the kinds of training that should be provided to lawyers.⁴⁷ Neither do they mandate suspects or lawyers to behave in particular ways: the success of these safeguards will always depend to an extent on the arrangements in place and the good faith of national states in interpreting and

⁴⁶ See *Dayanan v. Turkey* 7377/03, 13 Oct 2009 for an account of the kinds of work that the Court anticipated defence lawyers might embark upon as part of their custodial legal advice role.

⁴⁷ In addition to having suitably trained and qualified lawyers available to provide legal advice, the right to a lawyer during police detention is unlikely to be effective without adequate provision for legal aid. Although the Directive on legal assistance referred only to national arrangements, a subsequent measure has set down minimum thresholds for making legal aid available to criminal suspects: Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (EU) 2016/1919. There is a degree of interdependency between the Roadmap Directives, providing for translation and interpretation and that basic offence-related information is provided to the lawyer at the police station. The Legal Aid Directive (Art. 7) indicates that adequate training should be provided for legal aid lawyers.

applying measures.⁴⁸ Article 3 of the Directive stipulates that states should provide suspects with access to a lawyer “in such a time and such a manner so as to allow the person concerned to exercise their rights of defence practically and effectively.” It might be argued that the assistance of a specialist in family law, rather than criminal law, does not meet this threshold. The control exercised by the police may also undermine this right. Officers may delay the lawyer’s presence in serious cases and even in ordinary offences, with the agreement of the *procureur*, they may begin questioning without giving the lawyer time to travel to the station. The two-hour delay to allow the lawyer time to arrive is generally respected for the first interrogation, but is less strictly adhered to for subsequent interviews.⁴⁹ However, the inclusion of greater levels of detail and more prescriptive standards would in all likelihood be a bar to all states agreeing to the measure.

The role of the lawyer is set out in proactive terms: the suspect’s lawyer should be present during police questioning and be able to “participate effectively”. However, “participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned.” This gives some latitude to accommodate national procedures, provided that they do not undercut the effectiveness of the right. This ambiguity has resulted in a narrow interpretation in France, however, where the lawyer may be present during the suspect’s interrogation, but she may not speak, pose questions or clarifications or interrupt; she must remain passive throughout, permitted only to make observations at the close of the interview.⁵⁰ Again this demonstrates the limits of what the EU can or is prepared to enact in terms of mandating standards across different legal systems. The Directive achieves more than the broad principles to be found in ECtHR decisions, but comparative research suggests that gaps remain, limiting the extent to which the measure is likely to achieve transnational best practice in a way that is consistent across jurisdictions.

CONCLUSION

Transnational norms that seek to ensure that all suspects are provided with the opportunity to benefit from custodial legal advice must anticipate the ways in which police and lawyers might serve, consciously or otherwise, to undermine the effectiveness of this right in practice. This means taking account of procedural differences and the variety of legal personnel carrying out the functions of investigation, prosecution, defence and trial, but also of the web of

⁴⁸ States themselves may also undermine the impact of custodial legal advice by weakening other safeguards. In England and Wales, the presence of lawyers at the police station was then used to justify the attenuation of the right to silence; in Scotland, the extension of the time a suspect could be detained in police custody.

⁴⁹ P. Degoul, *L’intervention de l’avocat en garde à vue* (2018).

⁵⁰ Recital 25 specifies that the lawyer should be able to ask questions, seek clarifications and make statements, but only “in accordance with national law”.

cultures and practices that characterise a criminal justice process. The size and status of the criminal bar, the ways in which investigative supervision operates in practice, the availability of legal aid, and the importance that lawyers attach to the early stages of the police investigation, all differ across jurisdictions and will determine how transnational norms around custodial legal advice are likely to play out in practice and be experienced by suspects. This is not something that the ECtHR can do through its decisions, but EU instruments offer the potential to draw on these kinds of insights, provided there is an adequate evidence base to inform the development of these legal norms. Research that is comparative, but also empirical and socio-legal, can provide the kinds of understanding of practices and cultures needed to ensure that transnational norms are appropriate and effective. It can do this by anticipating where weaknesses might lie – in the availability of sufficient lawyers with appropriate expertise; in public funding; in avoiding suspects' rights by treating matters as non-criminal; or ensuring that suspects are informed of their rights in a way that enables them to exercise them. If measures are shaped with this in mind, they are more likely to be implemented in ways that ensure, rather than undercut, their effectiveness. The impact of comparative research will depend in part on the subject matter of the norms being developed and those who will be putting it into practice – changing the expectations of powerful players such as police officers can be especially challenging. Training programmes that support officers in their role and make clear the importance and the benefits of procedural safeguards are one way of bridging the gap between legal rules and legal practice.

However, research alone cannot ensure the effectiveness of transnational criminal procedural norms, unless there is the political will to bring this about. The state's criminal law powers go to the heart of its sovereignty and any limitations or conditions attached to the exercise of this power will always be a matter of sensitivity. In developing detailed and prescriptive legal norms that provide states with confidence in one another's processes of criminal justice, the EU has balanced the need to strengthen the broad principles established by the ECtHR, with measures that are sufficiently flexible to allow states to embed them within their own legal culture. In this way, the balance between standards that are broad and open-textured, or detailed and prescriptive, is also a balance between the universal and the local, the transnational and the national.