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EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition

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EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition

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EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition

Jacqueline Hodgson†

I. Overview	307
II. Enforcing Precedent Across Multiple Jurisdictions	312
III. Positive & Negative Rights	317
IV. The Importance of Practice-based Accounts	319

I. Overview

The papers in this issue were presented at the third conference in the series “The Future of the Adversarial System,” each of which was held at the University of North Carolina at Chapel Hill.¹ The theme in 2011 was a comparison of the application of European Union criminal justice measures as they apply across different European criminal procedures, with the American federal system. The conference was designed to encourage consideration of, and comparison between, different legal models in which the rulings and instruments of one overarching court or legislature must be applied by a myriad of courts subservient to this higher legal authority. This includes the European Court of Human

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¹ See *Conference: The Future of the Adversarial System*, THE UNIV. OF N.C. SCH. OF LAW, <http://www.law.unc.edu/faculty/conferences/adversary/default.aspx> (last visited Nov. 29, 2011). The series has been a great success, bringing together academics and practitioners from across Europe and North America to exchange ideas and experiences and to discuss aspects of domestic, European, comparative, and international criminal procedure in practical terms. I would like to register my thanks to Mike Corrado for organizing the conferences and including me from the outset. I have learned a lot and made many friends in the process. In the Spring of 2009, the first conference focused on “The Future of the Adversarial System.” See 35 N.C. J. INT’L L. & COM. REG., 285-538 (2009). In 2010, we turned our attention to the International Criminal Court. See 36 N.C. J. INT’L L. & COM. REG., 255-497 (2010).

Rights (hereinafter “ECtHR”), which is the court that interprets the European Convention on Human Rights (hereinafter the “Convention”) and whose case law applies not only to the country before it, but also to all forty-seven members of the Council of Europe. This also includes the European Union, whose legal instruments must be translated more directly into the domestic legislation of the twenty-seven Member States and whose court, the European Court of Justice, will rule on the interpretation and implementation of EU law. Finally, this includes the American federal model, where the rulings of the U.S. Supreme Court bind state courts.

The context of the conference theme² is the growing field of the EU criminal justice system in which police and judicial co-operation measures apply across (the often very different) legal systems of the twenty-seven Member States. Whilst Member States have agreed upon investigation, prosecution, and sentencing measures with relative ease, their adoption of corresponding safeguards that would apply universally across the European Union has proven to be more problematic.³ Some have objected that such safeguards are unnecessary because sufficient guarantees are provided by the Convention, to which all Member States are signatories.⁴ Others argue that procedural safeguards cannot be legislated for in a “one-size-fits-all” model, as the European Union proposes.⁵ This has led to a clash of legal models and a resistance to what is seen as the imposition of adversarialism across Europe. The right to legal assistance during police detention and interrogation illustrates this conflict most strongly: Is this a specific adversarial safeguard or a universal guarantee that applies across all procedural models, complementing rather than challenging even pre-trial judicial supervision?⁶ France prefers the term *contradictoire* to *adversarial*. The term *contradictoire* is

² See Jacqueline Hodgson, *Safeguarding Suspects’ Rights in Europe: A Comparative Perspective*, 14 NEW CRIM. L. REV. 4, 611-55 (2011) (serving as the background paper to the conference and providing a stimulus for discussion).

³ See *id.*; Taru Spronken & Dorris de Vocht, *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: “Step by Step,”* 37 N.C. J. INT’L L. & COM. REG. 436 (2011).

⁴ See Hodgson, *supra* note 2.

⁵ See *id.*

⁶ See *id.*

closer to the term “accusatorial,” referring to the accused’s right to see and to respond to the evidence against her, rather than adversarialism, which represents an entire system model, a methodology from investigation to trial.⁷ Presented in this way, due process rights are understood in countries such as France as checks on an existing centralized investigation model rather than as a shift towards a fundamentally different procedure. However, this model is becoming less tenable, as the lawyer’s role is slowly advancing into the earliest pre-trial stages and the role of the supervising prosecutor can be challenged as ineffective⁸ and non-judicial.⁹

Why has the European Union considered it necessary to prescribe procedural safeguards that set out in detail the basic rights already guaranteed in the Convention? The answer is that, in practice, the Convention does not provide a consistent level of safeguards, and enforcement is on a case-by-case basis and is thus relatively weak.¹⁰ This leaves those subject to measures such as the European Arrest Warrant¹¹ with uneven due process protections. It also undermines mutual trust among Member States, a key element to effective cooperation. Unlike many other areas of EU activity, the basis for EU police and judicial cooperation is not harmonization and imposition of uniform procedures upon all Member States; the basis is the principle of mutual recognition, described as the “cornerstone” of such cooperation. National measures such as a judicial decision within a member state must be recognized in all other Member States and have the same or similar effects there,¹² enabling states to work

⁷ See JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* 42-43 (2005).

⁸ See *id.* at 245-46.

⁹ See Eur. Consult. Ass., *Medvedyev and Others v. France*, HUM. RTS. INFO. BULL., Mar. 2010-July 2010, at 14, 15; Press Release No. 881, Eur. Ct. H.R., Applicant’s Police Custody Did Not Satisfy the Requirements of Article 5 § 3 (Nov. 23, 2010); Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 WASH. & LEE L. REV. 1361, 1388 (2010).

¹⁰ See Hodgson, *supra* note 2; Spronken & de Vocht, *supra* note 3.

¹¹ The European Arrest Warrant enables the rapid extradition of citizens within the European Union. See Council Framework Decision 2002/584/JHA, on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) ¶¶ (1), (5)-(6) [hereinafter European Arrest Warrant].

¹² See Communication from the Commission to the Council and European

together effectively but “with a minimum of procedure and formality.”¹³ Thus, evidence can be exchanged under the European Evidence Warrant;¹⁴ or now the proposed European Investigation Order,¹⁵ without scrutiny regarding how it was obtained; sentences are recognized between countries;¹⁶ and citizens are extradited through a judicial procedure that requires no consideration of the evidence for offenses that may not even be criminal in the extraditing state.¹⁷ Underpinning this cooperation is an assumption that all Member States (as signatories to the Convention) are human-rights compliant. Of course, this is not the case, and even where they are compliant, broad guarantees, such as the right to a fair trial under Article Six of the Convention, are assured in different ways across different procedures. For example, those rooted in a more inquisitorial tradition will typically rely more on judicial and prosecutorial supervision than on a defense input.

This is problematic because, under the mutual recognition principle, cooperation across jurisdictions does not take into account these procedural differences and thus risks creating gaps in due process protections. For example, an English court will have to determine what weight it will give to a confession obtained without the presence of a lawyer and not tape recorded

Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, at 2, COM (2000) 495 final (July 26, 2000).

¹³ See Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 COMMON MKT. L. REV. 1277, 1279 (2006).

¹⁴ See Council Framework Decision 2008/978/JHA, on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents, and Data for Use in Proceedings in Criminal Matters, 2008 O.J. (L 350) ¶ 7.

¹⁵ See Council of the European Union 10749/2/11 REV 2 of 8 June 2011, art.1, ¶¶ 1-2 (containing the current version of the proposed European Investigation Order); see also Council of the European Union 9145/10 of 29 April 2010, art. 1, ¶¶ 1-2 (evidencing the original proposed directive published).

¹⁶ See Council Framework Decision 5602/08, on the Application of the Principle of Mutual Recognition to Judgments in Criminal Matters Imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of Their Enforcement in the European Union, ¶ 5.

¹⁷ See European Arrest Warrant, *supra* note 11, at art. 4, ¶ 1. In thirty-two broad offence categories, including terrorism, fraud, drugs trafficking, and murder, the dual criminality requirement does not apply in many mutual recognition measures. See *id.* at art. 2, ¶ 2.

(which is unlawful in England and Wales), from elsewhere in the European Union, where this is a lawful procedure.¹⁸ An English court may also have to determine how it should evaluate the effectiveness of the “judicial supervision” of the suspect’s detention and interrogation provided by a French prosecutor.¹⁹ Patterns of safeguards between criminal justice personnel across different phases of the criminal process differ among Member States. Particular problems arise when information is gathered for one purpose and used for another. For example, when conducting terrorist investigations in France, the “*juge d’instruction*” shares information with and generates *evidence* from the security service in a way that would be unacceptable in England and Wales.²⁰ This might pose particular difficulties in determining the provenance of information and also the weight attached to any resulting evidence.

The European Union has recognized the gap in the Convention protection, as evidenced by the fact that EU criminal justice has itself created the need for some degree of uniform procedural rights that apply regardless of the procedural model of the jurisdiction.²¹ Whilst the Convention provides a benchmark, allowing states to provide protections as they see fit, the EU regime is more prescriptive and requires a greater degree of uniformity.²² Mutual trust is essential to mutual recognition, and this is enhanced if countries are confident that they are extraditing

¹⁸ Many countries, such as the Netherlands, provide legal advice prior to, but not during interrogation.

¹⁹ See Hodgson, *supra* note 9, at 1365. Although such practice is currently within French law, the role of the *procureur* as a judicial officer is increasingly contested both within and outside France. See Eur. Consult. Ass., *supra* note 9, at 15; see also Hodgson, *supra* note 9, at 1378-79.

²⁰ See generally Jacqueline Hodgson, An Independent Report Commissioned by the Home Office, The Investigation and Prosecution of Terrorist Suspects in France (Nov. 2006), available at <http://papers.ssrn.com/abstract=1321868> (last visited Nov. 29, 2011) (explaining French criminal procedure and comparing its counter-terrorism processes to those of the United Kingdom).

²¹ See Resolution of the Council 2009/C 295/01, on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, Annex, 2009 O.J. (C 295) 1.

²² See *id.* (“Whilst various measures have been taken at European Union level to guarantee a high level of safety for citizens, there is an equal need to address specific problems that can arise when a person is suspected or accused in criminal proceedings.”).

a citizen (including one of their own citizens) to a jurisdiction that will afford suspects and accused persons the same rights as in the country extraditing them. Reaching agreement on such measures, however, has been a real challenge.

Earlier attempts have failed, but the current step-by-step approach of the EU Roadmap for strengthening procedural rights takes the accused's rights one at a time,²³ maximizing the chances of agreement.²⁴ At the same time, the ECHR has handed down a set of robust judgments, beginning with *Salduz v. Turkey*,²⁵ emphasizing the importance of custodial legal advice for all suspects, across all jurisdictions, regardless of other procedural protections that may be in place. This has provided an additional driving force for change at the domestic level (both France²⁶ and Scotland,²⁷ for example, have legislated as a result) and should make Member States more willing to agree to these measures at the EU level, given that they closely mirror the jurisprudence of the ECtHR. Some may argue that EU measures are no longer necessary given the robust standards laid down by the ECtHR, but those standards primarily relate to custodial legal advice, and the Roadmap is a set of measures designed to work together. Furthermore, it is always preferable to have legislative standards rather than judicial rulings that might later change.

II. Enforcing Precedent Across Multiple Jurisdictions

The models under the European Union and the Convention are different than the system of precedent in common law systems,

²³ See *id.* at 3.

²⁴ After the adoption of the Lisbon Treaty, EU criminal justice now also operates under a different regime, requiring only qualified majority voting rather than unanimity. See Steve Peers, *EU Lisbon Treaty Analysis No. 4: British and Irish Opt-Outs From EU Justice and Home Affairs (JHA) Law*, STATEWATCH ANALYSIS (Nov. 3, 2009), <http://www.statewatch.org/news/2009/nov/statewatch-analysis-lisbon-opt-outs-nov-2009.pdf>.

²⁵ *Salduz v. Turkey*, 49 Eur. Ct. H.R. 421, 437-39 (2008).

²⁶ Loi no. 2011-392 du 14 avril 2011 relative à la garde à vue, [Law 2011-392 of April 14, 2011 relating to Police Custody], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 15, 2011, p. 6610, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023860729&dateTexte=&categorieLien=id>.

²⁷ Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, 2010, (A.S.P. 15), § 1, ¶ 4.

where the binding ruling of the superior court is applied by lower courts within the same jurisdiction.²⁸ This “traditional” common law model operates within a closed system in which legal issues flow vertically up and down, and are part of a common legal discourse and jurisprudence.²⁹ The lower courts frame the legal question to be determined on an appeal, and once the question is resolved, the ruling is subsequently applied and absorbed back into the legal system. The courts are part of the same legal process and thus work within shared understandings of legal rules and procedures.

The ECtHR model is different. At one level, it operates within the closed system of the Convention. The legal issue is necessarily framed in the Convention terms in order for the ECtHR to have jurisdiction; the judgment is restricted to this question and is couched in the jurisprudence of the ECtHR. What makes it different is that this decision must then be translated back into the terms, concepts, and procedures of the national system. Broadly, this is a reversal of the process in which the national issue was originally framed as the Convention issue to be determined by the ECtHR. For example, in *Salduz* the failure to allow the applicant access to legal advice whilst in police custody was challenged in the ECtHR as a breach of his right to a fair trial under Article 6 (3)(c) of the Convention, which provides that every person charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”³⁰ The ECtHR ruled that Article 6 had been breached.³¹ This translates back to the national case, in that the trial of Mr. Salduz on terrorism charges was held to have been unfair because he was denied legal advice whilst detained and interrogated in

²⁸ See Antonin Scalia, Assoc. Justice U.S. Supreme Court, Address at the Tanner Lectures on Human Values: Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, THE TANNER LECTURES ON HUMAN VALUES (Mar. 8-9, 1995), available at <http://www.tannerlectures.utah.edu/lectures/documents/scalia97.pdf>.

²⁹ See generally *id.* (discussing the concept of stare decisis and pointing out that new laws are added without overruling former laws in a common law system).

³⁰ *Salduz*, 49 Eur. Ct. H.R. 421 ¶ 45 (2008).

³¹ *Id.*

police custody.³² In some instances, the Convention violation is also a violation of national procedure. In others, the criminal procedure of the country itself is held to be in breach of the Convention. *Salduz* was just such a case, as there was no provision in Turkish law to allow suspects in security cases to have access to custodial legal advice.³³

It is not only the process of translation between domestic criminal procedure and the Convention that makes this model different from the “traditional” system of precedent. The second difference is the application of the decision against Turkey within the other forty-six legal systems of the members of the Council of Europe. Although providing a decision within the context of Turkish criminal procedure, *Salduz* sets out broad principles designed to flesh out the meaning of Article 6 in a way that might be applied across all forty-seven states. As discussed in more detail elsewhere,³⁴ given the differences in criminal procedure and due process protections across states, this can be problematic. This is complicated further by the ECtHR approach that there is a “margin of appreciation” whereby all states are not required to fulfill the Convention obligations in identical ways, taking account of procedural differences. Unlike the closed domestic system that operates within a single procedural model, the ECtHR cannot be so normative or prescriptive in its rulings and states have some leeway in how they apply this jurisprudence.

As a result, countries may resist compliance with ECtHR rulings. The reaction to the *Salduz* case again provides a good example. A number of countries, including France, the Netherlands, and Scotland, argued that although they had no provision for custodial legal advice, the *Salduz* ruling did not require them to make any changes because other safeguards were in place regarding the accused’s right to a fair trial; however, when this argument was challenged in the respective appeal courts, this reasoning was rejected.³⁵ *Salduz* made it clear that the right to

³² *Id.*

³³ *Id.*

³⁴ See Hodgson, *supra* note 2.

³⁵ Compare the U.K. Supreme Court ruling in *Cadder v. HMA*, [2010] S.C. 43 (appeal taken from Scot.), available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf (holding that Art. 6 of the Convention required suspects to have access to a lawyer during police detention and questioning),

custodial legal advice is essential in assuring the accused's right to a fair trial and applies to all procedures.³⁶ Nonetheless, the margin of appreciation cannot be used as an alibi for non-compliance. As a result, France and Scotland have been forced to provide a statutory right to legal advice before and during police interrogation.³⁷ Other countries such as the Netherlands are still grappling with their own legal reforms.

In the context of EU criminal justice, as opposed to court rulings, we might consider the parallel difficulties in legislating procedural rights across Member States. The legislative process is such that measures are debated and agreed to by member state representatives, but there is still the problem of producing a norm that can be applied across very different procedural traditions. For example, initial attempts to make a provision for legal advice in all EU Member States failed, and many countries argued that this was inappropriate and unnecessary in procedures centering on the judicial supervision of criminal investigations as well as on the detention and interrogation of suspects.³⁸ This opposition has

with H.M. Advocate v. McLean, [2009] H.C.J. 97, available at <http://www.scotcourts.gov.uk/opinions/2009HCJAC97.html> (ruling, by a unanimous bench of seven judges, that the absence of a right to custodial legal advice was not contrary to Art. 6 of the Convention). In France, the *Conseil constitutionnel* held that the absence of a provision for access to legal advice through the period of police detention and questioning was contrary to ECHR jurisprudence and thus unconstitutional. See HODGSON, *supra* note 9, at 1398-1411.

³⁶ See *Salduz v. Turkey*, 49 Eur. Ct. H.R. 421, ¶ 55 (2008) ("That in order for the right to a fair trial to remain sufficiently 'practical and effective'... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right...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.").

³⁷ See Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, 2010, (A.S.P. 15); Loi 2011-392 du 14 avril 2011 relative à la garde à vue, [Law 2011-392 of April 14, 2011 relating to Police Custody], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 15, 2011, available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=A19231ACC37222376D21E4D4F09EF8F4.tpdjo04v_1?cidTexte=LEGITEXT000023861852&dateTexte=20110918.

³⁸ See Hodgson, *supra* note 2. This claim was problematic on several levels. First, it failed to address the universal benefit of legal advice, whatever the procedure; second, it ignored the fact that in practice, judicial supervision provides almost no guarantee as to

eased slightly since the Lisbon Treaty, where a majority, rather than unanimous voting, is required. The U.S. federal system is perhaps closer to the “traditional” model of precedent, but the variations across state laws, the political dimension of the Supreme Court, and the Supreme Court’s relationship with state courts create a tension between those at the top and the bottom of the court hierarchy.

In these examples, the rather broad and diverse nature of the jurisdiction of the higher legal authority can alienate those required to implement the decision; put bluntly, those lower down in the legal food chain may not buy into the values enshrined by superior courts or legislatures. This can undermine compliance and enforcement. States may seek to restrict the application of these legal norms to the original party to which they are addressed, denying the systemic implications of the decision by deciding to overturn the conviction in a particular case but declining to change the legal procedure; other states may distinguish their own procedures as a way to avoid implementation of the decision. For example, *Salduz* affects Turkey, but France and Scotland may say they have different protections in place, so they are not affected by the decision. This may be a result of conservatism and a reluctance to change; it may reflect resentment towards a decision perceived to be “external” and so “imposed” in some way; or it may be a question of the practicalities of resources.

In this issue, Donald Dripps describes the unwillingness of cash-strapped state courts in the United States to impose costly and time-consuming procedural requirements upon the prosecutor in order to comply with (the admittedly rare) pro-defence interpretation of *Crawford v. Washington*, decided by the Supreme Court in 2004.³⁹ Like Richard Myers, also in this volume, Dripps questions the value of affirming rights claims without the corresponding power to enforce compliance.⁴⁰ There are interesting parallels with the implications of the ECHR ruling in

the treatment of the suspect in police custody. Supervision is distant and bureaucratic and is frequently the responsibility of the prosecutor. *See also* Hodgson, *supra* note 7.

³⁹ *See* Donald A. Dripps, *On Reach and Grasp in Criminal Procedure, OR, Crawford in California*, 37 N.C. J. INT'L L. & COM. REG. 349 (2011).

⁴⁰ *See* Richard E. Myers, *Adversarial Counsel in an Inquisitorial System*, 37 N.C. J. INT'L L. & COM. REG. 411 (2011); *see also* Dripps, *supra* note 39.

Salduz, which has already obligated Scotland and France to implement procedural reform to make provision for custodial legal advice.⁴¹ In both instances, the ECtHR decision was insufficient to trigger legislative reform. In France, legislation was the result of the ruling of the *Conseil Constitutionnel* that French criminal procedure violated the Constitution in failing to make a proper provision for legal advice during the suspect's detention and interrogation in police custody.⁴² In Scotland, the Supreme Court's decision in *Cadder*⁴³ has had the same effect. There was strong resistance to this: Only a year before, in the case of *McClean*,⁴⁴ Scotland's highest court rejected the argument that Scotland was in breach of the ECtHR under *Salduz*, given that suspects enjoyed no statutory right to custodial legal advice. *McClean* has now been overruled by *Cadder*.⁴⁵

III. Positive & Negative Rights

The difficulty of implementing ECtHR jurisprudence is a gap that EU criminal justice measures seek to fill. The EU "Roadmap" sets out five measures designed to protect the basic rights of suspects which, if adopted, will set positive standards in terms of what Member States are required to provide.⁴⁶ Richard Myers points out in his paper that courts are better at dealing with negative rights than enforcing positive ones, and he explores this in relation to the right to counsel in the United States.⁴⁷ This, he argues, might be a cautionary tale for parallel developments in

⁴¹ See *supra* notes 31-33 and accompanying text.

⁴² See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-31, Sept. 23, 2010, J.O. 17290 (Fr.).

⁴³ See *Cadder v H.M.A.*, [2010] S.C. 43 (appeal taken from Scot.), available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf.

⁴⁴ See *H.M. Advocate v. McLean*, [2009] H.C.J. 97, available at <http://www.scotcourts.gov.uk/opinions/2009HCJAC97.html>.

⁴⁵ See *Cadder*, [2010] S.C. 43.

⁴⁶ The five measures are: (1) Translation and interpretation; (2) information on rights and information about the charges; (3) legal aid and legal advice; (4) communication with relatives, employers and consular authorities; and (5) special safeguards for suspected or accused persons who are vulnerable. Member States also agreed upon a sixth measure, which was a Green Paper on pre-trial detention. See Press Release, Luxembourg Council of the European Union, Procedural Rights in Criminal Procedures (Oct. 23, 2009).

⁴⁷ See Myers, *supra* note 40.

Europe.⁴⁸ In the European context, the ECtHR has tended to find violations of the right to a fair trial under Article 6 of the Convention where the accused has not had adequate defence representation. This has been developed to include both pre-trial advice as well as legal counsel at trial. *Salduz*, however, is remarkable in that the court has gone further and emphasized the need for effective custodial legal advice and has set out what would be required for a clear, voluntary and unequivocal refusal of this right by the accused.⁴⁹ This goes beyond a general benchmark standard to be respected within the context of different national procedural protections and sets out part of a universal, core defence role.⁵⁰

The difficulties in enforcing positive rights are also multiplied when this enforcement must take place across quite different procedural systems. The ECHR allows a margin of appreciation to take account of procedural differences and the fact that the same protection might be provided in different ways.⁵¹ Provided the accused has received a fair trial overall, no breach will be found. This means that a breach of the Convention at the pre-trial stage might be remedied later. The European Union, therefore, is better placed to set out the basic core defence function in a more prescriptive way through its legislation and enforce its implementation through the European Court of Justice. This has been a difficult task. A major obstacle to such agreement is the very different legal procedures and cultures that exist across Member States, making it difficult to identify an inalienable core defence role that makes sense across jurisdictions. Taru Spronken and Dorris de Vocht's paper describes the history of attempts to provide due process protections at the EU level and sets out the

⁴⁸ *See id.*

⁴⁹ *See supra* note 25 and accompanying text.

⁵⁰ Most recently, this has been set out in the clearest terms in *Sebalj v. Croatia*, where the ECHR found that the police questioning of a suspect in the absence of a lawyer (where one had been requested) was a de facto breach of Article 6. *See* 4429/09 *Sebalj v. Croatia*, Eur. Ct. H. R. (2011). The Court found two separate breaches of the Convention: Article 6 §§1 and 3(c) were breached when the police questioned the applicant without a lawyer; Article 6 §1 was breached by admitting the alleged confession as evidence at trial and by relying on it in convicting the applicant. *See id.*

⁵¹ *See Salduz v. Turkey*, 49 Eur. Ct. H.R. 421, ¶¶ 50-51 (2008).

detail of the first provisions.⁵²

It is now more important than ever that this is achieved, (1) given the range of other E.U. criminal justice measures in force centring on police and prosecution co-operation; and (2) the wider context of co-operation that hinges on mutual recognition.⁵³ Mutual recognition requires states to recognize and enforce the legal instruments and judgments of other states as if they were their own. We can immediately see that the uneven provision of defence safeguards between the states is likely to undermine the mutual trust necessary for such co-operation, as Martin Böse's paper demonstrates in relation to trials in absentia.⁵⁴

IV. The Importance of Practice-based Accounts

The final common theme that emerges is the importance of empirical and contextual accounts of legal process. Christopher Slobogin's paper discusses how empirical comparisons might be approached and the potential benefits for policy makers.⁵⁵ The background paper⁵⁶ for the conference discusses the different defence roles that exist in French criminal procedure and in England and Wales and the ways that these models are understood by other legal actors and are played out in practice.⁵⁷ Occupational cultures, resources and wider process structures can all contribute to the success or failure of reform.⁵⁸ There are countless examples of measures rendered ineffective in this way. In England and Wales, solicitors failed to meet the challenge of providing custodial legal advice and thus left suspects unprotected, or worse, credited by the courts with a protection which they never received.⁵⁹ Rather than ensuring proper training for the new role,

⁵² See Spronken & de Vocht, *supra* note 3.

⁵³ See *id.*

⁵⁴ See Martin Böse, *Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia*, 37 N.C. J. INT'L L. & COM. REG. 489 (2011).

⁵⁵ See Christopher Slobogin, *Comparative Empiricism and Police Investigation Practices*, 37 N.C. J. INT'L L. & COM. REG. 321 (2011).

⁵⁶ See Hodgson, *supra* note 2.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See Jacqueline Hodgson, *Tipping the Scales of Justice: The Suspect's Right to Legal Advice*, 1992 CRIM. L. REV. 854, 854-862; see also Mike McConville & Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence*, ROYAL COMM. ON CRIM.

police station advice was routinely delegated to untrained, unqualified and inexperienced staff.⁶⁰ Highly antagonistic to the encroachment of defence lawyers onto police territory, officers often fail to inform suspects of their rights and persuade them that it is not in their best interest to have a solicitor present.⁶¹ In France, lawyers were given greater opportunities to influence the pre-trial investigation in cases before the *juge d'instruction*, but both their own occupational culture and that of the *juge* ensured that the lawyer continued to play only a subordinate role to that of the *juge* in charge of the inquiry.⁶² Dorris de Vocht and Taru Spronken describe the findings of an earlier cross-country study demonstrating the problems of ensuring that legal advice is both available and of sufficient quality to be effective when legal aid is patchy and the rates of pay are poor.⁶³

The ECtHR might be said to have taken a contextual approach to its assessment of criminal justice protection. It has emphasized the importance of seeing criminal procedure as a linked process in which the fairness of the pre-trial will have a significant impact on the trial.⁶⁴ It has also made it clear that rights must be practical and effective and not theoretical and illusory.⁶⁵ The growing importance of the European Union in criminal justice poses new challenges—in particular: how the European Court of Justice and the ECtHR will interact; how they will ensure consistent interpretation of fair trial guarantees; and how human rights protections will be asserted and implemented in different ways.

JUST. (Research Study No. 16, 1993).

⁶⁰ This is also generally representative of the organization of defence work in many firms. See MIKE MCCONVILLE, JACQUELINE HODGSON, LEE BRIDGES & ANITA PAVLOVIC, *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS* 17-45 (Andrew Ashworth ed., 1994).

⁶¹ See *id.* at 72-100.

⁶² See Jacqueline Hodgson, *Constructing the Pre-Trial Role of the Defence in French Criminal Procedure: An Adversarial Outsider in an Inquisitorial Process?*, 6 INT'L J. OF EVIDENCE & PROOF 1, 1-16 (2002).

⁶³ See Spronken & de Vocht, *supra* note 3.

⁶⁴ See *supra* note 28 and accompanying text.

⁶⁵ See *id.*