

“Falling on Deaf Ears”: Looking for the *Salduz* Jurisprudence in Greece

Dimitrios Giannouloupoulos

The unanimous decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* (*‘Salduz’*)¹ has led to dramatic reforms of custodial legal assistance rights across Europe, most notably in countries that had long resisted giving full effect to the right of access to a lawyer in police interrogations such as France, Belgium, Malta, Scotland, the Netherlands and Ireland. In Malta, for instance, breaches of the right to access to a lawyer have been haunting the state, and reforms remained pending, for many years.² Scotland and Belgium were denying suspects the right to consult with a lawyer prior to interrogation, while suspects in France and the Netherlands were entitled to a brief consultation with a lawyer *prior to*, but not *during*, questioning.³ Irish jurisprudence was recognizing access to a lawyer as a constitutional right,⁴ but did not ‘require that advice from a requested solicitor actually be made available to the relevant suspect prior to questioning’⁵ and rejected the possibility of having a lawyer present during questioning.⁶

In undertaking a contextual study of reforms of custodial legal assistance in five European countries (Scotland, France, Belgium, the Netherlands and Ireland), in an article that took its inspiration in the context of the ‘Obstacles to Fairness’ project (the article is hereinafter referred to as ‘RLA in five countries’),⁷ I offered evidence of the central role of the ECtHR in

¹ Application No 36391/02, Merits and Just Satisfaction, 27 November 2008.

² See generally A Spiteri, ‘The Right to Access to a Lawyer in Malta: a Few Steps Forward, a Few Steps Back’, Fair Trials International blog, 21 December 2016, available at <<https://www.fairtrials.org/the-right-to-access-to-a-lawyer-in-malta-a-few-steps-forward-a-few-steps-back/>>.

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

⁴ See *DPP v Healy* [1990] 2 IR 73.

⁵ *Gormley*, supra n 1 at para 5.7.

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

⁷ D Giannouloupoulos, ‘Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries’ (2016) 16 *Human Rights Law Review* 103. A first draft of this article benefited from presentation at the international workshop on ‘Obstacles to Fairness’ (Faculty of Law, University of Zurich, 4–5 September 2014).

effecting change in national jurisdictions. At the same time, I highlighted considerable variations in national responses to *Salduz*, and argued that these illustrate that cosmopolitan influences for reform are mediated by competing judicial and legislative agendas, local resistance and a variety of other political, institutional and economic factors. The article used these observations as an opportunity to discuss, and then propose qualifications to, the thesis developed by Jackson and Summers that when the ECtHR articulates its rules clearly, it can lead Member States to accept its position.⁸ More specifically, the article argued that *Court-centred explanations* of acceptance of ECtHR jurisprudence should go hand in hand with *contracting party-centred explanations* of acceptance of (or resistance to) such jurisprudence.

This chapter aims to take this line of argumentation further, by undertaking a contextual study of the right to custodial legal assistance in Greece. Greece offers an intriguing contrast to developments studied in ‘RLA in five countries’ as regards the influence of *Salduz* in domestic jurisdictions. While *Salduz* has had a major impact in these five countries, there has been virtually no engagement with it in Greece. *Salduz* rather seems to have fallen on deaf ears there, arguably because of complacency with meeting the baseline requirements set by this Strasbourg jurisprudence. Greece had long legislated the basic tenets of *Salduz*, the right to consult with a lawyer prior to interrogation and the right to have a lawyer present when questioned by the police. Perhaps this is why *Salduz* and the ECtHR case law that followed it have been ignored there. *Salduz* failed to ignite any dialogue on the need to effect change in practice, and yet one would have reasonably expected that continuing problems with custodial legal assistance in Greece would have made *Salduz* an ideal platform to revisit the implementation of custodial interrogation rights in practice. Apathy towards *Salduz* rather brings to the surface a culture of failing to address human rights challenges in a pragmatic way, and points to a country that may be taking its international human rights obligations lightly. It is instructive to note in that regard that Greece has a particularly poor track record in relation to responding to recommendations made by the European Committee for the Prevention of Torture, many of which are directly related to custodial interrogation rights recognised with the *Salduz* jurisprudence, and in relation to implementing ECtHR judgments more generally. From this vista, the example of Greece allows further exploration of contracting party-based explanations for the reception and effective implementation of Strasbourg jurisprudence.

⁸ J Jackson and S Summers, ‘Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence’ [2013] Crim LR 114.

1. The Seminal *Salduz* Jurisprudence

The Grand Chamber's decision in the momentous *Salduz* case departed from the previous approach of assessing fairness with regard to the entirety of the proceedings when a violation of the right to right to legal assistance had occurred, holding that Article 6(1) of the European Convention on Human Rights⁹ (ECHR or 'the Convention') requires that 'as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police',¹⁰ and that '[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'.¹¹ The Court rejected the argument that the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects occurring during police custody.¹²

Salduz quickly generated a strong line of Chamber judgments providing confirmation of this revolutionary jurisprudence while also penetrating a number of areas that *Salduz* had not touched upon. In *Panovits v Cyprus*,¹³ the ECtHR repeated the key *Salduz* tenet that 'Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation',¹⁴ before bringing more precision in *Dayanan v Turkey*, where it explained that a suspect should be assisted by a lawyer 'as soon as he or she is taken into custody ... and not only while being questioned'.¹⁵ *Dayanan* still provides today a bold vision of the role of the lawyer prior to and during police interrogation, in mandating that the suspect should be able to 'obtain the whole range of services specifically associated with legal assistance'.¹⁶ In other words, *Dayanan* found that the right to legal assistance was going beyond the mere right to legal advice during police interrogation to cover other aspects of the lawyer's role during the entire interrogation phase.¹⁷ In an equally fascinating development – which does not seem to have received much attention however – the Court found a breach of article 6 in *Aras v Turkey (no 2)*, in a case where the suspect's lawyer had been 'allowed to enter the hearing room during the questioning' of the suspect, but 'this was a passive

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

¹⁰ *Salduz* (n 1) para 55.

¹¹ *ibid*

¹² *ibid*, para 58.

¹³ Application No 4268/04, Merits and Just Satisfaction, 11 December 2008.

¹⁴ *ibid*, para 66.

¹⁵ Application No 7377/03, Merits and Just Satisfaction, 13 October 2009, at para 32.

¹⁶ *ibid*

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

presence without any possibility at all to intervene to ensure respect for the applicant's rights'.¹⁸ *Dayanan* and *Aras* bring to light the Court's desire to transform the lawyer's presence into a substantive guarantee, ensuring that *Salduz*-generated reforms will bring about much more than just a cosmetic change to protecting suspects' rights at the police station. They are both underpinned by the logic that the mere presence of a lawyer at the police interrogation stage does not suffice in itself to secure the rights of the suspect.

Taking another important step in the direction of safeguarding the application of the right to legal assistance in practice, the Court found in *Pishchalnikov v Russia* that a suspect 'who had expressed his desire to participate in investigative steps only through counsel, should not be subject to further interrogation by the authorities until counsel has been made available to him',¹⁹ while in *Brusco v France* the Court again clarified that the right to be assisted by a lawyer applied from the beginning of his detention and during questioning.²⁰ In *Navove and Others v Monaco* it removed any remaining doubts on the issue of the lawyer's presence during police interrogation²¹; the Court explained that it had on many occasions already specified that the right to legal assistance during police detention should be particularly understood as assistance 'during questioning'.²² Then, in *A.T. v Luxembourg*, the Court clarified that the lawyer's presence during questioning will not suffice for the right to fair trial to be respected, and that national legislation must also provide for private consultation with a lawyer prior to the beginning of the interrogation.²³ Taken together this jurisprudence now mandates that the suspect be afforded the right to legal assistance as soon as he is taken into custody, the right to consult with a lawyer prior to interrogation as well as the right to have a lawyer present – and be actively assisted by him or her – during interrogation.

Equally worthy of note is the Court's recent jurisprudence on the critical issue of waivers of the right to legal assistance. *Zachar and Čierny v Slovakia* provides a key illustration. The Court reiterated there that waivers 'must be established in an unequivocal manner and must be attended by minimum safeguards commensurate with the waiver's importance', and that

¹⁸ Application No 15065/07, Merits and Just Satisfaction, 18 November 2014, at para 40.

¹⁹ Application No 7025/04, Merits and Just Satisfaction, 24 September 2009, at para 79.

²⁰ Application No 1466/07, Merits and Just Satisfaction, 14 October 2010, at para 45. See also *Boz v Turkey* Application No 2039/04, Merits and Just Satisfaction, 9 February 2010; and *Adamkiewicz v Poland* Application No 54729/00, Merits and Just Satisfaction, 2 March 2010.

²¹ Interestingly, despite prior clear pronouncement by the ECtHR, the issue was still being hotly debated in the Netherlands. See generally Giannouloupoulos (n 7) 114-16.

²² Applications Nos 62880/11, 62892/11 and 62899/11, Merits and Just Satisfaction, 24 October 2013, at para 79. The Court cited the examples of *Karabil v Turkey* Application No 5256/02, Merits and Just Satisfaction, 16 June 2009, at para 44; *Ümit Aydın v Turkey* Application No 33735/02, Merits and Just Satisfaction, 5 January 2010, at para 47; and *Boz v Turkey*, at para 34.

²³ Application No 30460/13, Merits and Just Satisfaction, 9 April 2015, at para 87.

‘before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen the consequences of his conduct’.²⁴ In finding that the waiver in this case had not been attended by the minimum safeguards required,²⁵ the Court specifically paid attention to the fact that the suspects had been notified of their rights ‘via the first pages of [...] pre-printed [police questioning] forms’ – which were ‘informing the applicants, without providing any commentary or further explanation, that they had the right to remain silent and the right to choose a lawyer’ – and the fact, conversely, that ‘no individualised advice about their situation and rights was provided to the applicants’.²⁶

The *Salduz* line of jurisprudence continues to evolve at a very fast pace and to exert considerable influence in European countries. It was presented in some detail above, so that it could be demonstrated later on how Greece was already meeting the minimum standards set by this jurisprudence, but also how, on the other hand, Greece could have meaningfully engaged with it, to enhance the protection of the right to legal assistance in practice.

First it is useful to revisit the point about how the *Salduz* jurisprudence offers a valuable interpretative tool with regards to the factors that facilitate acceptance of (or, conversely, lead to resistance to) Strasbourg jurisprudence in contracting parties.

2. Court-Centred and Contracting Party-Centred Explanations of Acceptance of, or Resistance, to ECHR Jurisprudence

In work published in 2013, Jackson and Summers used *Salduz* as a paradigm drawing support for the thesis that ‘when the ECtHR articulates clear rules and a coherent rationale for its approach, it can win acceptance for its position even when this may have far-reaching consequences for national law’.²⁷ The article contrasted Strasbourg’s success in gaining acceptance for its position on custodial legal assistance in the United Kingdom and Switzerland (the two comparative points of reference in the article) – as a direct result of *Salduz* setting clear rules and having a coherent rationale – with Strasbourg’s failure to advance its thesis on confrontation (in the same legal systems), precisely because the relevant jurisprudence lacked a coherent rationale and was not providing national courts with clear

²⁴ Applications Nos 29376/12 and 29384/12, Merits and Just Satisfaction, 21 July 2015, at para 60, citing *Aleksandr Zaichenko v Russia*, no. 39660/02, para 40, 18 February 2010, with further references.

²⁵ *ibid*, para 74.

²⁶ *ibid*, para 70.

²⁷ Jackson and Summers (n 8) 115.

rules.²⁸ Though not applicable to confrontation evidence, the analysis in ‘RLA in five countries’ offered a useful opportunity to scrutinise the *Salduz* part of Jackson’s and Summers’ argument. At an empirical level, developments in the five systems examined there conformed with Jackson’s and Summers’ observations about the effect of *Salduz*. In these European systems Strasbourg had *in principle* gained acceptance for its position on custodial legal assistance. There is also evidence that where this was not immediately so, it was specifically grey – not so clear – areas of *Salduz* that may have fuelled resistance or given rise to a more reluctant approach.²⁹ Attention was moreover drawn to the variations in the national responses to *Salduz*. These variations considerably influence the application of *Salduz* rights in practice, to a degree that variations cannot not be dismissed as routine or insignificant. From this angle, I claimed in ‘RLA in five countries’ that the argument that clarity gains acceptability needed to be qualified. Variations in national responses signify variable degrees of acceptance. Despite its clear rationale, *Salduz* was not adopted with the same urgency or enthusiasm across different contracting parties, and, even today, there remain important differences as to the extent to which the right to have a lawyer present during questioning in particular has been written into national legislation.³⁰ Divergent attitudes also came to the fore when one distinguished between the responses of national courts and those ultimately provided by national legislation.³¹

The above observations led me to the conclusion, in ‘RLA in five countries’, that Jackson’s and Summers’ analysis needed to be situated in a wider context where sufficient

²⁸ With regards to the reception of ECtHR jurisprudence in England and Wales, the argument can be seen in combination with Dennis’ observation that English courts have not accepted Strasbourg’s jurisprudence on evidential matters uncritically, where they have found it ‘wanting in terms of clarity, consistency or coherence’: I Dennis ‘The *Human Rights Act* and the Law of Criminal Evidence: Ten Years On’ (2011) 33 *Sydney Law Review* 333, 337.

²⁹ In Belgium, for example, *Salduz*’s interchanging references to ‘the assistance of a lawyer’ and ‘access to a lawyer’ (*Salduz*, n 1, paras 54–55) gave rise to contrasting interpretations as to its precise effect: a ‘minimalist’ interpretation, according to which access to a lawyer did not go any further than a right to consultation *prior* to questioning, and a ‘maximalist’ interpretation, which also encompassed the physical presence of the lawyer *during* questioning. The controversy at the national level was resolved when the ECtHR specified in *Brusco v France* (n 22) that the suspect has the right to be assisted by a lawyer during questioning, which provides a good illustration of the strength of the argument developed by Jackson and Summers. See MA Beernaert, ‘La jurisprudence européenne *Salduz* et ses répercussions en droit belge’ in V Guillain and A Wustefeld (eds), *Le rôle de l’avocat dans la phase préliminaire du procès pénal* (Collection du Jeune Barreau de Charleoi, 2012) 45–6. Lack of clarity in *Salduz* also ‘helped’ the Supreme Court in the Netherlands and the ‘Working Group’ in Ireland to read the relevant jurisprudence as not necessarily providing a right to have a lawyer present during questioning: see HR 30 June 2009, *supra* n 105; and Report of the Working Group, *supra* n 74 at 2.

³⁰ See eg recent developments in the Netherlands in D Giannouloupolos and K Pitcher, ‘The shifting terrain for suspects’ rights in Europe – the right to legal assistance Saga in the Netherlands’, Guest blog post at Fair Trials International, 23 May 2016, available at <<https://www.fairtrials.org/the-shifting-terrain-for-suspects-rights-in-europe-the-right-to-legal-assistance-saga-in-the-netherlands/>>.

³¹ See, in detail, Giannouloupolos (n 7) 122.

consideration could be given to a more diverse set of factors that determine national responses to Strasbourg jurisprudence. Their argument that when Strasbourg articulates clear rules and a coherent rationale for its approach it can enhance adherence to Convention jurisprudence no doubt provides a convincing explanation for the reception of ECHR jurisprudence. But, by the same token, it is difficult to see how such a *Court-centred explanation* of acceptance of ECtHR jurisprudence could possibly stand alone, in isolation from *contracting party-centred explanations* of acceptance of (or resistance to) such jurisprudence. By Court-centred explanations I mean those that may offer an account of acceptance mainly by reference to the actions of the Court, such as in its bringing precision and coherence to its jurisprudence or in its pursuing a more active dialogue with national supreme courts and national judges. Contracting party-centred explanations may focus, on the other hand, on indigenous forces shaping national responses to the Court's jurisprudence. These contracting party-centred explanations may, for instance, locate acceptance primarily in the national jurisdiction's cosmopolitan attitudes or, conversely, link resistance with the perceived need to defend the national legal tradition against external influences.³² They may reveal a pragmatic approach to the relationship with Strasbourg³³ or bring to the surface simple logistical considerations relating to the ability of the Member State to accommodate the European jurisprudence in practice.³⁴ It was from this angle that I argued in 'RLA in five countries' that Jackson's and Summers' analysis can help the Court be more vigilant in

³² For example, Borge interpreted *Horncastle* ([2009] UKSC 14) as a manifestation of the Supreme Court's 'exceptionalist' approach to ECHR jurisprudence, which he contrasted with the 'internationalist' approach adopted by the same Court in *Cadder*: see E Borge, 'Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*' (2011) *Public Law* 475. Lord Hope explained the different outcomes in *Cadder* and *McLean* as a result of the 'difference of approach between the two courts to the Convention' and 'its effect on the domestic system': Lord Hope of Craighead, 'Scots Law Seen from South of the Border' (2012) 16 *Edinburgh Law Review* 58, 73. In an analysis of the Belgian response to *Salduz*, Beernaert located in the country's attachment to the inquisitorial legal tradition its reluctance to legislate a fully ECHR-compliant right to legal assistance, despite wide recognition of the 'mandatory' effect of *Salduz*: Beernaert (n 29) 66–7.

³³ In *Cadder*, the Supreme Court made much of the fact that *Salduz* was 'a unanimous decision of the Grand Chamber', which was 'a formidable reason for thinking that [it] should follow it': *Cadder v HM Advocate* (n 30) para 46. Writing extrajudicially, Lord Hope specified that, in contrast to an appropriate case like *Horncastle*, where the Supreme Court would ask the Strasbourg court 'to "think again" on a particular point', *Cadder* was a case where 'no amount of dialogue with Strasbourg would result in a change of view on its part'. Interestingly, such pragmatism by the Supreme Court was largely the result of Strasbourg having based *Salduz* on a principle 'strongly embedded in the European jurisprudence' (the privilege against self-incrimination), which left 'no room for a decision based on expediency'. Lord Hope's analysis provides much support to the thesis developed by Jackson and Summers. See Lord Hope of Craighead, *ibid.* at 74.

³⁴ In Belgium, it was argued that affording the right to legal assistance to all suspects, even when they were not detained by the police, would not be possible for logistical reasons, and that the reform should be implemented at different stages, prioritizing the more serious cases where the suspect was detained by the police first: see Circulaire n° 8/2011 du Collège des procureurs généraux, 23 November 2011 at 17. The *Conseil constitutionnel* referred to the need to put in place a system that 'could in practice be organised in a satisfactory way', which militated against expanding the scope of the right to legal assistance to include less serious offences: *Conseil constitutionnel*, Decision No 7/2013 of 14 February 2013, at para B.23.3.

elaborating precise rules and a coherent rationale for its approach – and perhaps even incorporating a reflection on the type of practical measures needed to ensure their effective implementation in practice – precisely when it hands down innovative judgments on controversial areas of criminal justice, where a common European position may have not yet fully crystallized and where national resistance may thus be likely to slow down, if not seriously obstruct, acceptance of the Court’s positions.³⁵

In a recent article investigating the links between procedural traditions and domestic responses to the *Salduz* case law, Jackson provided a refined model for the acceptance of ECHR jurisprudence. This now places substantial emphasis on contracting party-based explanations. More specifically, Jackson argues that

unless Strasbourg – and by implication the other European institutions as well – can put forward a rationale for a procedural right which can be justified as coming within a broad domestic procedural tradition, it may not be able to secure the endorsement of member states for it. The lesson here for European institutions is that in trying to command consensus on procedural rights, they must be able to communicate with the procedural traditions of member states as these traditions can be influential in determining whether the rights will be accepted.³⁶

Jackson then concludes, in agreement with ‘RLA in five countries’, that

[i]t is not enough for the court to provide a rationale purely in terms of ‘Strasbourg’ jurisprudence, what has been described as a ‘court-centred’ explanation of acceptance of ECtHR jurisprudence. ‘Court-centred’ explanations have to be considered together with ‘member state-centred’ explanations that offer an account of acceptance in terms of indigenous traditions and other forces shaping national responses.³⁷

With all this in mind, we can now move to the study of the (lack of) effect of *Salduz* in Greece as an illustration of further contracting party-based explanations for the acceptance

³⁵ As Judge Kovler explains, it is precisely when the ECtHR ‘adopts a novel approach without the basis of an existing consensus’ that the question of its acceptability in national and international courts becomes ‘of particular importance’: A Kovler, ‘The Role of Consensus in the System of the European Convention on Human Rights’ in ECtHR, *Dialogue between Judges* (2008) 11, 19, available at: www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf [last accessed 24 August 2015]. Conversely, an ‘emerging European consensus’ or ‘common understanding’ can be a convincing justification for judicial creativity by the ECtHR, as submitted by Ashworth: see A Ashworth, ‘A Decade of Human Rights in Criminal Justice’ [2014] Crim LR 325, 335.

³⁶ J Jackson, ‘Responses to *Salduz*: Procedural Tradition, Change and the Need for Effective Defence’ (2016) 97 *Modern Law Review* 987, 1005.

³⁷ *ibid.*

and implementation of Strasbourg jurisprudence. We will start by looking at the state of custodial legal assistance in Greece prior to *Salduz*.

3. Custodial Legal Assistance in Greece: a Liberal Legislative Framework

The right to custodial legal assistance and other fundamental custodial interrogation rights were enacted into legislation in Greece more than 15 years prior to the *Salduz* ‘revolution’ in Strasbourg. Law 2408 of 1996³⁸ gave an end to the exceptional powers that allowed the police to deprive the suspect from the ability to exercise his rights, particularly in relation to investigations for serious offences,³⁹ terminating a regime that was being seen as ‘judicially and politically unacceptable’ and an ‘amputation’ of suspects’ rights.⁴⁰ The 1996 legislation was of paramount importance for the protection of suspects’ rights, by bringing into the police station the fair trial guarantees that were previously only applying to interrogations by the Investigating Judge. It also sought to eliminate the highly controversial practice of examining suspects as witnesses, which was designed to stop them from exercising basic custodial interrogation rights, notably the right to legal assistance and the right to silence. Deprived from any protection at the police station, suspects would routinely confess. Then faced with their incriminating statements at later stages of the interrogation, this time possibly in the presence of a lawyer, they would repeat the unlawfully obtained confession thus giving it full legal effect.⁴¹ The suspect was, in other words, ‘morally coerced’ into confessing,⁴² as a result of arbitrary violations of his human dignity.⁴³ To combat this continuing issue, the 1996 legislation mandated the presence of the lawyer in custodial interrogations and introduced an ‘exclusionary rule’ that imposes the removal from the investigation file of any incriminating statements obtained in the absence of a lawyer during this preliminary phase of the proceedings.⁴⁴

³⁸ Law 2408/1996 reforming provisions of the Penal Code, the Code of Penal Procedure, the Code for the Treatment of Detained Persons and other provisions. See ΦΕΚ Α’ 104, 4 June 1996.

³⁹ Articles 105-106 Code of Penal Procedure (Greece) prior to Law 2408/1996.

⁴⁰ L Margaritis, ‘The Rights of the Accused in the Preliminary Phase’ in Association of Legal Scholars of the North of Greece, *The Protection of the Accused and the Victim in the Criminal Process* (Thessaloniki, Sakkoulas, 1991) 30 (in Greek).

⁴¹ N Androulakis, ‘Concerning the Problem of Confessions Obtained during Police Interrogation’ (1974) 22 *Nomiko Bima* 1345, 1348 (in Greek).

⁴² G Kaminis, *Illegally Obtained Evidence and Constitutional Guarantees of Human Liberties (The Exclusion of Evidence in the Criminal and Civil Process)* (Athens-Komotini, Sakkoulas, 1998) 215 (in Greek).

⁴³ Arios Pagos 129/ 2006, 56 Poinika Chronika 712. See also Arios Pagos 1/ 2004, 55 Poinika Chronika 113.

⁴⁴ Art 31 para 2 Code of Penal Procedure (CPP) (Greece).

Following the legislative reform of 1996, suspects in Greece now have the right to be assisted by a lawyer,⁴⁵ and communicate freely with him,⁴⁶ when questioned by the police and in other pre-trial examinations, including the examination by the Investigating Judge. The lawyer can ask questions and make observations, which have to be noted in the relevant report,⁴⁷ and has the right to access the investigation file in its entirety.⁴⁸ The police were since 1996 obliged to notify the suspect about the charges and the right to legal assistance, while legislation enacted in 2014 extended this duty to notifying the suspect about his right to translation and interpretation and, importantly, the right to silence.⁴⁹ In addition, a suspect cannot be detained for questioning at the police station for more than 24 hours.⁵⁰ Since these provisions all relate to the exercise of the rights of the defence any violations must be remedied through the pronouncement of an absolute nullity.⁵¹ The Code also specifically mandates that interviews that are conducted in violation of the aforementioned rights of the suspect, and in violation of the duty to notify the suspect of these rights, are ‘null and void’ and are ‘not taken into consideration’ by the court,⁵² and that they should be removed from the investigation file.⁵³ In brief, in marked contrast to strong resistance in many Western European legal systems to write suspects’ rights into legislation, Greece has possessed, for more than twenty years now, a progressive legislative framework which prioritises the protection of the right to legal assistance at the police station.

The Hellenic regime of custodial interrogation rights is of course far from being complete. There remain important legislative gaps, such as in relation to the right of the suspect to request to be submitted to a medical examination or the right to notify a third person,⁵⁴ and there is no provision for the audio-visual recording of police interrogations either. Much more worrying though is the fact that legal aid does not apply at the police interrogation stage, and that there are no duty solicitor schemes, which arguably makes a parody of

⁴⁵ Article 100 §1 CPP (Greece).

⁴⁶ Article 100 §4 CPP (Greece).

⁴⁷ See Androulakis, *Fundamental Notions of the Criminal Process*, 2nd edn (Athens-Komotini, Ant N Sakkoulas Publishers, 1994) 273 (in Greek).

⁴⁸ Art 101 CPP (Greece).

⁴⁹ Art 99A CPP (Greece) introduced with Law of 11 February 2014 implementing Directive 2010/64/EU on the right to translation and interpretation and Directive 2012/13/EU on the right to information in criminal proceedings. The right to silence is protected by art 273 §2 CPP (Greece).

⁵⁰ Art 279 CPP (Greece).

⁵¹ Art 171 CPP (Greece).

⁵² Art 105 CPP (Greece).

⁵³ Art 105 CPP (Greece) refers to art 31 para 2 CPP (Greece) in that respect.

⁵⁴ These rights are only provided by a Code of practice, and relevant violations are not followed by the pronouncement of procedural nullities. See eg art 3 of Presidential Decree 254/ 2004, ΦΕΚ 238/3.12.2004.

custodial interrogation rights.⁵⁵ Still, for the purposes of the argument that this chapter aims to develop, the preceding analysis highlights that, many years prior to *Salduz*, Greece had adopted most of the key custodial interrogation rights recognised with this jurisprudence.

4. Suspects' rights in practice

It emerges from the above that Greece has long possessed a particularly progressive and liberal legislative framework of custodial interrogation rights, recognising a key role for lawyers at the police station at a time when key European jurisdictions were reluctant to let suspects come anywhere near their lawyers when detained at the police station. But it is also clear from a first glance that many of these rights are devoid of much substance in reality. The fact that legal aid is reserved for later stages of the criminal process, and there are no duty solicitor schemes, cannot but significantly undermine the exercise of these rights in practice, and there are other major concerns as regards the law in action.

We can take as a point of departure reports by the European Committee for the Prevention of Torture (CPT) which have time and again highlighted the contrast between legislative protection and the exercise of custodial interrogation rights in practice.⁵⁶ The Committee has repeatedly noted, in particular, that the right to consult with a lawyer, and be assisted by a lawyer during interrogation, is rarely exercised in practice,⁵⁷ and that suspects generally meet with a lawyer for the first time when they appear in court,⁵⁸ after having been detained for a few days, mainly as a result of having been deprived of the ability to designate a lawyer.⁵⁹ Other CPT reports contain testimony from police officers according to which in most cases the suspect is not allowed to have any contact with a lawyer before he has made some

⁵⁵ See generally D Giannouloupoulos, Legal Aid in Greece fact sheet (part of Open Society Justice Initiative on 'Legal Aid in Europe') available at <<https://www.opensocietyfoundations.org/fact-sheets/legal-aid-greece>>. See also CPT, Report to the Government of Greece on the visit to Greece, CPT/Inf (2016) 4 (hereinafter CPT Report 2016) para 47, which finds, for example, that 'theoretically', suspects in Greece 'have the right to consult with a lawyer prior to and during interrogation by the police, but, in practice, the unavailability of legal aid at this stage means that this right is ineffective for most people'.

⁵⁶ See, eg, CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2009) 20, 15 (hereinafter CPT Report 2009).

⁵⁷ CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2010) 33, p. 24, §34 (hereinafter CPT Report 2010). See also Amnesty International, 'Greece: Briefing to Committee Against Torture', October 2011 <<http://www.amnesty.org/en/documents/EUR25/011/2011/en/>>.

⁵⁸ CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2012) 1, p. 42, §91 (hereinafter CPT Report 2012). See also CPT Report 2010, 24, para 34; CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2008) 3, 21, para 38 (hereinafter CPT Report 2008).

⁵⁹ CPT Report 2012, 42, para 91.

incriminating statements⁶⁰ and prior to appearing before the relevant prosecutor or Investigating Judge,⁶¹ while the situation is aggravated when the suspects are foreigners who are unlawfully in Greece.⁶² CPT similarly identifies significant problems in the exercise of the right to notify a relative and be examined by a doctor as well as in relation to the duty of police officers to notify suspects of their rights.⁶³

Criminal procedure experts in Greece have likewise been very critical of a practice whereby the waiver of the right to legal assistance was only being attested by a tick box within the police interrogation transcript. Anagnostopoulos argues that the fact that the vast majority of suspects were seen as waiving their rights by the simple act of signing the interrogation transcript created the suspicion that suspects were never notified of their rights in the first place.⁶⁴ A member of the Committee for the reform of the Code of Penal Procedure has recently gone so far as speak of the hypocrisy of the Greek custodial interrogation system on the issue of waivers, during a recent conference of the Hellenic Criminal Bar Association bringing together Supreme Court judges, prosecutors and defence lawyers from around the country. He characteristically argued that the suspect is presumed to have been notified of his rights simply by signing the interrogation transcript that makes reference to these rights, and then police immediately presume that he has waived his rights ‘fully voluntarily’ and ‘with direct effect’.⁶⁵ It can be added that more than any other issue demonstrating critical flaws with the exercise of suspects’ rights in Greece, troubling accounts of the continued use of threats and force speak volumes about the chasm between theory and practice. Police violence in custodial interrogations is one of the most important questions raised by Greek cases in Strasbourg, notes the Greek judge at the ECtHR, Linos-Alexandros Sicilianos,⁶⁶ adding that the details of some of the cases cause shock and alarm.⁶⁷

⁶⁰ CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2002) 31, 27, para 41 (hereinafter CPT Report 2002).

⁶¹ CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2001) 18 (Part 1), 35, para 85 (hereinafter CPT Report 2001, Part 1).

⁶² CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2001) 18 (Part 2), 24, para 42 (hereinafter CPT Report 2001, Part 2).

⁶³ See eg CPT Report 2008, 21, para 39; CPT Report 2010, 25, para 37; CPT Report 2011, 42, para 91.

⁶⁴ See Arios Pagos 2/1999 (plenary session), 49 Poinika Chronika 811, 813, obs I Anagnostopoulos.

⁶⁵ V Dimakopoulos, Intervention in 7th conference of the Hellenic Criminal Bar Association, ‘The right to legal assistance in criminal trials’, Patra 15-16 April 2016, available at <https://www.youtube.com/watch?v=TBh69yu28tw&feature=youtu.be&list=PLf_ValJasomldlwNdr7wkyoFnNmECv52l&t=19904> (in Greek).

⁶⁶ F Oikonomidis, Interview of Prof LA Sicilianos, ‘Greece has human rights issues’, Kiriakatiki Eleftherotipia, 29 October 2011 (in Greek).

⁶⁷ See eg *Bekos and Koutropoulos v Greece*, App No 15250/ 02, 13 March 2006; *Zontul v Greece*, App No 12294/ 07, 17 January 2012.

It is equally instructive to take note of anecdotal evidence from defence practitioners in Greece that suggests that there is a long road to travel to improve custodial interrogation conditions and the exercise of suspects' rights. During a recent working meeting of Greek defence practitioners-members of the Legal Advisory Experts Panel (LEAP) – which I have had the opportunity to chair – I have succeeded in getting an impression of the harsh realities associated with custodial interrogation in Greece, in line with pre-existing impressions gathered from interactions with legal practitioners there.⁶⁸ Notification of the right to legal assistance was one of the areas highlighted, with participants noting that it is often 'extremely delayed' and that the 'letter of rights' is hardly ever given to suspects. Significant problems with access to a lawyer were also pointed out. It was argued that there is often insufficient time to communicate with the suspect, lawyers doing police station work may be lacking the required experience and expertise, and there is very limited access to translators and interpreters. Some high profile cases were mentioned. It was pointed out that lawyers had been arbitrarily barred from meeting with and advising their clients prior to questioning, with the interrogation of the MPs of Golden Dawn being a key illustration. Significant logistical problems with translation and interpretation were also reported, and there was a consensus that these are gravely affecting the exercise of the right to legal assistance in practice. Reference was made to a pivotal corruption case involving the 'Siemens' corporation, where the trial had been postponed, and there was a risk that time limits for holding the defendants to account would be surpassed, all as a result of the inability of the relevant administrative service to translate into German and French the decision committing the defendants to trial.⁶⁹ Even more worrying was the observation, shared by nearly all participants, that police violence continues to be endemic of custodial interrogation in Greece.

⁶⁸ LEAP is an EU-wide network of experts in criminal justice and human rights which works to promote fair trial rights and effective judicial cooperation within Europe. There are currently over 120 members, made up of lawyers, NGOs, and academics, covering all 28 EU Member States. The working group meeting was organised as part of 'Fair Trials International' training on the EU Procedural Rights Directives (Athens, 4-6 April 2016). See also the guest post by Roksani Stan – one of the participants at the workshop – published at the Fair Trials International blog. R Stan, 'A Greek Legal Practitioner on the Right to Interpretation, Information and Access to a Lawyer', Fair Trials blog, 19 July 2016, available at <<https://www.fairtrials.org/guest-post-a-greek-practitioner-on-the-right-to-interpretation-information-and-access-to-a-lawyer/>>.

⁶⁹ See eg 'The Siemens case fiasco: a trial lost in translation', Eleftherostypos.gr, 12 July 2016, available at <http://www.eleftherostypos.gr/ellada/19207-fiasko-me-tin-upothesi-siemens-mia-diki-xameni-stibn-metafrasi/> (in Greek). The relevant documents were finally translated, even with great delay, and the start of the trial has now been set for 24 February 2017. See 'Siemens case: trial set for 24 February', ert.gr, available at <<http://www.ert.gr/ypothesi-siemens-stis-24-fevrouariou-i-diki/>>. I have discussed these issues with one of the lawyers working in the Siemens case, who has confirmed the serious difficulties with translation of key documentation and the significant delays this had caused.

5. *Salduz*'s Negligible Effect in Greece: 'Paying Lip Service' and Avoiding the Cost of Putting Up Resistance

In view of the significant problems with the law in action, one might have expected *Salduz* to generate – at least some – debate around potential legislative reforms of suspects' rights in Greece or the need to protect these rights more effectively in practice. One might have anticipated that the European awakening on suspects' rights would have had some echoes in Greece. But this was not the case. *Salduz* and its progeny were hardly noticed in Greek criminal law scholarship,⁷⁰ and there is no evidence so far that they have had any influence upon judicial practice.⁷¹ In spite of well known concerns about the exercise of the right to legal assistance, for instance, there was no reflection on *Dayanan*'s emphasis on the suspect's ability to exercise the wide range of services associated with this right. It can be argued that such reflection would have led observers to revisit some of the problems identified above in the light of this powerful Strasbourg jurisprudence, for example the fact that custody officers are often not notifying suspects of their rights, are arbitrarily denying them access to lawyers, and are often presuming that suspects have waived their right to a lawyer by the simple act of signing the police interrogation transcript. Despite waivers constituting a major problem in guaranteeing suspects fair access to the right to legal assistance, there are no signs either of any engagement with post-*Salduz* case law bringing precision on requirements for waivers to be effective.⁷²

⁷⁰ With a few notable exceptions. See eg I Anagnostopoulos, 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?' (2014) 4 *European Criminal Law Review* 3.

⁷¹ For example, a search at the electronic database of the longest running criminal law journal in Greece (*Poinika Chronika*), with the keyword 'Salduz', does not bring up a single result. There are 162 results when the keyword 'suspects' rights' is used instead (62 results in the scholarship section and 87 results in the case law sections), which suggests that not a single of these sources makes any reference to *Salduz*. A similar search at another major point of reference for Greek criminal law and procedure scholarship (*Poiniki Dikeosini*) brings up six results; all except for one discuss wider procedural issues, making passing reference – most of them in footnotes – to *Salduz*, while one article only concentrates on the right to access to a lawyer (though again it examines it from the viewpoint of EU law rather than ECHR jurisprudence). The article is authored by one of the eminent experts of EU criminal law in Greece, Prof Simeonidou-Kastanidou. See E Simeonidou-Kastanidou, 'The Right to Access to a Lawyer in the Criminal Process. Proposal for a Directive COM (2011) 326 final of the Council and the European Parliament' (2012) 8-9 *Poiniki Dikeosini*. It must be explained here that the vast majority of criminal law related scholarship, and all notable case law, appear in these two journals in Greece. This means that the above searches provide a good indication of the level of academic interest and judicial developments in this area. To contrast the above with the level of interest in other European jurisdictions, we can take the example of a search in the Westlaw UK database, which gives 125 results, many of which centre on *Salduz* and related developments, or the example of the Dalloz.fr database in France (the main electronic legal database there), where we get 229 results (all searches were conducted on 29 December 2016, using the keyword 'Salduz').

⁷² See eg *Zachar and Čierny v Slovakia* (n 24).

Strasbourg jurisprudence has also failed to initiate any dialogue in Greece on whether the country needed to revisit logistical and financial arrangements connected with the exercise of the right, most notably with a view, potentially, to putting in place a duty solicitor scheme and extending legal aid to custodial interrogations. In the wake of *Salduz*, lawyers went into strike in France and Belgium,⁷³ and there was major concern in Scotland, about the practicalities of effectively delivering legal assistance across police stations in these countries. There was no debate in Greece, and yet the European developments – and European concerns – discussed above could have provided the momentum for a review of practical arrangements around the delivery of the right to access to a lawyer. Alternatively, one might have expected a reaction from Greece about the substantial economic cost that could be associated with delivering an effective system of legal assistance, as a result of the ECtHR considerably extending the scope of the right to access to a lawyer or the right to translation and interpretation for that matter.⁷⁴ Again there was no reaction, either to the *Salduz* case law or to the EU Directives that stemmed from it and which have now created considerable financial burdens for all EU states, regarding all aspects of custodial legal assistance, from translation and interpretation to notification of rights, the right of access to a lawyer and, most importantly, the provision of legal aid in custodial interrogations.⁷⁵

Continuing with this line of reasoning, it is instructive to note that in the aftermath of *Salduz*, *Brusco v France* clarified that there was a violation of the right to legal assistance a fortiori in cases where the suspect had not been informed by the authorities of his right to

⁷³ See eg ‘Arrêt Salduz: les avocats bruxellois seront en grève mardi’, rtbf.fr, 17 June 2011, available at <https://www.rtbf.be/info/belgique/detail_arret-salduz-les-avocats-bruxellois-seront-en-greve-mardi?id=6286103>.

⁷⁴ In contrast, when the *Salduz* legislation was discussed in Belgium there were substantial concerns that affording the right to legal assistance to all suspects, even when they were not detained by the police, would not be possible for logistical reasons. This led relevant parties in the legislative process to accept that the reform should be implemented at different stages, prioritising the more serious cases where the suspect was detained by the police first. See, for example, Circulaire n° 8/2011 du Collège des procureurs généraux, 23 November 2011 at 17. The *Conseil constitutionnel* explained, in that regard, that the need to put in place a system that ‘could in practice be organised in a satisfactory way’ meant it was impossible to legislate a right to legal assistance that would apply to less serious offences. Conseil constitutionnel, Décision n. 7/ 2013 du 14 février 2013, para B.23.3.

⁷⁵ See eg Directive 2010/64/EU on the right to translation and interpretation, the Directive 2012/13/EU on the right to information, the Directive 2013/48/EU on the right to access to a lawyer and the Directive (EU) 2016/1919 on the right to legal aid. These EU Directives stemmed from a 2009 Roadmap which set out a gradual approach towards establishing a full catalogue of procedural rights for suspects across the EU. See Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009. For general information on progress with the implementation of the Roadmap directives see European Commission, Rights of suspects and accused, available at <http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm>.

silence.⁷⁶ And yet, Greece hardly noticed, even though the Code of Penal Procedure had long omitted to provide for a duty to notify suspects of this essential right. The right to silence was eventually added to the list of rights that interrogating officers have a duty to notify to suspects only when the Directive on the right to information in criminal proceedings was transposed into Greek law.⁷⁷ Paradoxically, this law was transposed in Greece in a way that curtailed existing rights of the defendant and other parties. More specifically, the transposing legislation introduced an exception to the procedural rule that previously allowed suspects to access the entirety of the investigation file. In other words, the transposition of a Directive that aimed to enhance suspects' rights finally led to undermining the protection provided to suspects. The relevant legislative reports show that, in their rush to transpose the Directive, the Greek authorities probably failed to notice that transposition would also have this negative outcome for suspects' rights.⁷⁸ This is further evidence of the lack of debate on, and serious engagement with, the *Salduz* jurisprudence, and, in this case, the EU Directives that it inspired.

At this point it may be wise to sound a note of caution. There is a risk that the preceding analysis might be interpreted as suggesting that there is either ignorance or indifference in Greek criminal scholarship and judicial practice towards Strasbourg jurisprudence. I must clarify that this chapter does not intend to make such a claim. Case reports in Greece are replete with references to ECtHR judgments,⁷⁹ while law journals, including criminal law and procedure journals, dedicate detailed analysis to key cases and publish annual reports bringing ECHR case law together.⁸⁰ More generally, in Greek legal scholarship, domestic law is rarely seen in isolation. On the contrary, there are constant references to its relationship with international law, with the case law of the ECtHR and the Court of Justice of the

⁷⁶ *Brusco v France*, App no 1466/07 (ECtHR, 19 October 2010), para 45. See also JF Renucci, 'Garde à vue et CEDH: la France condamnée à Strasbourg', *Recueil Dalloz* 2010, 2950.

⁷⁷ See Law of 11 February 2014 (n 49).

⁷⁸ See eg Parliamentary Report on the legislative Bill for the adoption of Directives 2010/64/EU of the European Parliament and Council of 20 October 2010 on the right to translation and interpretation in the criminal process (L280) and 2012/13/EU regarding the right to information in criminal proceedings (L 142) (in Greek).

⁷⁹ This is based on personal observations in relation to criminal law and procedure cases in particular, but see also Kaboglu and Koutnatzis who argue that it is common for Greek courts to cite the ECHR or to 'proceed along identical lines of reasoning with respect to both the Greek Constitution and the ECHR'. I Ozden-Kaboglu and SI Koutnatzis, 'The Reception Process in Greece and Turkey' in H Keller and AS Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford, OUP, 2008) 451, 500.

⁸⁰ A search of the legal database of the criminal law journal 'Poinika Chronika' with the keyword 'ECHR' has brought up 1444 results (including 230 results in the scholarship section and 736 in the case law section) (completed on 30 December 2016 at <http://www.poinikachronika.gr/SearchResults_Simple.asp>). In 2009, the high profile generalist law journal in Greece dedicated an entire issue to a celebration of 50 years of jurisprudence at the ECtHR, with commentary from 24 contributors, including judges at the ECtHR and several Greek academics and members of the judiciary. See 'A Tribute to the 50 Years of the European Court of Human Rights (2009) 57(8) *Nomiko Bima* 1821-2008 (in Greek).

European Union (CJEU) constituting primary points of reference.⁸¹ This chapter rather claims that it was the *Salduz* case law in particular that has failed to attract any attention in Greece, and that this merits attention considering the dramatic effect it has had in other European jurisdictions. We must now examine this claim in a wider context of Greek responses to international pressures for human rights reform, most notably, of course, in the area of custodial interrogation rights.

6. Greek Responses to International Pressures for Human Rights Reform: the Wider Context

In seeking to contextualise the absence of any discourse on the *Salduz* case law in Greece, it is useful to draw upon the latest CPT report (2016) on the country.⁸² This makes for disturbing reading, among other things on the treatment of suspects by the police and the application of safeguards against ill-treatment, in terms of the extent to which the Greek criminal justice system falls short of implementing international human rights standards in practice. Equally frustrating is the continued inability of the relevant Greek authorities to positively engage with these matters, a realisation that runs through CPT reports on visits to Greece that go back to some of the first reports in the 1990s.

Right from the outset, the 2016 report holds Greece to account for failing to act upon the CPT's recommendations. It first points out that the treatment of criminal suspects by law enforcement officers 'has been a long-standing concern of the CPT since its first visit to the country in 1993', before making the startling observation that

[r]egrettably, despite overwhelming indications to the contrary, the authorities have to date consistently refused to consider that ill-treatment is a serious problem in Greece and have not taken the required action to implement the Committee's recommendations and combat this phenomenon.⁸³

The report then emphatically states that 'it is high time for the Greek authorities to acknowledge their responsibilities and to take resolute action to address this matter'.⁸⁴ It

⁸¹ In the recent Hellenic Criminal Bar Association conference on the right to access to a lawyer, the vast majority of the papers touched upon international law. See the programme of the conference here: <<http://www.hcba.gr/attachments/article/228/Programma.pdf>>. The relevant interventions made several references to ECHR and CJEU jurisprudence.

⁸² CPT, Report to the Government of Greece on the visit to Greece, CPT/ Inf (2016) 4 (hereinafter CPT Report 2016).

⁸³ *ibid*, para 12.

⁸⁴ *ibid*.

brings to the surface ‘a significant number of credible allegations of physical ill treatment of criminal suspects (including of juveniles)’, particularly related to ‘excessive use of force’,⁸⁵ which is a ‘frequent practice’,⁸⁶ both at the time of apprehension and during questioning,⁸⁷ and ‘particularly against foreign nationals, including for the purpose of obtaining confessions’.⁸⁸ The report pinpoints ‘a criminal justice system which places a premium on confession evidence’ and which, as a result, creates incentives for the use of ‘physical or psychological coercion’.⁸⁹ It calls upon Greek authorities to ‘promote a culture change’⁹⁰ and to adopt ‘a fundamentally different approach towards methods of police investigation’.⁹¹

The report then moves on to discuss suspects’ rights and safeguards more generally against ill treatment. Here the CPT stresses that it must ‘reiterate the findings from its previous visits’:

[f]ormal safeguards against ill-treatment (including the rights of notification of custody, access to a lawyer and access to a doctor) do not for the most part apply in practice from the very outset of a person’s deprivation of liberty and more generally remain ineffective, despite the existence of clear rules.⁹²

Regarding the right of suspects to notify their next-of-kin, the CPT notes that it ‘once again’ has to call upon ‘the Greek authorities to take the necessary steps’ to ensure enjoyment of the right. In the same way, the Committee notes, in relation to the right to access to a lawyer, that the ‘right generally remains “theoretical and illusory” for those who do not have the financial means to pay for the services for a lawyer’.⁹³ The CPT expresses similar concerns in relation to the poor quality of ex officio lawyers (in the exceptional cases where these are available), the respect of confidentiality in the lawyer-client relationship as a result of the lack of detailed facilities in police stations and limited access to doctors.⁹⁴ This is followed by a number of recommendations, with the CPT finding, with apparent exasperation, that it ‘once again’ has to request that the Greek authorities ‘take immediate and effective steps to ensure

⁸⁵ *ibid*, para 15.

⁸⁶ *ibid*, para 21.

⁸⁷ *ibid*, para 15.

⁸⁸ *ibid*, para 21.

⁸⁹ *ibid*, para 22.

⁹⁰ *ibid*, para 23.

⁹¹ *ibid*. To achieve this, the report stresses that the onus must be placed on more rigorous recruitment procedures, regularly providing opportunities for training on professional interviewing techniques, an intelligence-led and physical evidence-based approach and introducing the electronic recording of police interviews among other things.

⁹² *ibid*, para 45, citing paras 27-32.

⁹³ *ibid*, para 47.

⁹⁴ *ibid*, paras 48-51.

that the right of access to a lawyer applies for any detained person as from the very outset of deprivation of liberty by the police’, also pointing out that this will ‘require the extension of the existing legal aid system to the police investigation stage or when the suspect is questioned by the police’.⁹⁵

In the face of such adverse findings, and against the backdrop of the blatant realisation running through the 2016 report that Greece has failed to act upon the recommendations of the CPT, it is intriguing to explore the official response of the Greek government. This, interestingly, provides an alarming confirmation of observations already made in this chapter, that external pressures to undertake human rights reforms of police interrogation, and to implement suspects’ rights in practice, seem to have fallen on deaf ears in Greece. In the face of the CPT findings of serious shortcomings in relation to the prompt notification of the suspect’s next-of-kin, access to a lawyer, the absence of legal aid, the poor quality of the work of ex officio lawyers, confidentiality of lawyer-client communications and access to a doctor, to take a few examples only, the Ministry of Justice had the following to offer as a response: the Greek authorities do not prevent suspects from informing a relative, ‘on the contrary [they] facilitate communication’, in compliance with the relevant legislation.⁹⁶ The right of access to a lawyer ‘applies to any detainee from the outset of his/her deprivation of liberty’, and ‘the right for (sic) legal assistance has been established at all stages of the criminal and administrative proceedings’.⁹⁷ Foreign nationals in particular are ‘entitled to free legal assistance and representation upon request’⁹⁸ and the right to access a doctor ‘is provided to everyone’.⁹⁹ Finally, ‘detained foreign nationals systematically receive information’ on their rights and obligations,¹⁰⁰ while ‘[t]he presence of an interpreter is also established and efforts are made to meet the interpretation needs in all Services’.¹⁰¹ In other words, the Ministry of Justice dismisses with a wave the sustained – and evidence-based – criticism from the CPT, choosing to ignore the painful reality described in its reports. All that is offered as evidence is a circular order issued in 2003, which was aiming to give effect to key custodial interrogation rights, as an illustration of efforts undertaken by the government

⁹⁵ *ibid*, para 47.

⁹⁶ Hellenic Republic, Ministry of Justice, Transparency and Human Rights, ‘Follow up to the recommendations included in the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to Greece from 14 to 23 April 2015’, CPT/Inf (2016) 5, p. 36, available at <<http://www.cpt.coe.int/documents/grc/2016-05-inf-eng.pdf>>.

⁹⁷ *ibid*, 37.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

¹⁰⁰ *ibid*, 39.

¹⁰¹ *ibid*.

to improve existing conditions in response to CPT recommendations.¹⁰² It truly beggars belief that, despite another damning report from the CPT repeating the recommendations made in the many reports that preceded it, the Ministry's response is more or less exhausted in a simple reference to a circular which has demonstrably had no effect in practice.

Following this line of argument, it is difficult to ignore the fact that Greece remains one of the countries in the Council of Europe that have the 'highest number of non-implemented judgments', mainly as a result of 'serious structural problems' which remain unresolved for years,¹⁰³ and that, if historical data is taken into account, it features as one of the countries with the highest total number of judgments against it.¹⁰⁴ It is equally instructive to draw upon scholarship that has exposed other areas where international pressure for human rights reform has failed to bring about substantive change in Greece. Cheliotis' study of the politics of immigration detention in Greece is a case at hand.¹⁰⁵ Cheliotis brings to the fore the use by Greek state authorities of rhetorical defence mechanisms to neutralise criticism from international human rights organisations, such as evoking 'philoxenia as an innate and constant national trait'.¹⁰⁶ He concludes that '[t]o date, the Greek state has essentially rebutted or otherwise circumvented domestic and international pressures to effectuate substantive progress changes to its treatment of immigrants'.¹⁰⁷ The contextual study of the right to legal assistance in this chapter very much resonates with these findings.

Before we proceed any further with this line of argument, we must, however, stress that analysis in this chapter should not collapse into the simplistic – stereotypical – view that the

¹⁰² Circular order 4803/22/44, 7 April 2003.

¹⁰³ As highlighted in the report of the Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, on the 'Implementation of Judgments of the European Court of Human Rights'. Doc. 13864, 9 September 2015, draft resolution, para 5. The Parliamentary Assembly concentrated in this report on the nine countries with the highest number of cases pending execution, where Greece ranks 6th with 558 cases (2014 statistics). Ibid, p. 8, citing Committee of Ministers Report on "Supervision of the execution of judgments of the European Court of Human Rights – Annual Report 2014". Similarly, Greece ranks 8th in the list with the 11 States with the highest number of cases under 'enhanced supervision', i.e. cases that reveal structural problems. Ibid. One of the four key issues detected as problematic concerning Greece related to the use of lethal force and ill treatment by law enforcement officers and the lack of effective investigation of such abuses. Ibid, p. 10, para 13.6.

¹⁰⁴ Data for the period since the Court was established (1959 to 2015) reveal that Greece is the country with the seventh highest total number of judgments finding at least one violation of the Convention (787 judgments), which can be compared – indicatively – with the total number of judgments against France (708), Germany (182), Italy (1,781), the Netherlands (85), Portugal (232), Spain (86), Turkey (2,812) or the United Kingdom (305) (but differences in population and the year in which these countries ratified the ECHR must be taken into consideration). See Overview 1959-2015 ECHR, March 2016, available at <http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf>.

¹⁰⁵ See L Cheliotis, 'Seeing Like a Small State: Globalisation and the Politics of Immigration Detention in the Margins of Europe' in V Mitsilegas, P Aldridge and L Cheliotis, *Theoretical, Comparative and Transnational Perspectives* (Oxford, Hart Publishing, 2015) 113.

¹⁰⁶ *ibid*, 131.

¹⁰⁷ *ibid*.

the discordance between the law in books and the law in action identified in Greece is intrinsic in the national – or perhaps Southern-European – legal culture. Greece is an idiosyncratic case in the sense of the combination of a particular liberal and progressive legal framework with worrying lack of implementation in practice, and in dismissing international criticism in that respect. But otherwise it is not too dissimilar from many other European systems in the sense of not succeeding to effectively implement custodial interrogation rights in practice. Reference can be made, for instance, to the ‘Inside Police Custody’ project, which has provided an empirical account of suspects’ rights in four EU jurisdictions, England and Wales, France, the Netherlands and Scotland. In disclosing common problems in these jurisdictions, the project has sought to ‘identify the kinds of factors that need to be taken into account in ensuring that procedural rights are effectively implemented and entrenched so that they become routinized and commonplace – an accepted part of everyday practice – especially for police officers and lawyers’.¹⁰⁸ A recent empirical study on procedural safeguards for young suspects in five countries has brought to light similar problems. In Belgium, for instance, it was found that young suspects were in some cases interviewed without a lawyer, even if it is now mandatory for a young suspect to have legal advice.¹⁰⁹ In the Netherlands, lawyers were now able to attend interviews, but were allowed no participatory role in them.¹¹⁰ In Poland, where the similarities with Greece are even stronger, the study found that young suspects must now be told that they can have a lawyer present in the interview, but, with no mechanism to arrange for one – due to the absence of legal aid and duty solicitor schemes – the police seldom mentioned this right to suspects.¹¹¹ Police also required suspects to sign an interrogation form stating that they had been given their rights. In England and Wales, which has long been seen as leading the way in the effective delivery of custodial interrogation rights, we cannot fail to notice an increasingly widening gap between rhetoric and reality, mainly as a result of an ever growing trend of assigning custodial legal assistance to non-solicitor staff¹¹² and restricting opportunities for face-to-face consultation with legal counsel,¹¹³ coupled with an ever-shrinking legal aid budget¹¹⁴ and the use of a full-

¹⁰⁸ J Blackstock, E Cape, J Hodgson, A Ogorodova and T Spronken, *Inside Police Custody* (Cambridge, Intersentia, 2014) 426.

¹⁰⁹ M Vanderhallen, M van Oosterhout, M Panzavolta and D de Vocht, *Interrogating Young Suspects – Procedural Rights from an Empirical Perspective* (Cambridge, Intersentia, 2016) 71.

¹¹⁰ *ibid*, 229.

¹¹¹ *ibid*, 297.

¹¹² See J Hodgson and L Bridges, ‘Improving Custodial Legal Advice’ [1995] Crim LR 101, 102; R Pattenden and L Skinnis, ‘Choice, Privacy and Publicly Funded Legal Advice at Police Stations’ (2010) 73 MLR 349, 352.

¹¹³ See L Bridges and E Cape, *CDS Direct: Flying in the Face of the Evidence* (London: Centre for Crime and Justice Studies, King’s College, 2008); P Pleasence, V Kemp and N Balmer, ‘The Justice Lottery? Police Station Advice 25 years on from PACE’ [2011] Crim LR 6.

blown system of adverse inferences impacting upon lawyers' ability to adopt an adversarial approach to police interrogation.¹¹⁵ It is equally intriguing that – according to a major 2011 empirical study – overall approximately 45 per cent of suspects request advice, 'less than might have been expected 25 years on' from the introduction of key custodial interrogation rights with the Police and Criminal Evidence Act 1984.¹¹⁶ Police ploys and informal conversations with suspects also continue to affect the use of the right to legal assistance, as recently highlighted in another important empirical study.¹¹⁷

7. The Role of Effective National Implementation of ECHR Rights

It becomes apparent from the above that Greece is seemingly aligned with ECHR jurisprudence on the right to legal assistance, while paying lip service to it. The country has failed to show any reflexes to the ground-breaking *Salduz* case law despite fundamental flaws in the Greek criminal justice system in the effective delivery of suspects' rights, and despite pressure from international human rights organisations and domestic scholarship to address the gap between the law in theory and the law in action. The only reform that happened in the aftermath of *Salduz* – the recognition of a duty to notify suspects of their right to silence – was the result of the transposition of the relevant EU Directive. It is, of course, quite oxymoronic that the rushed transposition of this Directive rather prejudiced the rights of the defence in the end, by limiting pre-existing rights in relation to access to the investigation file.

All this pinpoints the important limitations of Strasbourg jurisprudence, and even Strasbourg-inspired EU legislation, in terms of the implementation of fair trial guarantees in EU member states and ECHR contracting parties. More specifically, while 'RLA in five countries' has pointed to local resistance as a factor obstructing the reception of ECtHR jurisprudence, the example of Greece illustrates that paying lip service to, or simply avoiding to engage with, Strasbourg jurisprudence and related EU legislation can have the same effect; it can obstruct the effective implementation of ECtHR jurisprudence in practice. Paying lip

¹¹⁴ See A Edwards, 'Legal Aid, Sentencing and Punishment of Offenders Act 2012 – the Financial Procedural and Practical Implications' [2012] Crim LR 584.

¹¹⁵ See E Cape, 'The Rise (and Fall?) of a Criminal Defence Profession' [2004] Crim LR 401, 414.

¹¹⁶ I Dennis, 'Editorial – Legal Advice in Police Stations: 25 Years On' [2011] Crim LR 1, citing Pleasence, Kemp and Balmer (n 113).

¹¹⁷ L Skinnis, 'The Right to Legal Advice in the Police Station: Past, Present and Future' [2011] Crim LR 19, 34. See also V Kemp and N Balmer, *Criminal Defence Services: User's Perspectives* Research Paper No. 21, (London: Legal Services Research Centre, 2008).

service, and sweeping the difficult issue of implementation of human rights guarantees under the carpet, may in fact be helping Greece to avoid the cost of putting up resistance to the ECtHR, in relation to aspects of its case law that it may not in reality be willing, or able, to effectively implement in practice. If adopting ECHR and EU law compliant legislation is seen as the key indicator of the effective reception of these external influences, then paying lip service may be satisfying a cost-benefit analysis which means the country can continue with ‘business as usual’ while appearing to subscribe to its international human rights obligations.

The above create interesting new lines of inquiry around the fundamental question of ‘taking (Convention) rights seriously’ and the struggle to transform rights from illusory to pragmatic. These questions matter, as the varied implementation of rights across Europe can lead to a situation where countries see themselves as ‘winners’ and ‘losers’ in relation to acting consistently with their international human rights obligations, and where there is an inherent risk that the inability of the relevant international human rights organisations to address gaps in implementation in practice will ultimately undermine the European system for the protection of individual rights. Put differently, the more we turn a blind eye to contracting parties that take a ‘casual’ view to their international human rights obligations, the more we create the temptation for other countries to follow suit, especially at a time when the populist anti-European rhetoric and nationalist tendencies are on the rise.

Ultimately, this analysis reinforces the need to place significant emphasis on contracting party-based explanations for the reception of ECtHR jurisprudence. Indigenous legal cultures, combined with a variety of local conditions shaping national responses, can demonstrably subvert the exercise of Convention rights in practice, even where a contracting party has formally accommodated the relevant ECtHR jurisprudence. If we are to avoid ECHR rights being transformed into empty rhetoric, the ECtHR must therefore do more to comprehend local conditions on the ground. But, by the same token, this contextual study brings to light the intrinsic limitations of ECtHR jurisprudence in effecting change in national jurisdictions, in cases where there is a culture of subscribing to the ECHR in theory but paying lip service in practice, often due to longstanding structural problems that contracting parties have proven unable – or have lacked the political will – to tackle. Here the locus of explanation for the reception of ECHR jurisprudence needs to move further away from the Court, to be placed even closer to the contracting parties; we should not in any case forget that there is so much that the Court can do to accommodate local variations without risking to undermine the harmonious application of its jurisprudence across contracting parties.

Equally, it must be stressed that responsibility for the implementation of the ECHR ultimately – and primarily – rests with the contracting parties,¹¹⁸ alongside the ECtHR, the Committee of Ministers¹¹⁹ and the Parliamentary Assembly of the Council of Europe.¹²⁰ The vital role of national parliaments, in particular, as ‘guarantors of human rights in Europe’,¹²¹ is gaining considerable momentum in recent years. The Brussels Declaration of 2015, which enumerates specific steps that national parliaments should take to enforce the Convention,¹²² is the most recent indication of a new emphasis on reinforcing mechanisms for the national implementation of ECtHR jurisprudence.¹²³ This development seems to follow on from an increasing realisation at the Council of Europe that unless ‘national mechanisms, including oversight by national parliaments, to ensure the implementation of Court judgments’, are adopted, ‘the future of the Convention system – and even the Council of Europe itself – are in jeopardy’.¹²⁴

8. Concluding Observations

Following the formal incorporation of the *Salduz* jurisprudence in most European legal systems that were previously resisting giving suspects access to a lawyer, and in parallel with the ongoing process of the transposition of the EU Roadmap Directives, national legal

¹¹⁸ See Parliamentary Assembly of the Council of Europe, Resolution 1823 (2011), ‘National Parliaments: Guarantors of Human Rights in Europe’, 23 June 2011, para 1. The Parliamentary Assembly recalls in this Resolution that ‘Council of Europe member states are responsible for the effective implementation of international human rights norms they have signed up to, in particular those of the European Convention on Human Rights ... This obligation concerns all state organs, whether executive, judicial or legislative’.

¹¹⁹ See Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, ‘Ensuring the Viability of the Strasbourg Court: Structural Deficiencies in States Parties’, Report, Doc13087, 7 January 2013. See also Parliamentary Assembly of the Council of Europe, ‘The Effectiveness of the European Convention on Human Rights: the Brighton Declaration and Beyond’, Recommendation 2070 (2015), para 1. This urges the Committee of Ministers ‘to accelerate the implementation of the judgments of the European Court of Human Rights’, and to ‘take firmer measures in cases of dilatory, continuous or repetitive non-compliance’, working ‘towards reinforcing synergies with the Parliamentary Assembly and civil society’.

¹²⁰ See eg Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights, Part F, Execution of judgments of the Court, paras 26, 28 and 29e.

¹²¹ See Resolution 1823 (2011), (n 118).

¹²² See the Brussels Declaration adopted on 27 March 2015 by the High-Level Conference on the ‘Implementation of the European Convention on Human Rights, our shared responsibility’, discussed in Doc 13864, 9 September 2015, draft resolution, para 8, above (n 103). This placed emphasis on the responsibility of contracting parties to implement the Convention, particularly through the creation of effective domestic remedies, the provision of sufficient resources to national stakeholders responsible for implementing Court judgments, ensuring a prompt response to judgments raising structural problems, raising awareness about Convention standards and holding parliamentary debates on the implementation of Court judgments.

¹²³ See, generally, A Donald, ‘The Implementation of European Court of Human Rights Judgments Against the UK: Unravelling the Paradox’ in K Ziegler, E Wicks and L Hodson (ed), *The UK and European Human Rights: A Strained Relationship* (Oxford, Hart Publishing, 2015) 135.

¹²⁴ Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), Report on the ‘Implementation of Judgments of the European Court of Human Rights’. Doc 12455, 20 December 2010.

systems and European institutions are next required to seek the logistical gateways to make these rights work in practice. The contextual study of custodial legal assistance in Greece demonstrates quite clearly that the procedural rights transformations happening now in Europe will be devoid of substance until and unless we begin to find ways to ensure that suspects are not prevented or discouraged from exercising these rights.

The adoption of the EU Directive on the right to legal aid is an important step in this direction,¹²⁵ as it requires EU Member States to provide legal aid to suspects and accused persons at the latest before questioning and even before relevant investigative and evidence-gathering acts.¹²⁶ The recent adoption by the Parliamentary Assembly of the Council of Europe of a draft resolution on ‘securing access of detainees to lawyers’ is moving in the same direction. It signposts free legal aid, guaranteeing the presence of the lawyer during questioning and prohibiting the use of confessional evidence obtained in the absence of a lawyer as key reforms that can help transform theory into practice.¹²⁷ But as this chapter fully demonstrates, international influences for reform often do not suffice in themselves to effect change in practice, due to the significant obstacles to fairness that are intrinsic to legal cultures. This observation pinpoints the need for greater synergy between domestic and international actors if these obstacles are to be overcome. The challenge of human rights reform cannot be left on the international actors alone; the ECtHR, the Committee of Ministers and Parliamentary Assembly of the Council of Europe or relevant EU institutions for that matter. The role of effective national implementation is paramount.

In this respect, and to turn back our attention to – and conclude with – the example of Greece, it is perhaps encouraging that the Committee for the reform of the Code of Penal Procedure now appears to embrace the idea of the compulsory presence of a lawyer during the questioning of the suspect, and the provision of free legal aid at this critical phase of the criminal process.¹²⁸ The viability of this measure is, of course, open to question, especially at a time when Greece finds itself between the Scylla of the economic crisis – which means an increasing number of people cannot afford to pay for their own lawyer – and the Charybdis of the refugee crisis, which creates a considerable strain on resources, including police station

¹²⁵ Directive (EU) 2016/1919 of the European Union and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, L 297/1, 4 November 2016.

¹²⁶ *ibid*, art 4.5.

¹²⁷ Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report, ‘Securing access of detainees to lawyers’, para 6, available at <<http://website-pace.net/documents/19838/2192213/20161213-Pressokfjdoc-EN.pdf/b1f3932d-5937-4f53-88ec-8c5c057f388c>>.

¹²⁸ See Dimakopoulos (n 65).

facilities which continue to be used to detain irregular migrants and asylum seekers.¹²⁹ Still, a realisation that ‘all is *not* well’ with the right to access to a lawyer in Greece may prove an important first step in ensuring that custodial interrogation rights no longer remain an empty promise.

¹²⁹ See eg CPT Report 2016 (n 82), p. 12, which recognised ‘the significant challenges faced by Greece’ as a result of the refugee and economic crisis, in a report that addressed the detention of suspects, including foreign nationals held under aliens legislation.