discretion, or "undermine" its independence from the judicial system. This remains true even if the change is sold as only an "interim" measure.

C. CONCLUSIONS

The decision in Cadder has exposed some core tensions at the heart of Scottish criminal justice. Now these are in the open, it will be interesting to see how they develop. Of core concern is the attitude of the present Scottish Government to the jurisdiction of the Supreme Court. An informal consultation on the matter of devolution minutes, which might see significantly fewer Scottish criminal appeals making it to London, was carried out in late 2010. It will be interesting to see what changes flow from it.

The instant matter of worry is, of course, the changes introduced by the 2010 Act. As already suggested repeatedly, these would have benefited from calm examination, rather than one rushed afternoon/evening of debate. It is hoped that Lord Carloway's review into the wider effects of Cadder highlights the errors the Justice Secretary made in declaring an "emergency" situation and makes any future Government think twice before rushing through such important legislation.

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The Reluctant Dutch Response to Salduz

Although it has sometimes been a contested issue, there has never been a general right to legal assistance prior to, let alone during, police interrogation in the Netherlands, and Salduz is a decision that has upset both Dutch police practice and

39 As noted by Christine Grahame MSP in Report (n 12) cols 29559-29560.
40 "SCCRC chair warns of risk from Cadder response"—see http://www.journalonline.co.uk/News/1005973.aspx.
41 "MacAskill assures SCCRC that new s 7 an 'interim measure'—will be subject to Carloway's review"—see http://www.firmmagazine.com/news/2175/MacAskill_assures_SCCRC_that_new_S7_an_%E2%80%9Cinterim_measure%E2%80%9D_-_will_be_subject_to_Carloway%E2%80%99s_review_.html.
43 For the remit of the review, see http://www.scotland.gov.uk/News/Releases/2010/11/18123816.
1 Salduz v Turkey (2009) 49 EHRR 19.
legal doctrine. The impact of the string of decisions on this issue by the European Court has been the greater since they coincided with the dénouement of several miscarriages of justice in which false confessions played a major part. However, from the moment the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) was required to rule on a Salduz-like situation, the Dutch courts and criminal justice authorities appear to have embarked on a mission of damage control and to be primarily concerned with minimising the effect of Salduz and subsequent decisions, by applying the absolute minimum standard they could be said to set.

It should be noted that, under the Dutch Constitution, the European Convention has direct effect and is of higher status than national law. The courts can and must apply its provisions directly. The Supreme Court is a court of cassation and rules on points of law only, so that its tasks include the interpretation of decisions of the European Court of Human Rights. The following discusses the Supreme Court’s post-Salduz stance and the subsequent instructions issued to the police by the prosecution service, and asks whether this is in line with the new European “Salduz doctrine”.

I start, however, with the Dutch Code of Criminal Procedure regarding the pre-trial rights of suspects and lawyers and the debate on legal assistance prior to Salduz. For only if we take into account the essentially inquisitorial doctrine that has always informed legal thinking on the suspect in pre-trial process, is it possible to understand why there is such resistance in the Netherlands to what the “Salduz doctrine” seems to imply.

A. THE BARREN SOIL ON WHICH SALDUZ FELL

Dutch criminal procedure is firmly rooted in the continental inquisitorial tradition and its beginnings go a long way back. For the purposes of this contribution we may focus on two characteristic, interrelated notions, the vestiges of which still persist: that the suspect of an investigation is primarily a source of information, and that the prosecutor, in charge of the police, can be trusted to also take the suspect’s pre-trial interests into account; in combination, this is said to produce true and just outcomes in criminal cases. From this point of view, legal assistance has no added value; on the contrary, it merely hampers the truth-finding exercise. These ideas played a large part in the legal debate leading up to the Code of Criminal Procedure of 1926 that is still in force. The Code has, of course, been amended many times,

2 It has also been enthusiastically hailed as a “new dawn”. See e.g. Taru Spronken in and interview published in NRC Handelsblad, 4 Dec 2008.
3 Hoge Raad, 30 June 2009, LJN BH3084.
6 The 1926 Code replaced Napoleonic legislation introduced during the French occupation of the Netherlands between 1810 and 1813, although any revolutionary ‘foreign’ ideas such as legal assistance and jury trial were abolished as soon as the occupying armies left. On the situation in the 19th and early 20th Century, see Taru Spronken, Verdediging (2001) 9.
but the original structure of the right to legal assistance it introduced has remained essentially intact.

Under its provisions, a suspect has the right (article 28 Sv) to access the prosecution evidence (dossier) and to the assistance of a lawyer of his choosing or provided by the state (articles 38-46 Sv); as far as is possible, he must be allowed to contact the lawyer if he wishes. Article 50 Sv provides for lawyer-client contact and confidentiality for suspects in detention. If a pre-trial judicial investigation has been opened by the judge of instruction, the lawyer has right to be present when the suspect is interrogated by the judge (article 186,1 Sv). It has always been interpreted to mean that, a contrario, there is no such right with regard to police interrogations, and this is accepted as established legal doctrine. At the same time, in 1926 it was felt that the whole truth finding enterprise would be endangered if such pre-trial rights could be used to hinder the investigation. Thus, provisions granting these rights also had (and have) a second paragraph: “...unless in the opinion of the judge of instruction [or the prosecutor] the interests of the investigation make the exercise of right X undesirable” (or some such formulation).

The Code also brought another innovation relevant to the subject at hand: its most contested provision forbade undue pressure against the suspect (article 29,1 Sv) and prescribed a caution by the interrogator that he had the right to remain silent (article 29,2 Sv). Many thought this quite mad. The caution was called “the product of a weak mind”, contradicting the principle that the state must search for the truth by all appropriate means, “a sign of decadent times that the legislature would stoop to undermining the authority of organs of the state”. Others protested that “surely criminal procedure is about revealing the truth and eliciting the facts from the suspect who knows best what happened”. The caution was nevertheless originally included, but soon abolished in 1937. And so the situation remained until 1974 when the caution was reinstated. This was then regarded as sufficient protection against undue pressure and self-incrimination (and false confessions).

Calls for an extended right to legal assistance went unheeded, although in 1983 Parliament had asked for a study to be conducted into the right to have a lawyer present during police interrogations, and that study had delivered a positive answer. The whole matter then again disappeared from the (political) agenda until public

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7 All the articles referred to here are provisions of the Code of Criminal Procedure (Wetboek van Strafprocedure – Sv).
8 See e.g. HR 21 May 1985, NJ 1986, 26.
9 The only exception is the suspect who is to be further detained (by the prosecutor, or at a later stage the judge of instruction) and who has the right to have a lawyer present at the detention hearing – at the latest 15 hours after he has been detained by the police (art 57,2 Sv read in conjunction with 61). The Dutch Bar has a system of duty lawyers to assist such suspects. However, even suspects remanded in custody by the judge of instruction or the court until the trial begins can be subject to denial or restriction of access to their lawyer “in the interests of the investigation” (arts 50,2 and 62 Sv).
10 P van Heijnsbergen, “Het nieuwe Wetboek van Strafprocedure, een welkomstwoord”, in Verspreide Opstellen (1929) 89.
11 See J H Dreuth, De historische ontwikkeling van het inquisitoire strafproces (1939) 224-228 for these and many more examples.
12 C Fijnaut, De toelating van raadslieden tot het politiële verdachtenverhoor (1987).
unrest in 1995 about a suspected miscarriage of justice involving false confessions by the two putative suspects, led to demands for the (video)taping of interrogations. The government never officially refuted the idea, but simply shelved it with the promise of an “experiment”. By this time, apart from lawyers themselves, only very few academic voices in the wilderness were advocating more. An influential study by three universities, for example, conducted between 1999 and 2004 as the precursor to a total revision of the 1926 Code, urged that (video)taping be introduced and recommended giving suspects the right to consult with a lawyer prior to interrogation. But on the presence of the lawyer it had this to say: “police interrogations must start without delay and be geared towards truth-finding. We therefore include no recommendation to allow a lawyer to be present”.

The government dragged its heels on actually introducing recorded interrogations, and ignored, as it had always done over the years, calls by the European Committee for the Prevention of Torture (the last one, in 2008, referred explicitly to the prevention of miscarriages of justice) to review the legal aid situation. However, when another miscarriage came to light in 2005 (followed by two more in 2008 and 2010) and an official inquiry revealed yet another false confession and police malpractice, the minister of justice announced that audio-visual recording of interrogations would be introduced (this now functions in many but certainly not all police areas) and that an extensive police-training and improvement programme would be set up (also up and running). The government was also forced to start an experiment allowing lawyers to be present at interrogations of persons suspected of unlawful killing, after a motion to that effect was carried in Parliament. This experiment was on-going in 2008 and we may wonder what its influence would have been—regardless of its results—had not the European Court dropped its Salduz-bombshell.

**B. THE DUTCH SITUATION POST-SALDUZ: A RIGHT TO PRIOR CONSULTATION**

Following the cases of Salduz and—two weeks later—Panicos v Cyprus, the Minister of Justice wrote to Parliament announcing that the law and police practice were to change, but before any legislative action could take place the Supreme Court was required to interpret the decisions. On 20 June 2009 it ruled on a case

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13 The two were (wrongly) convicted in 1995, but not exonerated until 2001.
resembling Salduz in so far as it involved a minor in police custody whose statements, made without the assistance of a lawyer, were used in evidence against him although he had later retracted them. It was obvious that the European Court’s decisions were not entirely clear; they could be read restrictively or expansively, depending on what one read into them (what does “from the first interrogation” mean, is “access to a lawyer” the same as “assistance of a lawyer” and does assistance imply physical presence during police interrogation?). A lively debate had already ensued in Dutch legal journals and newspapers. The Supreme Court was certainly not on the expansionist side, but it was clear on the fact that, as a court, it could not draw up general rules for all aspects of legal assistance (that being a task for the legislature), but that, in expectation of new legislation, it could rule on the minimum standard apparently required.

Any suspect, the Court said, has the right to consult a lawyer prior to the first police interrogation, to be informed of that right, and, except in cases of an unequivocal waiver or if there are other urgent reasons, to be able within reasonable limits to exercise that right. Neither Salduz nor Panovits, however, implied a general right to have a lawyer present during the interrogation. Minors form an exception: they do have the right to have a lawyer or other “person of trust” with them in the room. Statements made by the suspect without his having enjoyed the (relevant) right and any other evidence found as a direct result of such statements, should, if raised as a defence, in principle, be excluded. Even if this was the correct interpretation of the minimum rights intended by the European Court, it still left important issues—both practical and of principle—unresolved: at what point does the suspect have to be informed of his consultation-right; what is an “unequivocal waiver”; what are “other urgent reasons”; what if the defendant does not raise a defence of violation of pre-trial consultation rights; how long can the prior consultation last; how long are the police to wait before the lawyer arrives; and where are all these newly required lawyers to come from?

The fact that so much remained unclear led to a number of contradictory decisions by the lower Dutch courts in the first six months following the Supreme Court’s ruling. They were also especially likely to consider that consultation rights had been waived. Moreover there were problems of transition caused by the Supreme Court’s requiring that violation of “Salduz-rights” be raised as a defence before the tribunal of fact before statements could be excluded—a rather unfair demand that it nevertheless continued to uphold in cases that had been tried before the advent of Salduz when the lawyer could not have been aware of the need to raise the defence (which would have been senseless anyway under the then accepted doctrine).

The prosecution service had already drawn up preliminary directions for the police on how to deal with the “Salduz problem”. These were followed by a definite set of
binding instructions in April 2010, based on the idea that no more than a right to prior consultation is required. The Instructions qualify consultation rights according to the seriousness of the offence and the age of the suspect. Every suspect arrested by the police must be informed of his right to consult with a lawyer prior to the first interrogation. In category A cases, suspects must also be informed that this legal assistance is free and that the right to consultation cannot be waived. In category B cases, legal assistance is also free, but consultation rights can be waived. In category C cases, the suspect must be informed of his right, but also that, should he wish to exercise it, he will have to pay for a lawyer himself.

In all cases the police are to inform the pool of duty lawyers (between 7 am and 8 pm) and wait for a maximum of two hours for the lawyer to arrive before starting the interrogation (although for category A the decision to start must be taken by a prosecutor); the consultation may last for 30 minutes. These are the general rules, but there are some exceptions. Should a “life-threatening” situation arise that requires immediate police action, the prosecutor may authorise the police to start the interrogation immediately without the lawyer. Suspects who make spontaneous statements before being cautioned must nevertheless be informed of their consultation rights and the police may not ask further questions until the lawyer has arrived or the right has been waived. On the other hand, if new suspicions arise during the interrogation there is no need to inform the suspect again of his consultation rights.

C. THE MINIMUM STANDARD?

The situation in the Netherlands is now reasonably clear, but that is not to say that it is unproblematic. There is obviously no legal infrastructure other than the system of duty lawyers who are present at detention hearings, so that the whole system of legal aid in criminal cases does not provide for either lawyers or their financial reimbursement before the point of detention. This means that, if at all legally permitted, suspects are now detained whether or not such deprivation of liberty is necessary in the interests of the investigation—the only way to make (the financing of) legal assistance prior to police interrogation possible. And because of the number of duty lawyers being called upon, the government has now decided that this will be too expensive and has proposed cutting legal aid fees by half, leading to vehement protest on the part of the Bar and some lawyers threatening to withdraw from the duty scheme.

24 ‘Aanwijzing rechtshulpstand politieverhoor (2010A007)’, Stc 2010, 4003.
25 Very serious crimes carrying a penalty of 12 years or more (e.g. intentional unlawful killing, arson, sex offences, organised crime) with a substantial impact on society; serious offences involving suspects between 12 and 15 years of age and those involving suspects between 16 and 17 whose intellectual faculties are impaired.
26 Those for which a remand in custody is allowed and which do not come under category A.
27 Minor offences and misdemeanours.
28 See Spronken (n 4) at 1307.
Given that there has not yet been a case against the Netherlands in Strasbourg, it is a moot question whether the new rules meet the European Court’s minimum standard that was not only set out in *Salduz* but has been clarified and expanded in a number of cases since. Increasingly, Dutch legal scholars are starting to doubt whether the Netherlands has come up to scratch.\(^{29}\) It has been said, for example, with regard to *Pischchalnikov v Russia*,\(^{30}\) that it is hard to see how effective legal assistance could be rendered without the lawyer’s presence during the interrogation. Commenting on *Dayanan v Turkey*,\(^{31}\) Schalken maintains that the Supreme Court’s minimum standard must now be revised, given that article 6 can be said to be violated if the suspect has not had the benefit of legal assistance at the police interrogation—full stop. Whether he made a statement or not, or withdrew or repeated it after consultation—all matters that the Supreme Court takes into account on deciding whether the trial can be said to be fair—is irrelevant now that the European Court appears to have separated the right to legal assistance from the principle of *nemo tenetur* and to regard the former a basic fundamental right on its own merits. *Dayanan* also makes clear that “legal assistance” in connection with police interrogations implies sufficient scope for discussing the case, for organizing the defence, for discovering exculpating evidence, monitoring the circumstances of detention and assisting confused clients. All of which, according to the commentator, means that the two hours waiting time and 30 minutes consultation allowed in the Netherlands must be regarded as insufficient.

Where *Dayanan* still gives no definite indication that the lawyer must be present during the investigation, *Bruuco v France*\(^{32}\) appears to do just that. Bruuco, originally heard as a witness, made self-incriminating statements when in detention (garde à vue) without legal assistance. The European Court found: “L’avocat n’a donc été en mesure ni de l’informer sur son droit à garder le silence et de ne pas s’auto-incriminer avant son premier interrogatoire ni de l’assister lors de cette déposition et lors de celles qui suivirent, comme l’exige l’article 6 de la Convention”.\(^{33}\) The prosecution service took this to mean that the right to legal assistance implies consultation either before or during the interrogation—the most restrictive interpretation possible. In response to parliamentary questions, the Dutch minister of justice and security is slightly more expansive: “the suspect must have the opportunity to consult with a lawyer before and during the investigation… which does not lead directly to the conclusion that the lawyer must be present at the interrogation”.\(^{34}\) Presumably the minister imagines a pause in the questioning to allow the suspect to consult. In the same letter to

\(^{29}\) See e.g. as well as Spronken (n 4), T.M. Schalken, Comment on Dayanan v. Turkey, NJ 2010, 92; A de Swart, NJB 2010, 4, 223; J Coster van Voorhout, DD 2009/10, 1110.

\(^{30}\) App No 7025/04, 24 Sept 2009.

\(^{31}\) App No 7377/03, 13 Oct 2009.

\(^{32}\) App No 1446/07, 14 Oct 2010. At the time of writing, the judgment was available only in French.

\(^{33}\) Pura 54.

Parliament, he refers to awaiting the results of the experimental research mentioned above before presenting his legislative proposal.

Those results have now been published and they have produced a very interesting conclusion. The researchers found that, if suspects were allowed prior consultation only, this resulted in a greater number of them invoking their right to remain silent. That in turn provoked the police into more coercive methods of questioning of the type capable of inducing false confessions (which in turn makes the presence of a lawyer the more necessary). Given that legal assistance during police interrogation is aimed at both protecting against self-incrimination and such police methods, the authors conclude that consultation cannot be split off as a separate right from the presence of the lawyer, but that effective legal assistance requires both. Moreover, a lawyer present in the room is more likely to be able to judge when it is in the suspect’s interests to collaborate with the police so that blanket refusals to speak (the only reliable advice the lawyer can give prior to questioning) would be less likely.

In the light of these findings, and as one decision has followed the other in Strasbourg, bit by bit the Dutch strategy of damage control has been eroded until, in his comments on Brusco, even the minister of justice and security himself reluctantly concedes that it can by no means be ruled out that “in future” the rights embodied in article 6 will include the right to not only consult a lawyer prior to and during police interrogations but also to have one present in the interrogation room. Indeed, during a recent symposium on the research, where representatives from the police and several academics spoke out vehemently against the idea, the head of the prosecution service gave a remarkable speech. He called on the government and the courts to give up what he termed a last ditch stand and to accept “the inevitable”. Even if the European Court never utters the words “right to the physical presence of a lawyer”, he declared, it is only a matter of time before the category of vulnerable suspects to whom it already affords that right has become so large, that in practice Article 6 can be said to embody the general principle that the right to have a lawyer attend the police interrogation is fundamental to a fair trial. “Whether we like it or not, the sooner we are prepared for it, the better”.

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36 Letter to the Second Chamber of Parliament from the Minister of security and justice (n 34).