# Criminal defence rights in a global context

## **Ed Cape** introduces this issue of **cjm**

***The right to fair trial is one of those motherhood and apple pie, feel good, aphorisms that no-one, and no government, can seriously disagree with. However, it is often preceded with 'of course' – as in 'of course fair trial is important', and then often followed by 'but' – as in 'but the system must be efficient'. As soon as you begin to ask what it means, and particularly if you ask what it means in terms of the rights of those suspected or accused of crime, the picture rapidly becomes clouded. In the United Kingdom, and in many other countries, the rise of managerialism and the 'discovery' of victims as a political constituency has meant that whilst lip-service is paid to fair trial, the importance of defence rights in the criminal process, both as a substantive aspect of human rights and as a key element of the right to fair trial, has been side-lined if not forgotten.***

Neither the *Coalition Programme for Government* (HM Government, 2010) nor the *Home Office Business Plan* (Home Office, 2012) mention fair trial nor, indeed, justice as objectives. The Ministry of Justice White Paper *Swift and Sure Justice* (Ministry of Justice, 2012) does, evidently, have 'justice' in the title, but it is used in a very particular way. The public has a right to expect 'swift justice' – meaning that low-level uncontested cases are dealt with promptly and efficiently, and 'sure justice' – so the system can be relied upon to deliver punishment and redress fairly and in accordance with the law and public expectation. 'In this way', states the White Paper, 'we will transform criminal justice from an uncoordinated and fragmented *system* into a seamless and efficient *service*'. But not, it seems, a service founded on the right to fair trial. Probably the most recent legislative programme explicitly designed to improve fair trial rights was the *Police and Criminal Evidence Act*, and that was brought in by the Thatcher government in 1984.

In the themed section of this edition of **cjm** we look beyond the shores (and in relation to Scotland, the land border) of England and Wales to examine criminal defence rights from a global perspective. Inevitably, England and Wales will figure in this examination – for some good reasons, but also for some bad reasons – but the aim is to leave behind some of the parochial concerns about fair trial rights in our own jurisdiction and to examine some of the very significant challenges, but also some positive developments, elsewhere.

The examination begins in Europe. Over the past decade or so, the European Court of Human Rights (ECtHR), interpreting the European Convention on Human Rights (ECHR) and in particular Article 6 (the right to fair trial), has progressively articulated what fair trial means, and what procedural rights suspects and accused persons should have in order to ensure fair trial. In the first article I briefly summarise some of this case-law, but a picture of widespread failure by signatory states to comply with Convention standards soon emerges. Whilst the worst offenders are to be found in some of the states that have acceded to the Convention relatively recently, such as Russia and Ukraine, some of the 'old Europe' states, our own included, do not have an enviable record. The Convention is now more than 60 years old, so why do states have such difficulty in meeting the standards? This question is explored using research conducted over the past few years in seventeen European countries.

The limitations of the ECHR in ensuring compliance with fair trial standards was one of the reasons why the European Union (EU) embarked on a programme of legislation governing procedural rights for suspects and defendants. The EU 'roadmap' of procedural rights is the subject of the article by **Caroline Morgan**, who played a leading role at the Commission in bringing it to fruition. Morgan explains that an attempt in the early part of this century to introduce legislation to redress the imbalance resulting from extensive EU legislation covering law enforcement and mutual recognition did not reach consensus but, perhaps, was too polite to mention that the British government played a major role in ensuring that it was defeated. However, the roadmap was adopted at just about the same time as the Lisbon Treaty, which introduced qualified majority voting in the field of criminal justice, came into effect. She describes the first measure adopted under the roadmap, the Directive on interpretation and translation.

The need for EU-wide legislation on procedural rights for suspects and defendants is demonstrated by **Jago Russell and Alex Tinsley's** article on the European Arrest Warrant (EAW). They show some of the difficulties that arise when jurisdictions with very different legal traditions and cultures are forced to closely co-operate with one another. The 'cosmopolitan' approach of the courts in enforcing EAWs presents real dangers to fair trial rights if effective minimum standards of procedural rights are not in place.

There follows three articles, by **Jodie Blackstock**, **Jacqueline Hodgson** and **Nadejda Hriptievschi**, which



10.1080/09627251.2013.805352

explore in the context of three different jurisdictions – Scotland, France and Moldova – the challenges of giving effect to one procedural right, the right of access to a lawyer for people in police custody. In Scotland and France, the introduction of this right was prompted by a decision of the ECtHR, whereas in Moldova the right had existed since 2003 but had not been effectively implemented. Their articles provide a flavour of the considerable difficulties that so often impede defence rights. In Scotland and France there was significant political and judicial resistance to the idea that suspects should have access to a lawyer, and in Scotland and Moldova the legal professions have been reluctant to take up the challenge of providing good quality legal assistance to people in police custody. The experience in all three countries shows how, if legal rights are to be effective, close attention must be paid to the issues of how suspects are to be informed of their rights, how suspects are to decide whether to exercise their rights, and how legal assistance is to be delivered.

Moving beyond Europe, the article by **Martin Schönteich** demonstrates why defence rights are so important. As he writes, on an average day over 3 million people are in pre-trial detention – that is, are locked up without having been found guilty of any offence or without having been sentenced. Collectively, those in pre-trial detention today will spend 640 million days behind bars. In some countries, the overwhelming majority of those in prison have not been tried. The result is not just felt by those in prison, and their families and dependants. Corruption, torture, criminality, ill-health and the spread of infectious diseases all result, in addition to adverse economic consequences.

One way of trying to tackle this is to ensure not only that suspects and accused persons have a right to legal assistance, but that they have an *effective* right to legal assistance – and that requires some investment. The word investment, rather than spending, is the appropriate word since expenditure on legal aid can bring dividends, not simply in making procedural rights effective, but in reducing corruption and ill-treatment, bringing down the numbers in pre-trial detention, improving the conduct of and respect for the police and legal institutions, and ultimately in terms of compliance with the law and social cohesion (Jackson, 2012). **Roger Smith** describes some global trends in criminal legal aid. Whilst in the UK we are witnessing what some believe to be the destruction of legal aid, the news elsewhere is not all bad. The United Nations has recently adopted Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (United Nations, 2012) and a number of countries are making real efforts to introduce or extend legal aid.

However, this is not to underestimate the size of the challenge, which in many countries may appear to be insurmountable. In India, as **Madhurima Dhanuka** describes, whilst the law appears to guarantee procedural rights for suspects and defendants, the reality is very different. People, especially poor and illiterate people, face ill-treatment by the police and can languish in prison, untried, for years. In Brazil, as **Isadora Fingermann** shows, the picture is not very different. Again, constitutional and legal rights look good on paper, but often mean little. Yes, there is a public defender service, but in São Paulo, for example, each criminal public defender has to serve an eligible population of nearly 140,000 people. Even if a defendant has a lawyer, they may not see them until 10 minutes before the trial, three or four months after they were first arrested.

Despite this dismal picture, both Madhurima Dhanuka and Isadora Fingermann have faith in the power of the norms established by the international community to enable, if gradually, domestic conditions to be improved. And this is where we might bring the British government back in. Far from celebrating the achievements of the ECHR and the EU in establishing, if not yet achieving, fair trial rights for suspects and accused persons, our own governments – both New Labour and the Coalition – have been obstructive at nearly every turn. Having defeated the earlier attempt by the EU to introduce legislation designed to improve procedural rights, in the post-Lisbon era the government (whilst opting in to the Directives on interpretation and translation, and on the right to information) has opted out of the proposed directive on the right to a lawyer, and is in the process of opting out of all of the pre-Lisbon Treaty criminal legislation. A massive own-goal that, according to Viviane Reding, the EU justice minister, will 'damage Britain' (Bowcott, 2013). But it is not only Britain, and its citizens, that the government's actions will damage. It will do untold damage to efforts around the world to improve procedural rights and give meaning to the right to fair trial and the rule of law.

This edition also features a heartfelt appreciation of that powerhouse of his generation, Stan Cohen, as remembered by **Barbara Hudson**. The topical section includes a thought-provoking piece by **Roy Coleman and Joe Sim**, who deconstruct the discourse of regeneration policy in the city of Liverpool, and a cogent argument for raising the age of criminal responsibility by **Tim Bateman**. ■

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