Avoiding procedural rights: the evidence from Europe

Ed Cape examines how the right to a fair trial has developed and how it is implemented

There is near universal agreement that the right to fair trial is a fundamental human right. The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948, states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him' (Article 10). This is reflected, and articulated in greater detail, in conventions, covenants and other forms of international law around the world. In Europe, still recovering from the catastrophic aftermath of the Second World War, the newly formed Council of Europe prioritised the drafting of a human rights charter, and ten member states signed the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in November 1950. It entered into force less than three years later. Over the decades since then the number of signatory states has continued to grow (now totalling 47) – signing up to the Convention was almost a rite of passage for the newly democratic states emerging from the break-up of the USSR in the 1990s, and is also a condition of membership of the European Union (EU).

ECHR standards

A key provision of the ECHR is the right to fair trial. Article 6 provides that in the determination 'of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (Article 6(1)). The Convention does not define fair trial, but it does set out some of the key constituent elements, expressed in terms of the rights of a person charged with a criminal offence: the presumption of innocence; the right to be informed of the nature and cause of the accusation; the right to adequate time and facilities for the preparation of the defence; the right of a person to defend themselves in person, or through a lawyer, paid for by the state if it is in the interests of justice and they cannot afford a lawyer; the same right as the prosecution to call and examine witnesses; and the right to free assistance of an interpreter for those who cannot understand or speak the language of the proceedings (Article 6(2) and (3)). There is now a large body of case-law from the European Court of Human Rights (ECtHR) putting flesh on the bare bones of the Convention and, importantly, the term 'charge' has been interpreted to include people who are under investigation by the police or other law enforcement agents. Thus, fair trial rights apply from the moment that a person is officially notified by a competent authority that they have committed a criminal offence (see ECtHR 15 July 1982, *Eckle v Germany*, No. 8130/78, para. 73).

… and violations

Even a rudimentary survey of ECtHR decisions shows that many European states fall a long way short of compliance with the fair trial standards of the Convention. Whilst some Eastern European states, and particularly Russia and Ukraine, together with Turkey, are some of the worst offenders, laws and practices in many 'old' European states such as France, Spain and the United Kingdom have regularly been found to be wanting (see generally Trechsel, 2006, and for the UK, Emmerson, et al., 2012). In 2011 the Parliamentary Assembly of the Council of Europe criticised nine countries for 'major systemic deficiencies' causing repeated violations of the ECHR (Council of Europe, 2011).

Decisions of the ECtHR provide only a partial picture of the widespread failure of European states to honour the fair trial rights, to which they so publicly subscribe. In order to get before the court, an applicant has to surmount considerable hurdles. Before they can lodge an application they must exhaust domestic remedies, must find a lawyer who not only has sufficient expertise, but who is willing to take the case on without any hope of being fully recompensed for the time spent, and must join the queue of about 130,000 pending applications. Moreover, the court is focused on whether, overall, a trial is fair – whilst it may find that procedural rights have been breached, it may nevertheless find the state not to be in breach of the Convention.

The problem is not the legal framework

Over the past few years a number of studies have examined more closely both the extent of the failure to comply with fair trial rights, but also why such failures are so widespread (Cape et al., 2010; Cape et al., 2012; Schumann et al., 2012). Between them, they looked at seventeen countries. Interestingly, the laws of most countries were found to be broadly compliant with the Convention fair trial obligations. So why, in practice, are the rights so frequently dishonoured?

Broadly, in order for fair trial rights to 'work' in practice, the laws setting out the rights must be supported by detailed regulations and procedures, and by institutions (such as legal aid authorities) that are designed, or charged with the duty, to give effect to the rights. Just as important, however, are the organisational imperatives affecting,

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and the professional obligations and cultural attitudes of, the key criminal justice personnel – police officers, prosecutors, judges and lawyers. If any of these elements is missing, the fair trial rights guarantees for suspects and defendants are likely to fail. This can be illustrated by a few examples.

Rights avoidance by police and prosecutors

In most countries in the studies the police, and to a lesser extent prosecutors, engage in practices which, intentionally or not, deprive suspects of some or all of their procedural rights. This is most starkly demonstrated by Ukraine, where most formal arrests are preceded by informal, unauthorised detention that may last for hours, and sometimes days. Unauthorised detention means that a person can be held without any procedural rights, and also without appearing in any official statistics. However, similar practices, if less extreme, are to be found in many countries – 'initial arrest', 'informal investigation', 'voluntary attendance' at the police station, interviewing suspects as 'witnesses'. Sometimes such practices are permitted by law. As Jodie Blackstock explains in her article in this section, in Scotland, until the Supreme Court decision in *Cadder* forced a change in the law, the police were permitted to detain a suspect for up to six hours and interview them without access to a lawyer. But even where such practices are contrary to the law, they are encouraged by management targets and professional cultures that regard anything other than successful prosecution as failure, and are ignored or condoned by judges who do not want to, or do not want to be seen to, undermine the police.

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Inadequate legal aid

Since most suspects and accused persons are relatively poor – which is the case across Europe – the right to a lawyer is dependent on a functioning legal aid system. This requires adequate resources, and institutions to administer it, clear means and merits criteria, procedures which ensure that accused persons are aware of the right and can access it, and schemes for delivering it. Some or all of these requirements simply do not exist in many countries. In Poland, for example, the means test is not clearly specified, and legal aid is determined by a judge, the cost coming out of the judge's court budget. This means that it is difficult to apply for legal aid at the investigative stage, and judges can use the lack of a means threshold to deny legal aid in order to protect their court budgets. In Italy, whilst legal assistance is mandatory in all criminal proceedings, the means threshold is extremely low, and thus most suspects and defendants are forced to pay for a lawyer whether or not they want them. Remuneration for legal aid work in most countries is far below lawyers' normal fees (and few have public defenders), and in some countries is hardly remunerated at all. This, of course, means that many lawyers do not want to do legal aid work, and where they do (or are required by professional rules to) take it on, they often do not do it to an acceptable standard. This often means that suspects and defendants in custody are rarely visited by their lawyers, are often not kept informed of developments in their case, and that lawyers only attend hearings where they are obliged to be present and do little on behalf of their clients even when they do attend. In many countries, inadequate remuneration means that legal aid work is carried out by young and inexperienced lawyers, and in some jurisdictions 'pocket lawyers', dependent on official appointment, simply do the bidding of the police or prosecutor.

Detaining a person in custody before they have been found guilty of an offence presents a challenge to the presumption of innocence

Over-use of pre-trial detention

Pre-trial detention decisions provide a third example. Detaining a person in custody before they have been found guilty of an offence presents a challenge to the presumption of innocence. In recognition of this, the ECtHR has held that judicial authorities must examine whether there is a genuine public interest that justifies deprivation of liberty and must consider alternatives such as conditional release. Decisions to detain a person must be reasoned, and detention must not exceed a reasonable time. The use of pre-trial detention does vary considerably across Europe – about 44 per cent of the prison population in Italy are in pre-trial detention, compared to England and Wales where the equivalent figure is about 15 per cent (EU, 2011). Seriousness of the alleged offence is not, in itself, a valid reason for ordering detention, but in many countries judges do simply look at the seriousness of the offence and take a formulaic approach to justifying their decisions. To some extent, this is not surprising. Ordering detention is the safe decision, whereas ordering release can carry significant risks. In Bulgaria, for example, judges who started to apply the proper criteria to their pre-trial detention decisions following a series of adverse ECtHR decisions, were then subjected to a

series of public attacks by politicians, including the Minister of Justice, for doing so.

Do governments care?

An interesting and important question that arises from this brief account of procedural rights in Europe is why governments sign up to due process obligations but often do so little to ensure that they are respected in practice. Whilst, quite rightly, the needs and interests of victims of crime have found 'voice' over the past two decades (although delivery of real benefits for them falls well short of what is needed), there is no equivalent lobby for, or political interest in, the rights and interests of those suspected or accused of crime. Giving effect to procedural rights for suspects and accused persons, and thus to the right to fair trial, is a complex, difficult, task and, with some notable exceptions, it is an obligation that many governments in Europe often appear content to avoid. ■

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