

BOOK REVIEW

T. Spronken, G. Vermeulen, D. de Vocht and L. van Puyenbroeck, EU Procedural Rights in Criminal Proceedings, Maklu Publishers, 2009, 116 pp. (ISBN 978090-466-0317-8)

The European Convention on Human Rights (ECHR) sets forth basic standards of criminal procedure which all EU member states are obliged to honour. As the authors of this study point out, however, how and whether particular member states honour those standards in practice varies widely. In 2003, the European Commission attempted to formally address the gap between Convention standards and the practice of criminal procedural rights, but disagreements between member states blocked agreement on a Council framework decision.¹ As a result, progress in this area within the European Union as a whole has been confined to the commissioning of studies that detail the current state of criminal procedural rights in the member states. As with the first study completed in 2005, this publication's primary value is that it raises awareness of the procedural standards set forth in the Convention and highlights the progress that remains to be made to achieve those standards.

The research presented in this volume focuses on member state legislation with respect to four specific procedural rights: the right to information, the right to legal advice, the right to legal assistance (partially) free of charge and the right to interpretation and translation. According to the study, which is based on questionnaire responses received from the member states, each of the member states 'more or less' guarantees those four procedural rights in accordance with the ECHR. That equivocal conclusion underscores the authors' finding that there is a wide divergence in the implementation of these rights in everyday practice between the member states and a gap between everyday practice and the standards set by the Strasbourg Court.

With respect to the right to information, the authors identify two separate dimensions of that right. The first dimension includes the defendant's right to be informed of the nature and cause of the accusations against him and the right to have access to the evidence underlying the accusation. In both France and Luxembourg, there is no statutory right to remain silent. Similarly, suspects in both Belgium and Finland possess no right under applicable state law to remain silent. Member state divergence from the ECHR's right to access the case file, which is a key requirement of a fair trial, is even more substantial, as Estonia, France, German, and Spain have all failed to codify that standard. The second dimension, which is not explicitly covered by the ECHR, is the right to be informed of fundamental procedural rights. Despite the fact that all member states possess a legal obligation to inform a defendant of his or her procedural rights, this information is not always communicated to defendants in a timely manner. Most critically, in

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many member states in which a suspect has a right to an attorney during a police interrogation, that right has either not been codified or no procedures exist in practice to secure that right despite the fact that the European Court of Human Rights (ECtHR) has ruled that the right attaches immediately following arrest. According to the study, the right to consult with an attorney before questioning is not guaranteed in four member states, and in five member states a suspect's attorney has no right to attend a suspect's interrogation. Moreover, the criminal codes of procedure in six member states contain no provisions requiring the state to inform the suspect that he or she has a right to call and examine witnesses.

Another aspect of criminal procedure in which there is a wide divergence of practice in the European Union concerns the right to information concerning legal aid. Member states define the moment at which that right attaches in a variety of ways, and the authorities in four member states are not obliged to inform the suspect of the right to legal assistance. Similar deficiencies exist with respect to other information-related rights.

The study next addresses the right to legal assistance that is partially free of charge. As one might expect, there is a wide variety between the standards that member states use to determine eligibility for legal assistance. Although Article 6(3)(c) ECHR guarantees individuals the right to legal assistance that is partially free of charge, the ECtHR's case law has granted states a certain margin of appreciation in designing a system to achieve that goal. A key finding reported in the study is that member states possess varying levels of financial resources that they are able to devote to legal assistance. In an era of restricted state revenues, the extremely low legal aid budgets in some member states call into question whether or not some countries can adequately fund legal assistance in all cases where the interest of justice requires it. Along similar lines, although member states are obligated to ensure that a suspect receives effective legal advice, the study reports that many countries lack system for monitoring the quality of the legal assistance provided to criminal defendants.

The multiplicity of languages spoken within the European Union, coupled with the fact that EU citizens possess an unrestricted right to travel within the Union, pose a challenge to criminal justice systems that must be prepared to interpret proceedings and documents into the suspect's language. All member states guarantee the right to interpretation during criminal proceedings. However, in five member states the right to translation is not guaranteed and there is not right to translation during attorney-client meetings.

The final procedural right addressed by this study is member state compliance with mutual recognition instruments. The study's key finding in this area is that the mutual recognition instrument that member states treat most equally to domestic procedures is the European Arrest Warrant. The study's findings with respect to other recognition instruments were hampered by the fact that some member states have not formally incorporated particular instruments into national legal schemes.

While this study possesses utility as an assessment tool, the results of the study raise several key questions. Most critically, what is the next step that the Commission can take to improve compliance with the Convention with respect to

criminal procedure? Secondly, in light of the fact that member states have already rejected a Framework Decision on Criminal Procedure, does a universal consensus exist that will advance compliance with the Convention's standards? Finally, if such a consensus does indeed exist, do politicians in individual member states possess the political courage necessary to enact legislative changes at the state level that may promote procedural justice?

These questions cannot be easily answered. In some sense, the economic challenges barring implementation of rights such as the right to legal assistance and the right to translation in some states represent the least tractable hurdle. The tougher challenges are political in nature. Achieving progress with respect to other Convention rights may face larger political hurdles at the member state level as politicians find it more expedient to make commitments to law and order programmes than to strengthen the rule of law. On a more fundamental level, perhaps, the key impediment to making progress on the ground towards improving criminal procedural rights may be unresolved disagreements on the proper relationship between criminal procedural rights and behavioural incentives for law enforcement. In the United States, courts' enforcement of the exclusionary rule in the context of an adversarial system encourages law enforcement officers to protect criminal procedural rights. In contrast, the continent's historical commitment to the inquisitorial method of truth-finding reflects a stronger confidence in state authority and neutrality than exists in the United States. On some level, the Convention's attempt to heighten and universalize procedural safeguards represents an acknowledgment that states cannot be completely trusted to find the truth in a manner that advances the cause of real justice. Ultimately, to close the gap between Convention standards and actual practices, the EU member states must come to a broader consensus on what measures the European Union can take to create both guidance and incentives for the actors in the criminal justice system to comply with Europe's increased normative commitment to procedural justice.

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