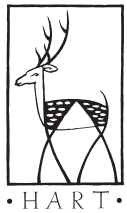
Obstacles to Fairness in Criminal Proceedings

Individual Rights and Institutional Forms

Edited by
John D Jackson and Sarah J Summers



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1

Introduction

JOHN D JACKSON AND SARAH J SUMMERS

I. FAIR TRIAL STANDARDS

THE FAIR TRIAL standards enshrined in various human rights instruments that were agreed in the post-World War II settlement have proved remarkably influential as a basis for legitimising criminal proceedings. The increasingly cosmopolitan nature of criminal justice forcing different legal systems to interact with each other as they attempt to combat crime beyond national borders has accentuated the need to rely upon common standards for building trust in each other's systems and the human rights instruments have provided a ready tool for doing this. The drive towards closer cooperation in criminal justice has been particularly acute in Europe within the European Union's area of 'freedom, justice and security'. In recognition of the differences between different jurisdictions, the principle of 'mutual recognition' has been developed whereby decisions taken in one Member State are accepted as valid in other Member States.[1] But for this to work there needs to be an element of trust in each other's systems and this has been based on the assumption that Member States meet the human rights requirements set out in the European Convention on Human Rights (ECHR) and in particular the minimum standards of procedural rights for suspects and accused persons set out in Article 6 of the ECHR. The European Union has since adopted its own Charter of Fundamental Rights which cannot fall below the protection of those afforded by the ECHR.[2]

Beyond the attempts to create closer cooperation between European criminal justice systems, the even more ambitious attempts to create an international criminal order by making individuals responsible for international crimes have again called upon human rights instruments and in particular the fair trial standards set out in the International Covenant on Civil and Political Rights (ICCPR) to lend them legitimacy. Amid the difficult task of finding agreement on the aims of international criminal justice and on what rules of procedure and evidence should govern the international tribunals and courts, there has been a consensus on the need for them to apply these fair trial norms. The report which the Security Council requested the Secretary General to prepare on the International Tribunal for the prosecution of persons relating to violations of international humanitarian law committed in

[1] See Treaty on the Functioning of the European Union Art 82 [2008] OJ C115.
[2] See Charter of Fundamental Rights of the European Union Art 52 [2012] OJ C326.

the former Yugoslavia—the first international criminal tribunal to be created since Nuremberg—considered that it was 'axiomatic' that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings.[3] In the view of the Secretary General, such standards were contained in Article 14 of the ICCPR and this Article was incorporated, almost verbatim, into Article 21 of the draft Statute which the Security Council approved for the Tribunal. The same standards have been incorporated into the statutes of the other international criminal tribunals including that of the International Criminal Court (ICC).[4] There were good pragmatic grounds for doing this. International tribunals have been dependent on the cooperation of states to execute their requests for assistance but without the tribunals adhering to internationally recognised human rights standards, states would run the risk of not complying with their own human rights obligations if they were to comply with these requests.[5] But, more importantly, it would be difficult for the international tribunals to maintain legitimacy and to avert the charge of 'victor's justice' if they did not sign up to standards that have long been recognised by national states as constituting a fair trial.[6]

It would be wrong, however, to consider that the fair trial standards in the various post World War II human rights instruments were somehow an 'add-on' to the procedural traditions of the states that signed up to these instruments. While subscribing to the instruments enshrining these standards helps states to provide external legitimacy to their justice systems, the standards were already embedded as professed standards within many domestic systems. Some of the values underlying them go back as far as the ancient world. Support for the right to be heard, for example, can be traced in biblical passages and in the writings and speeches of notorious playwrights and orators of the ancient Greek world.[7] The right found its way into Roman law and found expression in the inquisitorial regimes of continental Europe that existed up to the end of the eighteenth century which are better known for their unrestrained use of torture to extract confessions.[8] The right to a fair trial is more commonly traced back to the common law tradition and finds its expression most famously in Article 39 of King John's thirteenth century Magna Carta, which prescribed that no action shall be taken against a free man except by the lawful judgment of his peers.[9]

[3] *Report of the Secretary General pursuant to para 2 of Security Council Resolution 808*, s/25704 [106], cited in V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, Transnational Publishers, 1995) 23.

[4] See, eg, in addition to International Criminal Tribunal for former Yugoslavia (ICTY) Statute Art 21; International Criminal Tribunal for Rwanda (ICTR) Statute Art 20; The Special Court for Sierra Leone (SCSL) Statute Art 17; Special Tribunal for Lebanon (STL) Statute Art 16; and ICC Statute Art 67. Internationalised tribunals have similarly subscribed to the fair trial standards in Art 14 of the ICCPR. See, eg, Art 12(2) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Agreement. For further elaboration, see Ambos, ch 9 in this volume.

[5] S Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, Oxford University Press, 2003) 6.

[6] ibid. See also C Warbrick, 'International Criminal Courts and Fair Trial' (1998) 3 *Journal of Armed Conflict Law* 45, 48 f.

[7] See R Summers, 'A Plea for Process Values' (1974) 60 *Cornell Law Review* 1.

[8] M Damaška, 'The Quest for Due Process in the Age of Inquisition' (2012) 60 *American Journal of Comparative Law* 919.

[9] See A Arlidge and I Judge, *Magna Carta Uncovered* (Oxford, Hart Publishing, 2014).

Basic procedural safeguards that we now associate with the right to a fair trial did not, however, take hold until the Enlightenment when the notion of citizens as subjects of a democratic national state evolved. The underlying driver of this shift from persons as objects of state authority to persons as subjects in their own right was the need to respect the dignity of the human person, that subjects must at all times be treated with the concern and respect to which they are entitled by virtue of their humanity.[10] A number of 'inalienable' rights were accordingly enshrined in such transformative instruments as the American Bill of Rights and the French *Déclaration des Droits de l'Homme et du Citoyen* which included many now commonly associated with the right to fair trial such as the right to silence, the right to be informed of the accusations and have the time to prepare one's defence and the right to be presumed innocent.[11] Although many of these rights came to be constitutionalised in criminal justice systems throughout the nineteenth and twentieth centuries, it took the 'human rights revolution' after World War II to give them truly universal effect, transforming them into human rights, applicable to all citizens and non-citizens alike.[12]

Although finding their inspiration in the universal value of human dignity, the actual content of the fair trial standards has been in a constant state of evolution, changing not only from one century to another but also sometimes from one decade to another.[13] Taking Article 6 of the ECHR as a guideline, Hildebrandt has summarised its constitutive principles as follows:

1) the judge of the 'fair trial' is impartial and independent;
2) the trial is public;
3) the defendant will not suffer punitive actions as long as her guilt is not legally established (presumption of innocence);
4) the defendant is provided with equality of arms;
5) the judgment will be based on evidence presented in court (principle of immediacy, connected with a normative preference for oral testimony); and
6) the proceedings are contradictory (either adversarial or contradictory in the continental sense).[14]

To this can be added the privilege against self-incrimination which the European Court of Human Rights (ECtHR)—the authoritative source of the ECHR's interpretation—has declared to be 'one of the generally recognised international standards which lie at the heart of the notion of a fair procedure under Art 6'.[15] As Hildebrandt explains,

[10] P Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in RA Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial (2): Judgment and Calling to Account* (Oxford, Hart Publishing, 2006) 37, 41 citing I Kant, *The Metaphysics of Morals* [1797] ed M Gregor (Cambridge, Cambridge University Press, 1996) 209.

[11] CJM Safferling, *Towards an International Criminal Procedure* (Oxford, Oxford University Press, 2001) 21.

[12] Roberts (n 10) 43.

[13] T Bingham, *The Rule of Law* (London, Allen Lane, 2010) 90 f. See also his own judgment in *R v H and C* [2004] UKHL 5, [2004] 2 AC 134 [11].

[14] M Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen' in Duff et al (n 10) 15, 25.

[15] *John Murray v United Kingdom* [GC] (1996) 22 EHRR 29 [45]; *Saunders v United Kingdom* [GC] (1997) 23 EHRR 313 [68].

these standards are primarily addressed to how a defendant can challenge the criminal charge. They do not address how other participants such as victims and witnesses should be treated during the trial and one of the evolving questions that both domestic and international courts have had to deal with is how to incorporate the legitimate expectations of these participants as subjects within the criminal trial. Using the Rawlsian 'veil of ignorance' as a device to answer this question, Hildebrandt argued that while indeed victims are entitled to be treated with respect within the criminal justice system, this does not mean that within the confines of the democratic constitutional state to which we give the authority to prosecute defendants on our behalf as citizens, the victim is entitled to any legal standing in the strong sense. But this is precisely what has been contested from other perspectives which question the state's authority to act on behalf of the victim, especially in the international legal order where the state has itself no status to participate and where there is arguably a more direct role for victims in the quest to achieve its restorative and reconciliatory aims.[16]

Human rights bodies have inevitably been drawn into these controversies. In a famous enunciation of the need to recognise the rights of witnesses and victims, the ECtHR has held that 'the principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.[17] But in stopping short of proclaiming any status rights for victims, over and above the rights to which all persons are entitled under the Convention, especially in this context the need to protect the victim and respect her private life, the ECtHR has been able to maintain this balance without treading too deeply into the defendant's procedural rights.[18] Where, on the other hand, victims are given greater rights to have crimes against them vigorously pursued and to have the perpetrators brought to justice and punished, as has been suggested in certain decisions of the Inter-American Court of Human Rights,[19] then the interests in guilt determination would seem to collide more directly with the rights of the defence.[20]

II. OBSTACLES TO FAIRNESS

The continuing evolution of what fairness requires points to a difficulty in reaching a state where we can say that fairness has ever been achieved.[21] The impression given in much of the human rights jurisprudence, however, is that we are at least marching

[16] H Friman, 'Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court' in G Sluiter and S Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London, Cameron May, 2009) 205.

[17] *Doorson v The Netherlands* (1996) 22 EHRR 330 [70].

[18] JD Jackson and SJ Summers, *The Internationalisation of Criminal Evidence* (Cambridge, Cambridge University Press, 2012) 378 f.

[19] See, eg, *Bulacio v Argentina*, 18 Sept 2003, Series C no 100; *Alban-Cornejo v Ecuador*, 22 Nov 2007, Series C no 171.

[20] See M Sorochinsky, 'Prosecuting Torturers, Protecting "Child Molesters": Towards a Power Balance Model of Criminal Process of International Human Rights Law' (2009) 31 *Michigan Journal of International Law* 158.

[21] Bingham (n 13) 91.

in the right direction and that while much remains to be contested and developed, certain core principles are well established. Turning away from the normative perspective of what fairness requires and adopting instead an 'institutional' perspective towards the practice of criminal justice across domestic and international systems,[22] much greater scepticism would seem to be warranted about whether fairness is being achieved in the vast majority of criminal proceedings. Instead of the bulk of proceedings adhering to the fair trial standards enunciated in Hildebrandt's summary, we seem instead to be increasingly moving towards the position where in a number of domestic jurisdictions most proceedings are concluded *without* any significant intervention from an 'impartial and independent' judge, *without* any publicly contested trial, *without* the presumption of innocence bearing any significance in the proceedings, *without* the defendant being provided with any meaningful 'equality of arms' in terms of access to the assistance of counsel at the crucial moment of confession, *without* evidence presented in court and *without* any contradiction in the adversarial or contradictory sense. As Weigend has put it, the trial which was long ago regarded as the apex of the criminal process, has now become if not an 'endangered species' certainly a 'minority phenomenon'.[23] This would seem to have occurred across the dominant procedural traditions. While plea bargaining was once perhaps considered a haven of American exceptionalism, it now appears to have become the norm, albeit that it takes different institutional forms in countries that were once characterised as 'lands without plea bargaining'.[24] Weigend records that in 2001 only 15.6 per cent of cases with a known suspect were disposed of by trial in Germany.[25] The US figures remain much lower, with under three per cent of federal criminal cases going to trial and less than five per cent of state cases.[26]

Even when cases go to trial the fair trial standards which are professed are not by any means practised. In some jurisdictions such as the US there has been a decline in confidence in the competence and effectiveness of counsel.[27] In others cuts in legal aid are leading to a decline in the number of cases where defendants are legally represented at all.[28] Even if an effective counsel is available to combat the prosecution case at trial, the ability to achieve fairness at trial may be undercut by unfairnesses that have been perpetrated upon the defendant before trial. Unfairnesses before trial can be hard to locate as they tend to take place in environments closed to the public eye and, despite the requirement of a public trial, there would appear to be an increasing tendency for even criminal trials in some jurisdictions to take place

[22] See Roberts's characterisation of different perspectives or approaches to conceptualising criminal procedure and evidence in P Roberts, 'Groundwork for a Jurisprudence of Criminal Procedure' in RA Duff and S Green (eds), *Philosophical Foundations in Criminal Law* (Oxford, Oxford University Press, 2011) 379.

[23] T Weigend, 'Why have a Trial when you can have a Bargain?' in Duff et al (n 10) 207.

[24] M Langer, 'From Legal Transplants to Legal Translation: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1.

[25] Weigend (n 23).

[26] JS Rakoff, 'Why the Innocent Plead Guilty', *The New York Review of Books*, 10 Nov 2014. See also Lippke in this volume, ch 12, 222 n 2.

[27] See Sklansky in this volume, ch 3.

[28] See with reference to England and Wales, P Gibbs, *Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts* (London, Transform Justice, 2016).

in camera out of the eye of the public as sensitive information is withheld from the public.[29] In the interests of preserving informants' sources, information that is relevant to the case may even be withheld from the parties.[30]

Against such disregard for fair trial standards, it is not surprising that revelations of miscarriages of justice have come to light in a number of jurisdictions. To invert the famous maxim, not only is justice not being seen to be done, it is not actually being done. Such has been the level of anxiety at the number of wrongful convictions in the US that there have been calls for radical reforms to protect the innocent, including the idea that instead of pleading guilty or not guilty, defendants should have the option of pleading innocent.[31] But such procedures come only at the price of foregoing key constitutional and internationally recognised fair trial standards such as the privilege against self-incrimination.[32]

This book aims to explore the irrelation between the professed fair trials standards to which numerous domestic and international systems subscribe and the reality that many criminal proceedings end without these standards being adhered to. We asked specialists across the disciplines of law, philosophy, sociology and criminology to engage with these questions as it became apparent that a greater understanding would be achieved by adopting a pluralist methodology towards these issues. In this we are aligning ourselves with a long line of traditions that resist the idea of legal scholarship as autonomous and insist on the importance of studying law and legal practices in a social, historical and institutional context.[33] But we also considered it important to take a 'normative' perspective towards these issues in order to address the normative assumptions that underpin understandings of fairness in criminal proceedings. The aim was therefore to foster a greater engagement between the growing legal literature on the cosmopolitan jurisprudence that is emerging on the development of fair trial rights, the sociological and criminological literature on the importance of administrative and legal cultures within criminal justice systems and the normative literature that is emerging on criminal adjudication.[34]

[29] There was an outcry a few years ago in England and Wales when it was discovered that an entire trial involving allegations against two men, one a law student, of planning terrorist attacks, was going to be heard in secret. The Court of Appeal later ruled that while the core of the case must be heard in camera, accredited journalists would be allowed into the trial. See *Guardian News and Media v AB and CD* [2014] All ER (D) 88 (June).

[30] There has been an increase at least in England and Wales in the number of cases where claims of public interest immunity are made by the prosecution to exclude evidence that may be relevant to the case. See P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (Oxford, Oxford University Press, 2010) 323.

[31] See, eg, DM Risinger and LC Risinger, 'Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure' (2011–12) 56 *New York School Law Review* 869.

[32] For discussion, see P Ferguson, 'Pleading "Innocent"? Implications for Adversarial Criminal Procedure' (2018) 1 *Journal of Comparative Law* (forthcoming).

[33] N Lacey, 'Comparative Criminal Justice: An Institutional Approach' (2014) 24 *Duke Journal of Comparative & International Law* 501, 502 f, highlighting the Process School in the United States, Law and Society and socio-legal scholarship.

[34] For different normative perspectives on criminal adjudication, see RA Duff, L Farmer, S Marshall and V Tadros, *The Trial On Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford, Hart Publishing, 2007) and HL Ho, *A Philosophy of Evidence Law* (Oxford, Oxford University Press, 2008), both discussed in Roberts (n 22).

So, for example, while those versed in studying the institutional forms and practices that have developed in actual criminal justice processes may be able to provide compelling explanations as to why fair trial standards do not apply in many cases, a failure to engage sufficiently with normative questions that seek to uncover the way fair trial standards are characterised may fail to address the full extent to which there are obstacles to fairness and how they might be overcome. Conversely, however, an undue concentration on normative questions such as the characterisation of the fair trial rights within a 'trial-oriented' perspective may, in the words of one contributor, 'miss the woods for the trees' by failing to pay enough attention to the roles of the various actors charged with delivering fairness within the institutions of criminal justice.[35]

To explore these methodological issues a little further, a number of explanations may be put forward as to why trials and by necessary implication fair trial features, no longer dominate the criminal justice landscape of many criminal justice systems. First of all, we can point to trends that undermine the emphasis that the standards put upon the dignity and autonomy of the individual accused. Although we can differentiate between those who participate as subjects in the criminal process and the ends or objects of criminal process, there is an affinity between the need to respect human dignity and one of the dominant purposes of the criminal process which is that it serves retributive justice. Underlying both is what has been described as a 'liberal conception' of criminal justice that provides for censure and punishment and the need to respect the dignity of individuals in the criminal process.[36] But this paradigm has come under challenge as other priorities assume increasing importance. A number of these can be attributed to changing functions of the modern state as the state responds to demands for greater public protection and greater economy, leading to what has been variously described as the 'punitive turn', the 'preventive turn', or the 'managerial' turn in criminal justice.[37] While these shifts in direction have been more prevalent in certain systems than others,[38] there would seem to have been a discernible trend favouring efficacy, economy and outcome over justice.[39]

Beyond the confines of the modern state, we also see a preoccupation with expediency at the international level as courts struggle with wide-ranging indictments

[35] See Miller in this volume, ch 13, 239.

[36] A Ashworth and L Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21.

[37] On the 'punitive turn' away for 'penal welfarism', see D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, Oxford University Press, 2001). For the 'preventive turn', see A Ashworth and L Zedner, *Preventive Justice* (Oxford, Oxford University Press, 2014). On the rise of managerialiam, see J McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 *Legal Studies* 519.

[38] L Zedner, 'Dangers of Dystopia in Penal Theory' (2002) 22 *Oxford Journal of Legal Studies* 341; D Downes, 'Comparative Criminology, Globalisation and the "Punitive Turn"' in D Nelken (ed), *Comparative Criminal Justice and Globalisation* (Fanham, Ashgate, 2011).

[39] Ashworth and Zedner (n 36) 40 fn 85 citing Feeley's observation that there has been a trend in the 20th century that has moved law further along a continuum, away from a concern with morality and towards policy in M Feeley, 'Actuarial Justice and the Modern State' in G Bruinsma, H Elffers and J de Keijser (eds), *Punishment, Places, and Perpetrators: Developments in Criminology and Criminal Justice Research* (Cullompton, Willan Publishing, 2004) 64.

concerning events spanning many years and questions have mounted about the international community's commitment and ability to end impunity for human rights violations.[40] The unique context that the international tribunals operate in has led to calls for the 'abandonment, or relaxation, of some cherished domestic procedural arrangements' and a modification of defence rights which some have claimed has already taken place in the prosecution of defendants in 'leadership trials'.[41] At the same time, victim-oriented theories of restorative or reparative justice which directly challenge the very conception of retributive justice as a proper end of justice have gathered force particularly in states undergoing transition and in international criminal justice, putting a strain on due process rights.[42]

While these phenomena challenge the liberal conception of criminal justice, however, they do not in themselves explain why the fair trial standards on which so much store has been placed in normative terms can melt away so easily under such pressures. After all, those who push for greater public protection from crime and who advocate for restorative and reparative justice do not reject the core concepts of dignity and autonomy that underlie the fair trial standards. At this point we need to look closer at the characterisation of the fair trial standards themselves. What makes them so vulnerable to challenge? One theme that is explored by various essayists in this collection is that the fair trial standards are not just a series of prescriptions as to how trials should be conducted across the various criminal justice systems. They have been increasingly conceived in the form of rights or constitutional guarantees available to the accused, enforceable against the state.[43] Some of the rights such as the presumption of innocence or the right to silence may be characterised as protecting the accused against the power of the state and the various organs that are charged with investigating and prosecuting crime. Others, such as the right to have adequate time and facilities to prepare a defence and the right to legal assistance counsel, may be seen as providing opportunities for the accused to participate in the criminal process.[44] But whether the rights are viewed as protective or participatory, in each case they are characterised as 'belonging' to the accused from which it follows that it is up to the accused to invoke them. This raises the question as to what happens when the rights are not exercised, as they frequently are not, and suggests a tension between the autonomy of the accused—the accused's right to exercise the rights—and the institutional need for the rights to be exercised so that the proceedings as a whole are fair and legitimate.

How this tension gets resolved may depend very much on the relative significance that is given to the importance of the accused exercising rights within the procedural

[40] G Boas, *The Milosević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge, Cambridge University Press, 2007).

[41] See MR Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10 *Journal of International Criminal Justice* 611, 612. *cf* A Zahar, 'Pluralism and the Rights of the Accused' in E van Sliedregt and S Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford, Oxford University Press, 2013) 225.

[42] J Doak, *Victims' Rights, Human Rights and Criminal Justice* (Oxford, Hart Publishing, 2008).

[43] Duff et al (n 34) 51.

[44] On participatory rights more generally, see A Owusu-Bempah, *Defendant Participation in the Criminal Process* (Abingdon, Oxon, Routledge, 2017).

traditions and institutional practices of different systems. Although the ECtHR has chosen, for good reason, not to influence a state's choice of a particular criminal justice system and has tended to assume that the procedural standards can be applied uniformly irrespective of the procedures involved,[45] the reality is that the standards have to be given meaning within the procedural traditions, cultures and institutional practices that are embedded within particular criminal justice systems.[46] At a time when economic, political and cultural systems across different jurisdictions are increasingly perceived to be part of a global whole,[47] there has been much scholarly debate on the extent to which procedural systems themselves are converging or whether the diffusion of legal institutions from one dominant system is taking over the whole.[48] But there would still seem to be considerable procedural diversity across jurisdictions and categories such as 'adversarial' and 'inquisitorial' which are used to differentiate procedural traditions and legal cultures still exercise considerable influence on comparative criminal procedure scholarship.[49] So, for example, it has been claimed that adversarial systems which put a premium on the parties controlling procedure operate on the assumption that litigants know what is best for them.[50] It follows that parties are left to invoke or waive their rights, whether this is seen in terms of objecting to inadmissible evidence or in terms of waiving their right to trial altogether. Conversely, in inquisitorial systems it is more the court's responsibility to guard against the infringement of the accused's fundamental human rights and evidentiary regulation in Europe as opposed to the US is by and large the province of the judge both as regards searching for the truth and protecting the defendant.

Another problem with characterising fairness in terms of individual rights lies in the fact that the rights are necessarily limited in terms of reach and content. There has been a slow acceptance that the fair trial rights cannot just be limited to the trial process as what happens at the pre-trial stage has an important impact on the fairness of the trial. Although concerns about the under-regulation of the pre-trial phase have existed since the origins of the modern system of European criminal procedural law,[51] the ECtHR has been slow to accept that evidence obtained during the investigation phase can determine the framework in which the offence charged will be considered at trial.[52] But there is a limit to how far away from the trial process the fair trial standards extend, as any unfairness must be shown to have

[45] See, eg, *Taxquet v Belgium* [GC] (2012) 54 EHRR 26 [83].

[46] For an examination of the different forms of legal and cultural resistance that have been offered by Member States to the European harmonisation process, see R Colson and S Field (eds), *EU Criminal Justice and the Challenges of Diversity* (Cambridge, Cambridge University Press, 2016).

[47] See V Mitsilegas, P Alldridge and L Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice* (Oxford, Hart Publishing, 2015).

[48] There is massive literature on globalisation, convergence and diffusion. For a penetrating discussion, see W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, Cambridge University Press, 2009) ch 9.

[49] M Langer, 'The Long Shadow of the Adversarial and Inquisitorial Categories' in MD Dubber and T Hörnle, *The Oxford Handbook of Criminal Law* (Oxford, Oxford University Press, 2014) 887.

[50] E Grande, 'Legal Transplants and the Innoculation Effect: How American Criminal Procedure Has Affected Continental Europe' (2016) 64 *American Journal of Comparative Law* 583.

[51] See SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Oxford, Hart Publishing, 2007); Jackson and Summers (n 18) 100.

[52] But see Can v Austria (FS), 30 Sept 1985, Series A no 96 and now *Salduz v Turkey* [GC] (2009) 49 EHRR 19 [54].

prejudiced the accused's fair trial rights before there can be any remedy for breach of Article 6. A further limitation is to be found in the content of the fair trial standards which cannot possibly encompass the full range of legal and ethical standards that actors are required to live up to in order to be fair to persons caught up in the criminal justice process.

III. INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS

The essays that follow then adopt a pluralist methodology in seeking to identify obstacles to fairness, examining both the normative limitations of viewing fairness in terms of individual rights and the institutional limitations that inhibit effective regulation of the actions of the police and prosecutors before trial in criminal justice systems.

In his chapter Stefan Trechsel discusses the characterisation of the human right to a fair trial. The essay starts with an attempt to place this right within the hierarchy of international human rights' norms before addressing its role within the framework of Article 6 of the ECHR. His argument is that the right to a fair trial is not a 'normal' human right which protects the individual against the abuse of power by the state. In his view, the notion of fairness by its nature cannot be conceived as the right of an individual in isolation as fairness presupposes interaction between parties and requires more than one actor. The essay argues that fairness is concerned rather with regulating relations between participants 'in the game' and it would be absurd to claim fairness for one participant (the accused) alone. Other interests have to be taken into account in doing fairness—those of the public prosecutor and the victim. *Al Khawaja and Tahery v UK*[53] is quoted to show that the ECtHR recognises that the right to a fair trial is not an absolute guarantee but one which is open to balancing the competing interests of the defence, the victim, witnesses and the public interest in the administration of justice.

Trechsel's conclusion that in the final analysis the right to a fair trial is a 'fuzzy panacea, a cluster of rights, not exclusively reserved for the accused, a vague ideal, more a shell than a guarantee of substance' appears to suggest that the concept of fairness is a nebulous one.[54] But his argument that in the criminal justice context it cannot be confined to the rights of the accused is one that is in stark contrast to the characterisation of fairness discussed by David Sklansky in his chapter. Drawing upon US jurisprudence rather than the jurisprudence of the ECtHR, Sklansky identifies two assumptions that shape the way fairness is pursued in American criminal procedure both of which view fairness as centred on the accused's autonomy and agency. The first assumption that is arguably a characteristic of 'adversarial' systems more generally is that fairness is best advanced through a series of procedural rights that defendants can invoke or waive at their discretion. The second assumption is

[53] *Al Khawaja and Tahery v UK* [GC] (2012) 54 EHRR 23.

[54] See Trechsel in this volume, ch 2, 35. See also Y McDermott, *Fairness in International Criminal Trials* (Oxford, Oxford University Press, 2016) 44.

that the choices made by defence attorneys can be fairly attributed to their clients. Although Sklansky regards each of these assumptions as defensible and strongly rooted in national political culture, he concludes that when the principles of autonomy and agency interact with each other in American criminal procedure they produce results that are justified on the basis of defendant choice but do not in reality reflect defendants' actual choice at all.

The next four chapters pick up on the theme that the characterisation of certain fair trial rights may end up becoming an obstacle to fairness. In their essays, Lindsay Farmer and Hannah Quirk each hark back to recent history to reflect upon the status and impact of particular rights—the presumption of innocence and the right of silence respectively—that have become associated with a fair trial. Using the House of Lords' decision in *Woolmington v DPP*[55] as a backdrop, where Viscount Sankey famously declared that one golden thread of English law that is always to be seen is the duty of the prosecution to prove the prisoner's guilt, Farmer's essay explores the way that the connection has been made between ideas of responsibility and individual *mens rea* and fairness in the criminal trial, to ask whether responsibility (or at least a particular conception of it) can under certain circumstances become an obstacle to fairness. He identifies two modern versions of the presumption. A wide version associates it with the presumption of 'material' innocence in the sense of not having committed a wrongful act, while the narrow version is more procedural and focuses on 'probative' rather than 'material' innocence. But while both these versions are motivated by the desire to address the important issues of protecting those accused of crimes and limiting the scope of the criminal law, Farmer points out they have developed alongside a criminal justice system that has become increasingly punitive. Drawing upon an argument that is developed in his recent book, *Making the Modern Criminal Law*,[56] that the commitment to moralised responsibility while promising limits and fairness to the individual has in fact been accompanied by extensions to the criminal law, he suggests that the focus on innocence as a moral quality has taken place in a cultural context where there is greater stress on the rights of the victim and the justified punishment of the guilty which is actually broadening rather than limiting the scope of the criminal law. He concludes by suggesting that in contrast to the versions of innocence which have linked together innocence, guilt and responsibility, it may be more productive to think about fairness in the criminal justice process in terms which disentangle the idea of procedural rights from moral claims about innocence and guilt so as to maximise liberty and secure civil order.

Like the presumption of innocence, the right of silence has been regarded as an article of faith by many who have seen it as an essential feature of a fair criminal justice system. Quirk's essay explains why the right has been invested with so much importance by both its supporters and critics despite the fact that even before it was curtailed in England and Wales, it was rarely relied upon by suspects who were questioned by the police. Like the presumption of innocence with which it is often

[55] *Woolmington v DPP* [1935] AC 462.

[56] L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford, Oxford University Press, 2016).

linked, the right of silence has stood for much more than a practical procedural right to be considered alongside other procedural rights, but as symbolically giving force to the more substantive right that defendants should not have to account to the state for their actions. Unlike the presumption of innocence, however, which would seem to have gained in stature by being linked to the concepts of material innocence and responsibility, the right to silence as an expression of the legitimacy of non-cooperation with the state would seem to have lost ground. Quirk argues that the curtailment of the right should be seen as a critical turning point in the 'culture of control' that developed in the 1990s altering the balance of power between the state and giving rise to a 'normative expectation' that defendants must cooperate fully in the investigation and trial process.

The following two chapters focus on another right that is strongly associated with fair trial—the right to counsel. In their essay, Jackson and Summers argue that while the fair trial rights are grounded in the first order values of autonomy, dignity and liberty, they should be viewed in an institutional context in which state monopoly on the punishment of crime and the need to avoid wrongful convictions requires that assessments of guilt are made in an environment that protects judicial impartiality by instituting a strong defence to test the prosecution case. In their view, the right to counsel is not only a personal right of the accused but an expression of the institutional need to mount an effective case against the prosecution. The essay then illustrates how this institutional account of fairness which takes a broader view of counsel than simply acting as an agent of the accused, provides a more secure basis for meeting challenges such as the pressure to avoid trials altogether, the need to withhold sensitive sources of information and the need to protect witnesses and victims.

In his chapter, Wolfgang Wohlers extends the discussion in Jackson and Summers's essay by examining the role of defence counsel in various criminal justice systems and considers whether the models of defence participation that are seen in common law and civil law systems are as far apart as is commonly assumed or whether there is common ground for developing an understanding of counsel's role on the transnational level. One way in which these models are commonly differentiated is by asking whether counsel are required to assist the accused person or whether they are expected to act as the accused person's representative. After a detailed examination of the impact of the right to counsel on the procedural role of the accused in English, US, German and Swiss law, he concludes that the all-or-nothing approach in common law systems whereby either counsel acts as the representative of the accused or the accused must defend herself unaided by counsel puts the accused between 'a rock and a hard place'.[57] Instead, he argues that a model of hybrid representation of the kind seen in Germany and more recently developed at the International Criminal Tribunal for the former Yugoslavia would seem to put the accused in a better position. At the same time he questions the fairness of the German approach whereby in certain appeal cases an accused who is not present is denied the right to be represented by counsel. At stake here is whether the pragmatic reasons against

[57] See Wohlers in this volume, ch 7, 152.

hybrid representation in adversarial proceedings or against full legal representation in German proceedings should prevail over the need to recognise the accused's interest in the assistance of counsel at all proceedings where the accused is representing himself or is absent from the proceedings.

Wohlers's argument that fairness requirements cannot be dismissed by reference to the traditional structure of national criminal procedure leads to the theme of the next three chapters which are concerned with the challenges of integrating transnational fair trial rights into diverse procedural environments at the national or international level. In his essay Dimitrios Giannoulopoulos builds on his previous work which used the ECtHR decision in *Salduz v Turkey* to explore the interaction between Strasbourg jurisprudence and the jurisprudence of courts in the contracting states.[58] He examines the case of custodial legal assistance in Greece to provide further insights into the role of the ECtHR in effecting change in national jurisdictions. While his previous examination of five countries found that *Salduz* has had a major impact, its effect has been hardly identifiable in Greece. He argues that this is not the result of ideological or cultural resistance to change. Rather, *Salduz* fell on deaf ears in Greece as a result of complacency in meeting the baseline requirements set by the Strasbourg jurisprudence. Before *Salduz* was decided, Greece had already legislated on the basic tenets of the right to consult with a lawyer prior to interrogation and the right to have a lawyer present when questioned by the police, although reports by the European Committee for the Prevention of Torture highlight a contrast between legislative protection and the exercise of the rights in practice. In the light of this, one would have expected *Salduz* to have generated at least some debate. Yet *Salduz* failed to ignite any dialogue on the need to effect change. Greece represents a classic example of the gulf that can emerge between the 'law in the books' and the 'law in practice' and the failure of transnational justice to effect any change in practice.

Unlike certain national systems like Greece which have been able to ignore taking rights seriously, the international community cannot afford to do so for the reasons explained above. The international criminal tribunals and the ICC have faced formidable obstacles in bringing to justice those accused of international crimes without the investigative and enforcement powers that are taken for granted in domestic systems. Yet, as each of the following two chapters illustrate, the 'mixed' procedural model developed by the international criminal tribunals has been heavily influenced by international human rights standards. In his essay, Ambos illustrates how the fair trial framework derived from human rights instruments is deeply embedded in the statutes of the international criminal tribunals. He argues that international criminal procedure must be guided by the two principles of fairness and expediency, positing that these principles do not contradict but complement each other and that a procedural model informed by them is fully in line with the historical experience and goals of international criminal justice. In her essay, McDermott considers the extent to which the procedures developed by the international criminal tribunals can claim to represent a universally acceptable model for ensuring the rights of the accused.

[58] See D Giannoulopoulos, '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.

She argues that international criminal tribunals have the opportunity to inform best practice in their interplay with domestic legal systems. As such, then, international criminal procedure has the potential to act as a model to be followed by domestic courts in ensuring the rights of the accused. Using a number of practical examples, however, she argues that international criminal procedure has been unable to fully live up to this potential. She discusses the possible reasons for this inability, and asks whether international criminal procedure can rise beyond these difficulties in time to provide a universal model of fairness.

One way in which the international criminal tribunals and the ICC can try to live up to the fair trials standards they profess is by making their processes as transparent as possible. The next three chapters focus on the manner in which certain non-transparent and unfair pre-trial processes can have a decisive effect on the outcome of the proceedings. One feature that is common to both domestic and international criminal procedures is their heavy reliance upon the written records of witnesses and suspect interviews conducted before the trial. In her essay, Nadja Capus considers the manner in which written records are generated from police and prosecutorial investigative interviews and how their production and use can have a distorting effect upon the decision making process. She begins by explaining how, despite the emphasis on orality and immediacy at the trial process in both common law and civil law jurisdictions and the ECtHR's insistence on evidence being examined at trial, summarised or verbatim written records form the foundation of much evidence at trial. Although she accepts that good written records may be substituted for oral testimony without impacting on fairness, the production of written records is influenced in practice by expectations in relation to the manner in which the documents are likely to be used with the result that their content is tightly controlled by the police or prosecution. She uses examples from empirical research to highlight how writing styles and formal features of the written record can impact upon the decision making process and how the written record has a decisive influence in assessing the credibility of persons questioned. She concludes that the distorting effect of the written record upon the decision making process calls into question the most basic principle of fair process—the principle of impartiality and the separation of powers—and she makes a plea for more empirical studies on how investigative interviews are recorded and used as evidence.

Richard Lippke's chapter considers another opaque process that has become increasingly common in criminal proceedings across both common law and civil law proceedings—the role of concessions in exchange for admissions of guilt. Instead of advocating the abolition of such practices which appear to undermine the right to a public trial, however, Lippke proceeds on the premise that while plea *bargaining*, especially the excesses of US-style plea bargaining which proliferate in misdemeanour cases, might be a dubious practice, appropriately constrained and judicially monitored plea *concessions* might be more defensible. He considers constraints that would limit the size of the sentencing discounts that those who plead guilty receive which can amount to 50 per cent reductions in some cases and ways of encouraging judges to more actively and vigorously scrutinise the charges that have been lodged against persons who are prepared to enter guilty pleas and the evidence in support of those charges. He concludes on the rather pessimistic note, however, that

while limited and more carefully regulated plea concessions would produce more procedural fairness for the mostly poor persons who are the denizens of the misdemeanour case-processing world, they would not do so in the absence of a broader societal commitment to provide competent defence counsel to poor offenders and without re-thinking the use of the criminal sanction altogether for certain low-level offences such as vice crime.

Lippke's call to rethink the criminalisation of vice crime is aimed at reducing the process costs inflicted on the socially and politically marginalised who tend to be at the receiving end of the policing of such crime. Improved adjudication procedures, he admits, would do little to affect the policing of vice crime as they do not address discriminatory police practices that take place before adjudication. This takes us to the argument made in Eric Miller's chapter that the focus on adjudication procedures as a means of ensuring fairness in the criminal process is misplaced as such procedures are far removed from the central concerns of police activity. In his view the adjudication-oriented view of the police as participants in the process of criminal adjudication who gather evidence for prosecution, trial and punishment takes too narrow a view of their role which encompasses taking full advantage of their powers to investigate, arrest, search and interrogate and perhaps even punish *without* resorting to prosecution and trial. A wider, more pluralist account of the policing role in Miller's view entails recognition that much police activity on the street is not aimed at criminal prosecution or the imposition of punishment, but at achieving public order and social control. This role requires that they be given special powers, that they be under special obligations and be given special permissions to impose themselves on the public in ways that have significant material and normative consequences, albeit consequences that do not always result in trial. This view has implications not only for normative claims that trials are the proper place for holding individuals responsible for their wrongs.[59] If police officers are not required to bring offenders to trial, then questions must be asked about the merits of trial-oriented theories of criminal justice as part of a philosophy of punishment or criminal law. But questions also need to be asked about making trial fairness the central concern of the criminal process and making the trial the forum for ensuring that the police are held accountable for their actions. If many of the standards that govern police conduct are not related to the adjudicative process of gathering evidence and individuals for criminal prosecution and punishment, then how are the police to be made accountable for the non-investigative aspects of their job?

Miller's argument that trials are conceptually, pragmatically and normatively independent of policing may suggest that there is no role at all for the trial in regulating police conduct. But if it is true that much that goes in the name of policing never makes it into the adjudicatory domain, it nevertheless remains the case, as Miller concedes, that *some* police conduct does make it into this forum and the question then arises as to how the judiciary should respond when there has been a failure to comply with the fair trial standards. One approach is to adopt what has been called

[59] See, eg, Duff et al (n 34) 167 f and RA Duff, 'Relational Reasons and the Criminal Law' in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford, Oxford University Press, 2013) 175.

the 'separation thesis' which argues that the actions of the police are entirely separate from those of the judiciary and should be addressed through other means such as complaints against the police, disciplinary proceedings, actions for damages, or perhaps more effectively by requiring prior authorisation for activity that impacts upon individual rights.[60] Another approach which is discussed in Kelly Pitcher's chapter is that the courts should exclude evidence obtained in breach of a right in order to prevent the right holder being disadvantaged as a result of the violation.[61] Although the question as to what rights should come within the ambit of this doctrine has been much discussed in the literature,[62] Pitcher advances the hypothesis that framing criminal procedure doctrine solely or predominantly in terms of individual rights, in particular, those set out in written constitutions or in international human rights instruments, is problematic because it oversimplifies matters, suggesting as it does that complex questions of criminal procedure can be resolved by reference to a single 'variable'. With its focus on a single variable, a rights-based approach may be an obstacle to achieving certain criminal procedure or criminal justice objectives, in particular, to preserving 'fairness' within the meaning of the right to a fair trial. Drawing upon the law and practice of jurisdictions which do not adopt a robust rights-based approach to the question of pre-trial violations, she illustrates how, on the one hand, the 'rights thesis' can be employed to achieve a more restrictive approach to pre-trial procedural violations thus allowing the courts to pursue crime control objectives under the guise of protecting rights (as in the Netherlands where it would appear to be the case that no consequences attach to violations that do not cause prejudice to the actual accused's defence rights) and how, on the other hand, the thesis can operate to unduly limit consequences being attached to pre-trial violations where fairness *is* the overriding criterion (as in the case of England and Wales and at the international criminal tribunals where the notion of fairness lies at the heart of the determination whether to stay criminal proceedings).

Apart from critiquing the 'rights thesis', Pitcher also points to how there can be various meanings attached to fairness when it is considered to be the central criterion for deciding how to respond to pre-trial impropriety. She suggests that fairness is such a diffuse concept that it is able to accommodate a variety of different values including epistemic and non-epistemic considerations and, seemingly, each of the rationales commonly advanced for attaching legal consequences to pre-trial impropriety (the reliability, deterrence, protective and integrity rationales). While a more explicit recognition of the different meanings that attach to 'fairness' would help to differentiate the 'rights' approach from fairness as a whole, others who profess to adopt a more pluralist approach towards the question of how to address pre-trial impropriety have steered away from using the term 'fairness' and preferred to use the term 'integrity' to encompass the full range of activity that should come within

[60] A Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P Mirfield and RJ Smith (eds), *Essays for Colin Tapper* (Oxford, Oxford University Press, 2003) 107.

[61] The argument was made originally by A Ashworth, 'Excluding Evidence as Protecting Rights' [1977] *Criminal LR* 723.

[62] See, eg, P Roberts, 'Excluding Evidence as Protecting Constitutional or Human Rights?' in L Zedner and J Roberts (eds), *Principles and Values in Criminal Law* (Oxford, Oxford University Press, 2012) 171.

the ambit of an exclusionary rule preventing the use of evidence obtained by unfair means.[63] When the concept of integrity is viewed in terms of normative coherence, it has been argued that criminal proceedings must be viewed as a continuous whole for which the state is ultimately responsible so that when there is gross impropriety in a criminal investigation, this so taints what comes later in the process that it is impossible, normatively speaking, to justify punishment even when the offender is guilty.[64] It is this thinking rather than any attachment to fair trial rights which would seem to be attributable to the recent judicial trend in common law procedures towards staying proceedings or excluding evidence on the basis of improperly obtained evidence. Whether 'fairness' or 'integrity' is used as the operating criterion, however, what would seem to be important is that the courts articulate, as transparently as they can, the reasons for the legal consequences that they believe should attach to particular pre-trial improprieties. A fair process is ultimately one that encourages dialogue with those who are subject to it and seeks to justify the decisions that are taken.

In the closing chapter, Antony Duff offers some thought-provoking conceptual and normative reflections on the preceding chapters in the collection. Returning to the question as to how fairness should be characterised, he points to the temptations and dangers in giving the term a broad meaning and questions whether it should be interpreted as a distinctive value standing alongside, and perhaps sometimes conflicting with, other values that bear on the criminal process or whether we should see it as an 'over-arching meta-value given determinate content by other more substantive values or principles'.[65] Building on Trechsel's insight that fairness cannot be narrowly conceived as an individual right as it presupposes an interaction between different parties, he posits that fairness in criminal proceedings can be taken to be (very roughly) a matter of giving all the different actors in the proceedings their due, so that to say that a provision is fair to the accused must also be to say that it is fair to the other parties affected by it (the witness, the complainant, the public, etc). This leads him on to the suggestion that when we think about the public interest in criminal proceedings, we need to think not only about the effective investigation and prosecution of crime but also about doing justice by paying proper regard to the interests and rights of all those who are affected by crime and the criminal justice system and of maintaining a set of legitimate institutions that can pursue these aims.

In inquiring into the fairness of our criminal proceedings, or into obstacles to such fairness, Duff argues that we must inquire more deeply than most theorists have done into the fairness of those institutional practices that enable the criminal law to function in the way that it does. This call for criminal law theorists to take institutions seriously mirrors the call others have made to political theorists to take institutions seriously.[66] It prompts Duff to make one final reflection which points the way to further inquiry and ties in well with some of the other chapters in the

[63] See, eg, Roberts and Zuckerman (n 30) 189 and more generally J Hunter, P Roberts, SNM Young and D Dixon (eds), *The Integrity of Criminal Process* (Oxford, Hart Publishing, 2016).

[64] J Hunter, P Roberts, SNM Young and D Dixon, 'Introduction' in Hunter, *et al* (n 63) 20.

[65] See Duff in this volume, ch 15, 303.

[66] J Waldron, *Political Political Theory: Essays on Institutions* (Cambridge MA, Harvard University Press, 2016).

collection. A focus on institutions means that we must attend to the range of roles that parcel out the various patterns of responsibilities, duties and rights of the various actors in the criminal justice system and together contribute to the fairness, or otherwise, of the institutional practices that are embedded in the criminal process and the criminal law. In the end, it would seem that institutional roles, not individual rights, offer a better explanatory and normative framework for understanding 'fairness' in criminal proceedings.