

# The Impact of the ECHR on access to justice in Europe

A discussion of a major research project on criminal defence rights in Europe in which JUSTICE is engaged.



## Effective Criminal Defence Rights in Europe

The goal of the project is to determine and define the right to effective defence in criminal proceedings in accordance with human rights' standards, and to empirically examine compliance with those standards across nine European jurisdictions.

This is done particularly in relation to procedural rights such as the rights to information, effective advice and representation, free legal aid for poor defendants, and to interpretation.

In addition the project aims to develop monitoring indicators which may be used to assess the extent to which effective criminal defence is available in any jurisdiction.

### Project partners

Maastricht University  
University of the West of England  
Open Society Justice Initiative  
JUSTICE

# Countries in study

<b>England &amp; Wales</b>	<b>Finland</b>	<b>Turkey</b>
<b>Belgium</b>	<b>Germany</b>	<b>France</b>
<b>Hungary</b>	<b>Poland</b>	<b>Italy</b>

# Four major research questions

- What are the core procedural safeguards for effective defence in general and for indigent suspects in particular?
- By which indicators can these procedural safeguards be monitored?
- To what extent are the requirements for an effective defence met in practice in a range of selected European countries?
- To what extent there is a gap in the protection of procedural safeguards and what role might remain for the EU?

# Our approach to effective criminal defence

A human rights approach to effective defence: putting the suspect/ accused at the centre.

This requires:

- equality of arms;
- effective representation; and
- effective participation.

# Article 6 ECHR – the substantive right

## Article 6 – Right to a fair trial

1. 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 – the specific requirements

3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in language he understands ... the nature and cause of the accusation;
  - b. To have adequate time and facilities for the preparation of his defence;
  - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free ...;
  - d. to examine or have examined witnesses against him ...;
  - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

# Fundamental pre-conditions for a fair trial

Our focus in this project is on:

1. Right to information
2. Right to legal advice
3. Right to legal assistance free of charge
4. Right to interpretation and translation



# ECHR – some unanswered questions

- When does the right to legal assistance arise?
- At what point does the right to legal aid arise?
- What information should be given to the accused about their rights, when and in what form?
- Who should appoint the defence lawyer?
- What is the role of the defence lawyer?
- What quality of legal assistance is required?
- What is the relationship between fair trial, procedural rights and criminal defence?

# Effective criminal defence rights in the EU

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**Emerging themes and  
preliminary findings**

# Emerging themes

- European Convention on Human Rights (ECHR) does not cover all aspects of effective criminal defence
- Compliance with ECHR fair trial rights in practice is variable
- There are major deficiencies in those jurisdictions examined so far

# Translation and interpretation

- No mandatory written translation of key documents (Germany: reasons of the judgment not translated; Italy: only documents addressed to a defendant; etc.)
- Summary oral translation by a court interpreter/defence lawyer of documentary evidence deemed sufficient (e.g. Germany)
- No clear statutory right to interpretation and translation (England & Wales, Hungary)
- In Italy, court must first ascertain that the defendant neither speaks nor understands Italian before right exists
- Poor quality of translation & interpretation due to lack of professional certification and training requirements (Turkey, Hungary, Belgium, Poland)
- Questionable independence when interpreters are appointed by investigative authorities (Turkey, Hungary)
- Lack of effective remedies against inadequate translation/interpretation, e.g. replacement of interpreter/translator (Poland: only if influences case outcome)

# Information: about the accusation or charge and procedural rights

- No general obligation to inform persons interrogated of nature and cause of accusation (Belgium; Hungary in relation to persons in “short-term” arrest)
- No obligation to provide a written ‘letter of rights’ (Finland, Belgium, Hungary, England –only at investigative stage)
- Persons questioned with regard to a criminal offence but who are not formally “suspects” not informed about their rights (Hungary; Poland; Belgium)
- No obligation to inform suspects in provisional detention about the right to silence (France) or the consequences of its waiver (Turkey)
- Formalistic approach to informing defendants about their rights/no obligation to explain rights and verify whether they are understood (Poland; Turkey; Hungary; Germany)
- Evidence obtained in breach of the obligation to inform is used by courts (Poland; Hungary)

# Information: access to a criminal file

- No general statutory right of access to the file at the investigative stage (Belgium, France, Poland)
- Serious limitations on access for suspects that are not detained (Germany)
- The discretion of prosecutor/ investigative authorities to restrict access often too broad (Turkey)
- Use of secret investigative measures impeding lawyer's access to a file (Finland)
- Increasing obligations on accused and their lawyers to provide information to the prosecution (England and Wales)

# Access to legal assistance

- Moment of access delayed by law in all countries studies
- No statutory right to free legal assistance during provisional detention (Poland; Germany –only after 3 months” of detention)
- Lawyers have no right to be present during police interrogations (Germany; France; Belgium)
- Statutory limitations on the duration of lawyer-client consultations during police detention (30 minutes in France)
- Lawyer-client communications may be supervised during the first 14 days of investigation (Poland)
- In terrorist cases, written communication between a lawyer and his/her client may be supervised (Germany, Turkey)
- Practical impediments on access when a suspect is in detention:
  - limited visiting hours in detention facilities (Belgium)
  - travel to a detention facility not covered by legal aid (Hungary)

# Wider limitations on effective criminal defence

- ‘Managerialist’ approach to criminal justice which emphasizes efficiency, often at the expense of procedural safeguards of defendants’ rights, is becoming popular.
- In some countries, populist “crime control” policies are on the rise in response to increased public feelings of insecurity and fear of crime exacerbated by media
- In most countries, pre-trial detention is still used by default, often for the convenience of access to a suspect/as a means to secure an admission of guilt
- Police discretionary powers to investigate and prevent crime are increasing, and as a result the boundaries of permissible interference into the individual freedom are being redefined
- In post-inquisitorial systems, judicial control over investigations is growing less effective; ample examples of judicial bias towards the interests of investigation
- In post-inquisitorial systems, lawyers often choose a passive/reactive approach (especially during pre-trial stages of the proceedings) as –allegedly –the best defence strategy



# Recent case law

- ***Salduz v Turkey*, 27 November 2008 (Application no. 36391/02)**  
... access to a lawyer should be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated in the light of the particular circumstances of a given case that there had been compelling reasons to restrict this right. Even where compelling reasons might exceptionally justify denial of access to a lawyer, such restriction – whatever its justification - must not have unduly prejudiced the rights of the accused under Article 6.
- ***Panovits v Cyprus*, 11 December 2008 (Application no. 4268/04)**  
... the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance *during* an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings.

# Conclusions

- There are significant gaps between the (object and purpose) of ECHR and the individual countries' legislation and practice
- Studies on the position of suspects in criminal proceedings in the EU, as well as jurisprudence of the ECtHR, have indicated that, where there are clear legal provisions governing defence rights of suspects, their observance of these standards varies in practice.
- Developing case law on the importance of pre-trial rights in the ECtHR (such as *Salduz v Turkey* in relation on the importance of legal assistance) poses a challenge for compliance by states bound by the European Convention on Human Rights.

# Conclusions

- These issues can be addressed by the European Union through:
  - Adoption of binding legislative instruments to ensure that general legislative norms comply with fair trial rights standards
  - Development of an implementation framework which would flesh out the general principles enshrined in binding legislative instruments
  - Development of mechanisms to evaluate compliance with effective defence rights in law as well as in practice

# The way forward

- The project will culminate in a written publication comprising reports of the 9 countries as well as analysis of the findings and recommendations for the future.
- The recommendations are likely to centre around the role of the EU in bridging the gap we currently have between the core right enshrined in Article 6 and the deficiencies in effective criminal defence in practice across Europe.

