

**Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms**, by J Jackson and S Summers, (Hart, 2018), 325pp., hardback £80.00, ISBN: 978-1-78225-835-3.

Jackson and Summers offer a compelling and interesting book that analyses the “increasingly cosmopolitan nature of criminal justice ... [and] the need to rely upon common standards for building trust in each other’s system.” (p.1). The book readily accepts that the notion of ‘fair trial standards’ are in a constant state of evolution; however in order to build these common standards the book takes Hildebrandt’s<sup>1</sup> summary of principles as the starting point for fairness in criminal proceedings:

- 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;
- 4) The defendant is provided with the equality of arms;
- 5) The judgment will be based on evidence presented at court and;
- 6) The proceedings are either adversarial or ‘contradictory’ in the continental Europe sense.

The book claims that the whilst these fair trial standards are uncontested, there appears to be an increasing move towards a position where a number of domestic jurisdictions conclude proceedings “*without* any significant intervention from an ‘impartial and independent judge,’ *without* any publically contested trial, *without* the presumption of innocence bearing any significance in the proceedings, *without* the defendant being afforded 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” (p.5). Furthermore, the introductory chapter suggests that plea bargaining, once regarded as ‘American exceptionalism’, appears to have become the norm, albeit adopting varying forms from country to country. The book seeks to explore the “irrelation between the professed fair trial standards to which numerous domestic and international systems subscribe and the reality that many criminal proceedings end without these standards being adhered to” (p.6). The book fuses the disciplines of law, philosophy and criminology to take a ‘normative’

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<sup>1</sup> M. Hildebrandt, ‘Trial and “Fair Trial” From Peer to Subject Citizen’ in R.A. Duff, L. Farmer, S. Marshall and V. Tadros (eds), *The Trial on Trial (2): Judgment and Calling to Account* (Oxford: Hart Publishing 2006) 15, 25.

perspective towards these issues in order to address the “normative assumptions that underpin the understandings of fairness in criminal proceedings” (p.6). The notion of fairness is explored through the terms of both “individual rights and the institutional limits that inhibit effective regulation of the actions of the police and prosecutors before trial in criminal justice systems” (p.10).

The first substantive chapter begins with a contrast regarding the Right to a Fair Trial. Stefan Treschel examines the characterisation of the right to a fair trial and highlights that should one side be afforded a greater deal of fairness that would be “grotesque, absurd and completely illogical” (p.33). He suggests that fairness can take many differing forms; *Cassell’s New German Dictionary* gave 20 differing meanings (p.33). Instead, fairness should be applied to “all participants in the game” and should mean “equitable, balanced and giving each an equal chance to present their point of view” (p.33). Treschel concludes that the “right to a fair trial goes beyond the interests of the individual and includes a structural element ... [ultimately] the right to a fair trial is a fuzzy panacea ... of rights, not exclusively reserved for the accused...” (p.35).

In Chapter 3, David Sklansky analyses two assumptions that underpin fairness in US criminal procedure. The first is that the idea of fairness is best advanced through “a series of procedural rights that defendants can invoke or waive at their discretion. The second assumption is that the choices made by attorneys can be fairly attributed to their clients” (p.37). Sklansky explains that the first assumption reflects the national commitment to a person’s individual autonomy and the second reflects the important role lawyers play in safeguarding a defendant’s interest. He states that criminal defendants are so reliant on counsel because the self-represented defendant generally ‘make a hash’ of representing themselves (p.45). Nonetheless, turning the case over to a lawyer to drive sits uneasily with the idea personal autonomy and this problem is exacerbated when we consider that the average quality of legal representation afforded to poor defendants is notoriously low (p.46). Furthermore, the poorer the representation the less likely any relief from the courts will be; the “[defendant’s] record will be shaped in a way that will make the defendant’s guilt seem all the more obvious” (p.54). To tackle the issues surrounding poor defence representation, and thereby increase the quality of fairness, the problem of resourcing needs to be addressed. Sklansky suggests that government resources to defence representation is “scandalously inadequate” and whilst this problem is well-known and persistent, it requires addressing (p.55). These complaints are eerily similar to our complaints concerning legal aid in England and Wales. However, a quicker fix

may be to make the waiver of procedural protections more difficult, or at least harder, to waive. These waivers include waiving the post-conviction review (discussed at p.47), waiving confrontation (p.49) waiving non-discriminatory jury selection (p.50), waiving discovery (p.51), and the waiver of assistance of counsel (p.53). Finally, he suggests that fairness could be improved if trials were less dependent on lawyer skill as “it is widely believed that having a superb attorney instead of a very good one can mean the difference between acquittal and conviction” (p.56).

While Chapters 2 and 3 examined the notion of ‘fairness’ in fair trial rights, Chapters 4 to 7 examine individual elements of the right. In Chapter 4 Lindsay Farmer examines the presumption of innocence and believes that the scope of the presumption can be viewed in a wide or narrow manner (p.67). The wide approach centres on the idea of ‘material innocence’ (p.67). This occurs when a person may in fact be guilty but the allegations have not been proven to the courts’ satisfaction. This then allows claims that the person should be presumed to be ‘without reproach’ in the context of criminal law, unless the prosecution have proven otherwise. The narrow approach is focussed on ‘probative’ rather than material innocence. This demands that the state actors “recognise the defendant’s legal status of innocence at all stages prior to conviction” (p.69). He states that both approaches produce a version of fairness that accepts that the biggest threat to justice is that the innocent will be convicted (p.69). Farmer suggests that both versions are designed to protect those that have been accused of crimes, however this has been developed in a climate that has become increasingly punitive. He concludes that fairness should be considered in a manner in which procedural rights are disentangled from moral claims of innocence and guilt.

In Chapter 5, Hannah Quirk explores the origins of the right to silence and its perceived demise in England and Wales with the advent of the Criminal Justice and Public Order Act 1994 (CJPOA). The CJPOA was the first example of “re-balancing the criminal justice system” against ‘criminals’ who were exploiting its protective elements (p.76) and the first time a decision was made to “remove safeguards from the accused on the basis that they had too many rights” (p.77). Quirk does acknowledge that the effect of these changes to individual fairness was somewhat limited as the right was rarely invoked. However, the changes did impact upon the overall fairness of the system as they created a normative expectation that suspects will co-operate fully in the criminal process and failure to do so means they have something to hide. Ultimately, this is incompatible with the “principles of adversarialism, sits uneasily with the

presumption of innocence, and assists the prosecution in discharging the burden of proof” (p.97).

Chapters 6 and 7 focus on the right to counsel. In Chapter 6, Jackson and Summers argue that where the defence lawyer can test the case against the accused means that whilst the verdict cannot be guaranteed to be reliable, it can be accepted by the public as being fair (p.124). If a case is being disposed of via an out of court method, there needs to be mechanisms which “permit a degree of adversarial testing” to take place (p.124). Furthermore, any guilty plea in advance of trial needs to be subject to the same testing. The importance of defence counsel is exemplified by the suggestion that should the accused refuse representation, the court should have the power to appoint representation, even if it is against the wishes of the accused, as the need to ensure the prosecution evidence is properly probed is of paramount importance. If counsel is viewed as a protective measure that ensures the fairness of the trial process, rather than merely as the lawyer for the accused, this would improve the fairness of system as a whole. In Chapter 7, Wolfgang Wohlers highlights the importance of counsel in criminal proceedings. He suggests that “[the accused] will only be able to make effective use of their procedural rights if they are assisted by defence counsel” (p.128). The chapter seeks to consider whether “representation of the accused by counsel is a legal transplant, emanating from an adversary system, which cannot be reconciled with the German criminal trial and which ought to be therefore rejected” (p.134). The chapter concludes with the notion that full representation, as advanced in the adversarial setting, deprives the accused of their autonomy, “forcing them to put their fate in the hands of counsel and hope for the best” (p.152). The chapter contends that a ‘hybrid’ system of representation would put the accused in a better position of fairness as they do not lose all autonomy to the lawyer; they devise a defence strategy together which develops trust between the two and allows the accused to play an active part in proceedings.

Having examined in the first half of the book the issues surrounding fair trial rights and defence representation, the second half of the book changes track slightly. Chapters 8, 9 and 10 examine the challenges jurisdictions face when attempting to implement the fair trial rights into varying different models of criminal procedure. In Chapter 8, Dimitrios Giannouloupoulos explores the ramifications of the *Salduz v Turkey* decision on Greece. He suggests that one “might have anticipated that the European awakening on suspects’ rights would have echoes in Greece. But that was not the case” (p.166). He states that “custody officers are often not notifying suspects of their rights ... arbitrarily denying them access to lawyers ... often presuming that suspects have waived their right to a lawyer by the simple act of signing the

police interrogation transcript” (p.167). Jurisdictions that were resistant to suspects’ rights in the police station are now making logical pathways to making these rights work in practice yet suspects in Greece are still being denied or discouraged from exercising their rights. However, he concludes that recognising “that ‘all is not well’ with the right to access a lawyer in Greece may prove an important first step in ensuring that custodial interrogation rights no longer remain an empty promise” (p.177). In Chapter 9, Kai Ambos illustrates that to be a fully successful and credible system, international criminal procedures require both expediency and fairness. Both principles are complementary and cannot exist without the other as fairness is a pre-requisite for the production of reliable truths and expediency guarantees a smooth production of the reliable result. Chapter 10 considers the difficulty faced when international criminal tribunals claim to represent a universally acceptable model of ensuring rights of the accused. In this chapter, Yvonne McDermott argues that the tribunals have a number of shortcomings which do not represent a universally acceptable model of fairness. The issues include the flexibility of procedural rules and the fact that amendments to the rules appear to be retroactive as opposed to being driven by a desire to create a fair procedural model. Furthermore, there are issues surrounding a lack of independent oversight and inconsistencies across (and sometimes within) tribunals. However, she suggests that these issues are not insurmountable and change is occurring at a steadier pace. This brings with it a degree of certainty to the form and content of international criminal procedure which could lead to the recognition of international criminal procedure as an “ideal model of fairness” in the future (p.204).

The final four chapters focus on the pre-trial process and unfairness which can be caused by a lack of transparency. In Chapter 11, Nadja Capus examines the effect of how the written records of witnesses, which have been generated by police and prosecutorial interviews, can have a distorting impact at trial. Whilst she accepts that ‘good’ written records may be substituted for oral testimony, there is an inbuilt difficulty to ascertain what ‘good’ is and she points out that only a few witnesses would be “up to the task of counter-checking effectively and correcting the record” before signing it (p.217). So once the record is signed, it is agreed that it reflects the statements that have been made. Drawn from empirical evidence, the collection of the record and its designed purpose and use means the “principle of impartiality and separation of powers” are called into question and the use of written records as evidence should be carefully re-thought, arguably through the findings of further empirical studies on its use (p.219). In Chapter 12, Richard L. Lippke reminds the reader that whilst the focus of this

book has so far been on fair trial and procedural rights, in the United States upwards of 95 per cent of persons accused of crimes waive the right to a trial and plead guilty in exchange for various concessions. In many misdemeanour cases, the only evidence proffered by the prosecution is that of a single police officer and ‘poor demoralised defendants [are] offered generous plea deals [and] are eager to plead whether the State could prove them guilty or not’ (p.227). He suggests that the low-level misdemeanour offences represents little more than an “assembly line” form of procedural justice (p.227). He believes that the judges ought to be equipped “with the means and authority to scrutinise the appropriateness of the charges to which accused persons indicate a willingness to plead” (p.236), as currently little thought is given to “accurate outcomes or the treatment of the accused” (p.237). In Chapter 13, Eric J. Miller highlights that fair trials do not necessarily ensure that citizens receive fair policing. As such, criminal trials should not be the only way in which the ‘unfair cops’ can be held accountable for wrongdoings. In the penultimate chapter, Kelly Pitcher intimates that regardless of whether it is fairness or integrity which underpins the process, it is imperative that the courts clearly articulate these factors as transparently as possible. By being transparent, fairness or the integrity of the process can occur when the courts open dialogue with all who are subjected to the process. In the final chapter, Antony Duff, explains that the fairness of proceedings ought to be viewed through the lens of institutional roles, rather than the rights of the individual. This would offer a better explanation of how we can understand fairness in criminal proceedings.

The essays contained throughout the book offer the reader and an engaging set of perspectives that consider a number of elements which underpin the notion of ‘fairness’ in criminal proceedings. The book flows well and can easily be dissected into various component parts of criminal process; from the characterisation of what is meant by the right to a fair trial, the middle portion of the book examines individual elements of that right, viewed through the lens of procedural protections and the right to counsel. The final portion of the book attempts to uncover the less transparent elements of criminal procedure and in places, calls for further studies to be undertaken to improve fairness. Ultimately, whilst the various systems discussed aim to be fair, there are aspects that could be vastly improved. In conclusion, this book comes highly recommended for criminal procedure scholars who are interested how fairness underpins criminal proceedings.

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