

# THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN ANALYSIS OF THE APPLICATION OF THE CONVENTION AND A COMPARISON WITH OTHER INSTRUMENTS

*by Stephanos Stavros, published by Martinus Nijhoff, Dordrecht, 1993, 388 pp  
(including 3 appendices), price (hbk) £ 87.00*

*Reviewed by A S Butler\**

This book is a detailed analysis of the case law of the organs of the European Convention on Human Rights on the interpretation and application of Article 6 of the Convention. That article guarantees fair trial rights in the determination of criminal charges and in the determination of civil rights and obligations. The scope of Dr Stavros' study is the rights of an accused under Article 6.

The book is comprised of four chapters. The first chapter concerns the scope of application of Article 6 under the criminal limb. The chapter examines the meaning of the concept of "criminal charge". As it is the trigger for the application of Article 6 its definition is of obvious importance to the supervisory work of the Convention organs. Stavros' chapter captures this importance, but, further, subjects the Convention case law to a rigorous critique. In particular, Stavros' critical analysis of the two leading cases of *Engel v The Netherlands*<sup>1</sup> and *Oztürk v FRG*<sup>2</sup> is well handled. These two cases have led to a number of incongruous results such that deprivations of parole for up to 180 days have not been classified as criminal charges while relatively minor traffic offences are. The coverage of the article is, therefore, uneven. Moreover, as Stavros notes administrative proceedings

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1 (1976) 1 EHRR 647.

2 (1984) 6 EHRR 409.

often fall through the net of Convention protection; many cannot trigger the (admittedly generous) definition of criminal charge, and their public law nature has been held by the Court to put them outside the civil right and obligations category. Stavros makes a strong case for the inclusion of public law and administrative proceedings under the criminal head where penalties or quasi-penalties are imposed.

The second chapter contains an extended analysis (over 250 pages in length) of the standard of fairness applicable within the "traditional field of application" of Article 6. In examining the standard of fairness applicable Stavros divides the chapter into ten sections, which deal with specific aspects of the rights delimited in Article 6 itself and by the Court and Commission in their jurisprudence. The sections follow the chronological order of a traditional criminal proceeding and this order facilitates exposition greatly. A particularly prominent theme in this chapter is the failure of the Convention organs to take the presumption of innocence seriously and apply it throughout the criminal process. As Stavros convincingly argues the case law on self-incrimination,<sup>3</sup> adverse pre-trial publicity,<sup>4</sup> *mens rea* and the definition of offences<sup>5</sup> and sentencing<sup>6</sup> suffers from serious defects on this ground. Moreover, this chapter demonstrates that in large part the protections afforded under the New Zealand Bill of Rights Act 1990 and other statutory and common law rules are more thorough-going. Disclosure rules in Europe are weak;<sup>7</sup> the jurisprudence on "loss of time" orders (awarded in UK against those bringing unmeritorious appeals) has inexplicably escaped Convention censure;<sup>8</sup> and protections for those subjected to post-arrest questioning are extremely weak.<sup>9</sup> In addition, Stavros cogently argues that the Convention organs have quite often applied the important concept of "equality of arms" in a manner which can only be regarded as perverse; he points to a number of cases where the Court and Commission have relied on the concept to uphold national provisions which underprotect an accused's rights on the grounds that the prosecution suffers from a similar disability. This is odd as the purpose of the concept is to raise the floor of rights protection, not lower the ceiling.

Stavros advances a number of reasons for the minimal nature of the Convention protections. First, Stavros emphasises a number of times that the Convention organs are

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3 Page 70.

4 Page 157.

5 Page 224.

6 Page 261.

7 Page 181.

8 Pages 277-279.

9 Pages 74-76.

alive to the diversity among the membership of the Council of Europe. The case law reflects an (awkward) attempt to advance a minimum European content to the principles contained in Article 6, tempered by recognition that the effectiveness of European supervision depends to a significant extent on establishing the legitimacy of the Convention in the area. In turn this requires a softly-softly approach to the interpretation and application of the article. Second, the Convention organs have a limited role in reviewing the holdings of national courts as to law and fact. Adherence to this limited role has resulted in the Convention's narrow review of challenges based on a lack of disclosure, the partiality of courts, the discharge of counsel's duties, and so on. Third, the doctrine of "national margin of appreciation" has been recognised by the Convention organs and this has resulted in significant leeway for national authorities. These explanations are generally sound and are argued for in each individual case cogently and clearly.

The third chapter concerns the standard of fairness outside the traditional field of application. More concretely, the applicability of Article 6 to prison proceedings, professional association discipline, and military law is examined. The chapter illustrates the important point made by Stavros in his opening chapter that a broad definition of the concept "criminal charge" requires in turn a graduated, context-sensitive approach to the interpretation and application of the guarantees in Article 6. As Stavros observes this is a task which has posed significant problems to the Convention organs; the guarantees in Article 6 are quite specific and the language of the article does not readily admit of variation in the application of its provisions. Notwithstanding this, the Convention organs have attempted to do as much as is possible within the confines of the wording of the article. A final theme of this chapter concerns the potential application of Article 6 to the myriad of administrative proceedings. And a number of the guarantees of Article 6 could be usefully applied to such proceedings. (Stavros mentions impartiality as an example.) The European Court's response to this problem has been inadequate and is most confusing, and Stavros again exposes this weakness clearly and lucidly.

The final chapter contains the conclusions which the author draws from the material traversed. He brings together the threads of his argument that much of the explanation for the confusing development of Article 6 jurisprudence can be laid at the feet of the drafting of the article and the interpretational dilemma which its wording presented the Commission and Court. In addition, Stavros explains very clearly the problem of "spill-over" visible in the definition of the substantive rights of accused persons under the Convention. The problem is that the interpretation of a guarantee in one context has been applied to another situation where a broader guarantee would have been more appropriate and vice versa. However, Stavros submits that the problem of "spill-over" is not so great as some commentators and judges have feared and in light of the breadth of material which he has traversed it is hard to argue against him. The chapter finishes with a useful assessment of

the case law under the heading, "A Fair Balancing of the Rights of the Individual and the Interests of the States Parties in the Context of Article 6".

Let us step back from a description of the individual chapters to the merits of the book. The first thing that struck this reader was the thoroughness of the review of the case law. The book is encyclopaedic in its treatment of the case law. Second, there is frequent reference to other important international instruments of relevance, such as the American Convention and the International Covenant. Reference to the latter is of particular importance to the New Zealand reader bearing in mind the central role of the Covenant in the development of our Bill of Rights. Third, this book is not just a collection of cases. Rather it is a closely argued and keenly pointed critique of the extensive Convention jurisprudence. And while the argument revolves around a small number of major themes, the manner in which it is done raises the book above the level of a predictable dirge, to a convincing and tight critique. This relates to a further point. This book, which has grown out of a doctoral thesis, has obviously been a labour of love. The author's enthusiasm for his subject is apparent; the result is a treatise which is eminently readable. This is something which goes some way to blunt one of major criticisms of the book--the lack of an index.

When I first came across this book I was working on a case where reference to Article 6 material was likely to be of use. Unfortunately, I found the book virtually impossible to use on that occasion, due to the lack of an index. The only way for readers to get themselves around the book is reliance on the skeletal Table of Contents. But that table really tells little as to the substantive issues dealt with in each section. Even the List of Cases Cited contains no cross-referencing to the main text. For a practitioner this absence will be a serious drawback and will affect any decision to buy. And being candid, I do not understand how author or publisher can expect a person to part with the large sum of money with which this book is ticketed without providing a comprehensive index.

Another point of concern for the potential buyer relates to the currency of the book. Though the publication year is 1993, the case law stops well before then. For example, the latest decisions of the Human Rights Committee and the Inter-American Court referred to date from late 1989, and from the European Court and Commission, late 1991.<sup>10</sup>

Moving to matters of substantive content, there is an important omission from the book. While Stavros spends much time in considering the definition of a criminal charge and its

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<sup>10</sup> In the intervening period there have been notable developments of relevance to the issues discussed in the book. For example, the *Funke* (1993) 16 EHRR 297, *Cremieux* (1993) 16 EHRR 357 and *Mialhe* (1993) 16 EHRR 332 cases examine the right to a fair trial in the context of a statutory obligation to produce incriminating tax and customs related documents. There have been a number of bail related decisions of the Court and Commission which raise questions as to the presumption of innocence.

application to various quasi-criminal, disciplinary and administrative proceedings, the treatment of the important issue of the distinction between true crimes and regulatory offences is weak. Almost all of the states parties to the Convention operate such a distinction, and use it inter alia to justify lower constitutional rights protection in the case of the latter. While Stavros' treatise touches on the subject it does not really (in this reviewer's opinion) get to grips with it.

In addition, the exposition (though generally of an excellent standard) is confused in places. In the first chapter, for example, Dr Stavros examines the important *Ireland v United Kingdom*<sup>11</sup> and *Kaplan*<sup>12</sup> decisions. He criticises the approach of the Convention organs to the definition of "criminal charge" in those cases, and contrasts them unfavourably with the *Oztürk* decision, in such a way as to suggest that they are departures from *Oztürk*. As it happens of course these decisions pre-date *Oztürk* and so the terms of the critique are a little misleading.

Another potential criticism is that the book does not contain a sustained examination of the literature surrounding Article 6. However, the presence of such a literature review might well have dulled the sharpness of Stavros' critique of the cases themselves. And, in the reviewer's opinion, the close examination and critique of the Convention case law is the very strength of the book as a whole.

These comments aside, I would conclude by praising the author for providing an excellent exposition and critique of the case law on Article 6. The book is lucid and comprehensive in its coverage (subject to the date constraints noted above). The absence of an index is, however, a serious lacuna which affects my ability to recommend the book to practitioners, especially bearing in mind the book's price. However, its claim to scholarship of a very high standard cannot be denied. It is a must for law libraries. And those wishing to undertake any serious study of Article 6 will find it invaluable. I look forward to Dr Stavros providing us with a second edition of this book in a few year's time.

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11 (1978) 2 EHRR 25.

12 (1980) 21 D&R 5.