

Presumption of innocence, children's rights and legal aid in the case law of the ECtHR and CJEU

*Dr Angelo Marletta
FNRS Belgique – Université Libre de
Bruxelles*



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Outline

Part I: Presumption of innocence

Part III: Legal Aid

**Part III: Children's Rights in
criminal proceedings**

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PART I:

Presumption of Innocence

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Normative references

ECHR

- Art 6 para 2

EU Law

- Art 48 para 1 EU CFR
- Directive 2016/343

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“Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law”

ECHR, Art 6 para 2

A multifaced principle

Right to silence

Burden of proof

Premature expressions

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Pol and the Right to Silence

- The right to silence is **not specifically mentioned** under Art 6 ECHR and under Art 48 EU CFR
- Is part of the notion of a fair procedure and in **close connection** with the Pol
- Landmark case ECtHR, *Funke v France* § 44, 1993
- Its **effective exercise** is closely connected with the **right of access to a lawyer** (*Salduz v Turkey*, § 54)

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Pol and the Right to Silence: adverse inferences

- Respect of the Pol implies that a conviction **cannot be based solely** or mainly on the defendant's silence
- However, the RTS is a **relative right**
- **Adverse inferences** from the silence "in situations that clearly call for an explanation" (*John Murray v UK* § 47, *Ibrahim and Others v UK* § 269)

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Pol and the burden of proof, *in dubio pro reo*

- The Pol requires **the prosecution to bear the burden of proof** with regard to the charges against the accused (*Barberà, Messegué and Jabardo v Spain*, § 77)
- It follows that, in principle, the Pol is **violated if the burden of proof is shifted** from the prosecution to the defence (*John Murray v UK*, § 54) and also that **any doubt should benefit the accused**
- However...

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Pol and the burden of proof: presumptions of fact or law

- **Presumptions of fact or law** can be allowed “**within reasonable limits**” (*Salabiaku v France*, § 28; *Radio France and others v France*, § 24)
- In particular, **striking a balance** between the importance of the **protected interests** and the **rights of the defence**
- Such presumptions must be **rebuttable**

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Pol, premature expressions and public references to guilt

- The Pol requires also judicial authorities to refrain from **premature expressions** of guilt before the accused has been formally declared guilty according to the law (*Kangers v Latvia*, § 60)
- **Separation of cases** presenting “strong factual ties” must be **carefully assessed** (*Navalnyy and Ofitserov v Russia*, § 104)
- **Parallel proceedings against co-suspects:** references to the **co-suspects tried separately** must be made **only if indispensable** and **worded** in such a way to avoid potential pre-judgment about their guilt (*Karaman v Germany*, § 64)

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CJEU case law and the Pol

Case law on Pol and RTS as **general principles**:

- *Orkem v Commission* (C-374/87)
- *Spector Photo* (C-45/08)

Case law on the **2016 Directive** on the Pol:

- *Milev* (C-310/18 PPU)
- *RH* (C-8/19 PPU)
- *AH and Others* (C-377/18)
- *DK* (C-653/19 PPU)

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The 2016 Directive on Pol and decisions on pre-trial detention

(CJEU, *Milev*, *RH* and *DK*)

To date 3 cases on the applicability of the 2016 Directive in regard to

- ***Milev***: extension of pretrial detention ("reasonable grounds")
- ***RH***: extension of pretrial detention, evaluation of evidentiary elements
- ***DK***: re-examination of pretrial detention and burden of proof
- In all of the three occasions, the CJEU insisted on the **minimal degree of harmonization** of the Directive and that it **does not govern the requirements and conditions** for the adoption of decisions on pre-trial detention
- Such decisions, however, **should not refer** to the person in custody as **being guilty**

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Art 4 para 1 of the 2016 Directive on the Pol: public references to guilt

*“Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and **judicial decisions**, other than those on guilt, do not refer to that person as being guilty. This shall be **without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature**, which are taken by judicial or other competent authorities **and which are based on suspicion or incriminating evidence.**”*

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The 2016 Directive on the Pol, public references to guilt and separation of proceedings

(CJEU, AH and Others)

A **separate agreement** concluded with the prosecution by **only one (MH) of five co-defendants** tried for participation in a criminal organization

The agreement contained an admission of guilt by MH and **reference to the other co-defendants** as members of the criminal organization

Is this **compatible with art 4 para 1** of the 2016 Directive?

The CJEU **recalled the ECtHR case law** in *Karaman v Germany* ad *Navalnyy and Ofitrov v Russia* and concluded that the reference to co-defendants tried separately is possible **only**:

- **If necessary** for the **categorisation of the legal liability** of the person entering the agreement
- **Using a wording** that **clearly** indicates that the guilt of the other co-defendants has not been legally established

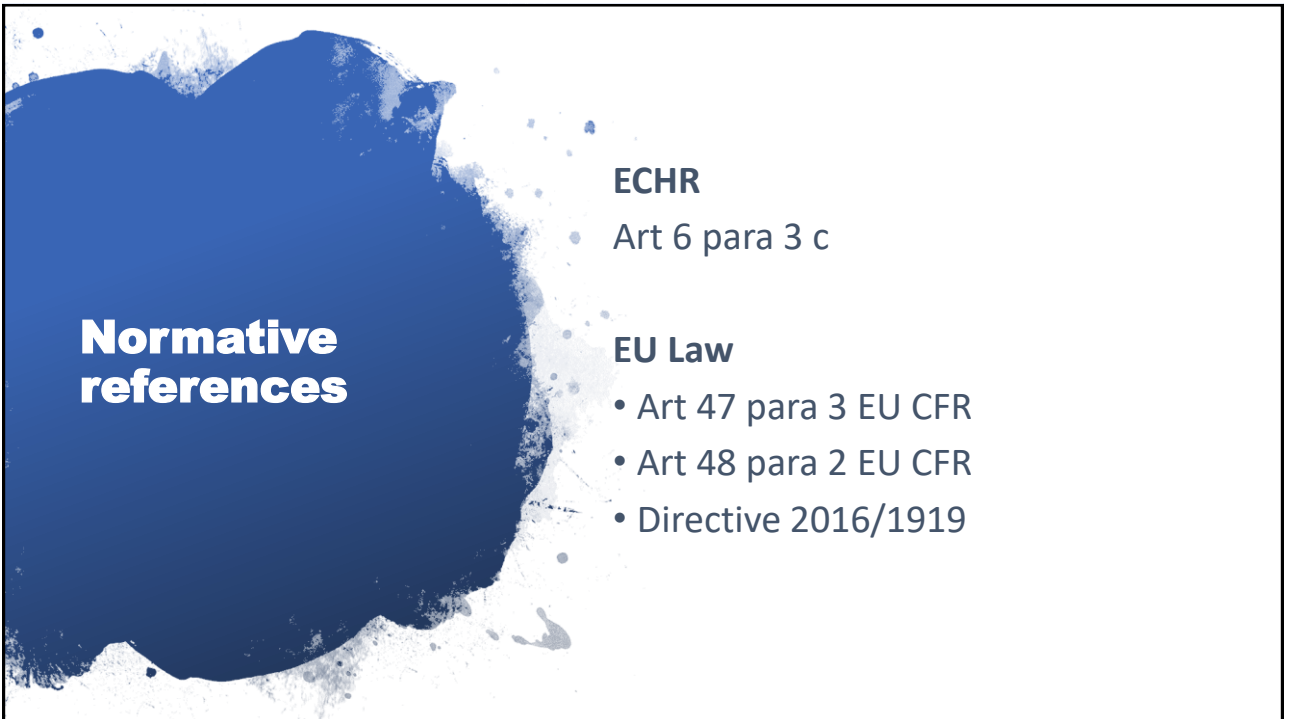
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PART II:

Legal Aid

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Normative references

ECHR

• Art 6 para 3 c

EU Law

- Art 47 para 3 EU CFR
- Art 48 para 2 EU CFR
- Directive 2016/1919

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Right to free legal assistance if he has not sufficient means to pay for it and “when the interests of justice so require”

(ECHR Art 6 para 3 c)

Two cumulative conditions:

- Means test: “some indications” are sufficient (*Tsonyo Tsonev v Bulgaria* n.2 § 39)
- “Interests of justice” test:
 - **Seriousness** of the offence
 - **Severity** of the penalty
 - **Deprivation of liberty** at stake (*Quaranta v Switzerland* § 33, *Benham v UK* § 61, *Zdravko Stanev v Bulgaria* § 38)
 - **Complexity of the case**: f.i. unfamiliarity with the language or the legal system (*Quaranta v Switzerland* § 35, *Twalib v Greece* § 53)

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Right to legal aid in criminal matters under EU Law

- Art 47 para 3 and 48 para 2 are corresponding to art 6 para 3 ECHR (need for consistent interpretation)
- To date, no CJEU cases on the **Directive 2016/1919**
- **Innovative** right to legal aid also in the **issuing MS** in EAW proceedings (art 5), however:
 - Exclusion of “**executive**” EAWs
 - Need to interpret the “**merits test**” strictly: EAWs involve **normally involve deprivation of liberty**

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PART III:

Children's Rights

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Normative references

International Conventions:

- Art 14 para 4 of International Covenant on Civil and Political Rights
- UN Convention on the rights of the Child
- Beijing Rules on Juvenile Justice

ECHR/CoE:

- Art 6 para 1 ECHR (in particular)
- Guidelines of CoE Committee of Ministers of on child friendly justice (soft law)

EU Law:

- Art 24 par 2 EU CFR
- Directive 2016/800

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ECtHR on juvenile criminal justice

- Need to **fully take into account age, level of maturity and intellectual and emotional capacities**, and to promote his ability to **understand and participate** in the proceedings (*T v UK*, § 84).
- Need to take into account vulnerability and to ensure the **effective participation and understanding** of his/her rights **since the early stage of the proceedings** and **waivers** of rights should be admissible only if expressed **unequivocally and in full awareness** (*Panovits v Cyprus*, § 67-68, *Salduz v Turkey*, § 59-60)
- **Detention** of minors shall be the measure of **last resort**, shall last as **short** as possible and they shall be kept **separate from adults** (*Nart v Turkey*, § 31)

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Right to an individual assessment

(Art 7, 2016 Directive on minors)

"1. Member States shall ensure that the **specific needs** of children concerning **protection, education, training and social integration** are taken into account

2. For that purpose children who are suspects or accused persons in criminal proceedings **shall** be individually assessed. The individual assessment shall, in particular, take into account the **child's personality and maturity**, the child's **economic, social and family background**, and any **specific vulnerabilities** that the child may have.

(...)

4. The individual assessment shall serve to establish and to note, in accordance with the recording procedure in the Member State concerned, such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when:

- (a) determining whether **any specific measure to the benefit of the child** is to be taken;
- (b) assessing the appropriateness and effectiveness of any **precautionary measures** in respect of the child;
- (c) taking **any decision** or course of action in the criminal proceedings, including when **sentencing**.

(...)

9. Member States **may derogate from** the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, **provided that it is compatible with the child's best interests**."

Art 7 does not apply in EAW proceedings: see Art 17 of the 2016 Directive on minors

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Minors and the EAW

(CJEU,
Piotrowski)

- Art 3 para 3 of the EAW FD provides a **mandatory ground for refusal** in regard to persons who may not, owing to their age, be criminally tried according to the law of the executing MS
- The case related a 17 years old residing in BE and subject to an EAW from PL. According to **Belgian Law**, minors between 16 and 18 years old can be subject to criminal proceedings **only following an individual assessment**
- The CJEU established that the executing authority must **simply verify whether the person concerned has reached the minimum age** required to be regarded as criminally responsible in the executing Member State **without having to consider any additional conditions**, or individual assessment
- **Strict interpretation**, functional to mutual recognition and **justified also on the basis of the 2016 Directive on minors**: its art 7 on individual assessment is not recalled among the guarantees provided for EAW proceedings (art 17)

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Thank for your attention!

Dr Angelo Marletta
angelo.marletta@ulb.be

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ECtHR case law in order of reference (with hyperlinks)

- [*Funke v France*, 1993, App n 10828/84](#)
- [*Salduz v Turkey*, 2008, App n 36391/02](#)
- [*John Murray v UK*, 1996, App n 18731/91](#)
- [*Ibrahim and Others v UK*, 2016, App n 50541/08](#)
- [*Barberà, Messegué and Jabardo v Spain*, 1988, App n 10590/83](#)
- [*Salabiaku v France*, 1988, App n 10519/83](#)
- [*Radio France and Others v France*, 2004, App n 53984/00](#)
- [*Kangers v Latvia*, 2019, App n 35726/10](#)
- [*Navalnyy and Ofitserov v Russia*, 2016, App n 46632/13](#)
- [*Karaman v Germany*, 2014, App n 17103/10](#)
- [*Tsonyo Tsonev v Bulgaria n 2*, 2010, App n 2376/03](#)
- [*Quaranta v Switzerland*, 1991, App n 12744/87](#)
- [*Benham v UK*, 1996, App n 19380/92](#)
- [*Zdravko Stanev v Bulgaria*, 2012, App n 32238/04](#)
- [*Twalib v Greece*, 1998, App n 24294/94](#)
- [*T v UK*, 1999, App n 24724/94](#)
- [*Panovits v Cyprus*, 2009, App n 4268/04](#)
- [*Nart v Turkey*, 2008, App n 20817/04](#)

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CJEU case law in order of reference (with hyperlinks)

- [*Orkem v Commission*, 1989, C-374/87](#)
- [*Spector Photo and Van Raemdonck*, 2009, C-45/08](#)
- [*Milev*, 2018, C-310/18 PPU](#)
- [*RH*, 2019, C-8/19 PPU](#)
- [*AH and Others*, 2019, C-377/18](#)
- [*DK \(also known as Spetsializirana prokuratura\)*, 2019, C-653/19 PPU](#)
- [*Dawid Piotrowski*, 2018, C-376/16](#)

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