Outline

Part I: Presumption of innocence

Part III: Legal Aid

Part III: Children’s Rights in criminal proceedings
PART I:

Presumption of Innocence

Normative references

ECHR
• Art 6 para 2

EU Law
• Art 48 para 1 EU CFR
• Directive 2016/343
“Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law”
ECHR, Art 6 para 2

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 PoI

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)
PoI and the Right to Silence: adverse inferences

• Respect of the PoI 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)

PoI and the burden of proof, in dubio pro reo

• The PoI 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 PoI 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...
PoI 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

PoI, premature expressions and public references to guilt

- The PoI 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)
CJEU case law and the PoI

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)

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**
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.”

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 ECHR 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.
PART II:
Legal Aid

**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
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
PART III: Children’s Rights

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
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)

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
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)

Thank for your attention!

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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](#)
- [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](#)

**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](#)