



Uniwersytet
Wrocławski

EU Criminal Law

Lecture **Criminal Procedure and Courts 1**

Dr hab. Wojciech Jasiński
Department of Criminal Procedure
Faculty of Law, Administration and Economics
University of Wrocław



International law in the domestic legal systems

1. EU law has primacy over national law (both EU primary and secondary law)
2. International conventions are binding and take precedence over a statute

Article 91 Polish Constitution

1. After promulgation thereof in the Journal of Laws of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.



European Convention on Human Rights

1. Source of various procedural rights

2. Rights of the suspect and accused

- ❖ Protection against maltreatment (Article 3)
- ❖ Right to personal liberty (Article 5)
- ❖ Fair trial rights (Article 6(1)-(3))
- ❖ Right to privacy (Article 8)
- ❖ Rights included in Protocol no. 7 to the ECHR
 - Right not to be punished twice
 - Right to appeal in criminal matters
 - Right to compensation for wrongful conviction



European Convention on Human Rights

3. Procedural rights of the victims

- ❖ Protected to the limited extent, mainly because of the wording of Article 6 of the ECHR
- ❖ This deficiency is compensated by the concept of „positive obligations of the state” elaborated by the ECtHR in cases referring to violations of Article 2, 3 and 8 ECHR

The positive obligation of the state is *inter alia* an **obligation to conduct effective official investigation** in cases of violation of above-mentioned ECHR rights.



European Convention on Human Rights

3. Procedural rights of the victims

- ❖ The effective official investigation should be capable of leading to the identification and punishment of those responsible. The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness.

Effective investigation means that victims or their relatives should be respected, involved and informed about the progress of investigation.



European Convention on Human Rights

3. Procedural rights of the victims

- ❖ Rights of the victims are also acknowledged in interpretation of the Court of the right to a fair trial (Article 6 ECHR)

„The Court’s primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will **look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted and, where necessary, to the rights of witnesses.**

The ECtHR allows special procedures for questioning vulnerable victims and witnesses limiting the rights of the defendant (e.g. right to question witness directly and in person).



Interpretation of the European Convention on Human Rights

- ❖ **Convention as a living instrument**
- ❖ **Autonomous interpretation of Convention's terminology**
- ❖ **Subsidiarity principle**
- ❖ **Margin of appreciation**



Interpretation of the European Convention on Human Rights

❖ Convention as a living instrument

Tyrer v. the United Kingdom (25 April 1978)

“the Convention is a living instrument ... which must be interpreted in the light of present-day conditions”

object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions **must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory**



Interpretation of the European Convention on Human Rights

❖ **Autonomous interpretation of Convention's terminology**

In order to interpret the provisions of the Convention and the Protocols thereto in the light of their object and purpose, the Court has developed additional means of interpretation through its case-law, namely the principles of autonomous interpretation and evolutive interpretation, and that of the margin of appreciation. These principles require the provisions of the Convention and the Protocols thereto to be interpreted and applied in a manner which renders their safeguards practical and effective, not theoretical and illusory



Interpretation of the European Convention on Human Rights

- ❖ Subsidiarity principle
- ❖ Margin of appreciation

Protocol 15 (enters into force 1 August 2021)

Preamble of the Convention supplemented

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”



Interpretation of the European Convention on Human Rights

❖ **Subsidiarity principle**

The Court draws attention to the fundamentally subsidiary role of the Convention system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions



Interpretation of the European Convention on Human Rights

❖ Limitations of subsidiarity principle

The Court notes, that it will in general cede to the national courts' interpretation as to whether there has been a breach of the domestic law, unless the breach is "flagrant" – that is, unless the national courts' findings can be regarded as arbitrary or manifestly unreasonable



Interpretation of the European Convention on Human Rights

❖ Limitations of subsidiarity principle

Court is mindful of its fundamentally subsidiary role in the supervisory mechanism established by the Convention, according to which the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto. It also notes, however, that the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply the domestic law in a manner that gives full effect to the Convention.



Interpretation of the European Convention on Human Rights

❖ Limitations of subsidiarity principle

It therefore follows that while it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, it falls ultimately on the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention. when examining whether there has been a breach of the relevant domestic rules in a given case, the Court will in principle defer to the national courts' interpretation and application of domestic law – unless their findings are **arbitrary or manifestly unreasonable**.



Interpretation of the European Convention on Human Rights

❖ **Margin of appreciation**

Where the legislature enjoys a margin of appreciation, the latter in principle extends both to its decision to intervene in a given subject area and, once having intervened, to the detailed rules it lays down in order to ensure that the legislation is Convention compliant and achieve a balance between any competing public and private interests. However, this does not mean that the choices made and solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by those legislative choices .



Interpretation of the European Convention on Human Rights

❖ Margin of appreciation

A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case. The margin will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will also be restricted. Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.



Interpretation of the European Convention on Human Rights

❖ **Margin of appreciation**

A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"



Right to a fair trial

Article 6 par. 1

In the determination of his civil rights and obligations or 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.

Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Right to a fair trial

Article 6 par. 2

Presumption of innocence

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Right to a fair trial

Article 6 par. 3

Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- (b) to have adequate time and the 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 when the interests of justice so require;

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.



Right to a fair trial – scope of application

The concept of a “criminal charge” has an “autonomous” meaning, independent of the categorisations employed by the national legal systems of the member States (Adolf v. Austria, § 30).

The starting-point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the criteria outlined in Engel and Others v. the Netherlands, §§ 82-83:

- (1) classification in domestic law;
- (2) nature of the offence;
- (3) severity of the penalty that the person concerned risks incurring.

(so-called Engel criteria)



Right to a fair trial – scope of application

„It is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States”.

Right to a fair trial – scope of application

In evaluating the second criterion the following factors can be taken into consideration:

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character
- whether the proceedings are instituted by a public body with statutory powers of enforcement
- whether the legal rule has a punitive or deterrent purpose
- whether the imposition of any penalty is dependent upon a finding of guilt
- how comparable procedures are classified in other Council of Europe member States



Right to a fair trial – scope of application

„However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so”.



Right to a fair trial – scope of application

Proceedings not labeled as criminal that might be treated as criminal by the ECtHR:

- competition proceedings
- placement of juvenile in temporary detention
- proceedings regarding penalties for market manipulation
- proceedings regarding prohibited acts committed by juveniles
- customs proceedings
- lustration proceedings

Right to a fair trial – scope of application

Criminal proceedings:

The pre-trial stage (investigation)

Some requirements of Article 6, such as the reasonable-time requirement or the right of defence, may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (*Imbrioscia v. Switzerland*, § 36).

Accordingly, Article 6 § 1 may be held to be applicable to the investigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply (*Vera Fernández-Huidobro v. Spain*, §§ 108-114).

Right to a fair trial – scope of application

Criminal proceedings:

The pre-trial stage (investigation)

A “criminal charge” exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (e.g. a person was arrested by the police; questioned as a witness and confessed to committing a crime)

Right to a fair trial – scope of application

Criminal proceedings:

The trial stage

Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process.

However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code (Nurmagomedov v. Russia, § 50).

The Article 6 guarantees apply in principle to appeals (also extraordinary), and to constitutional proceedings, where such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons.