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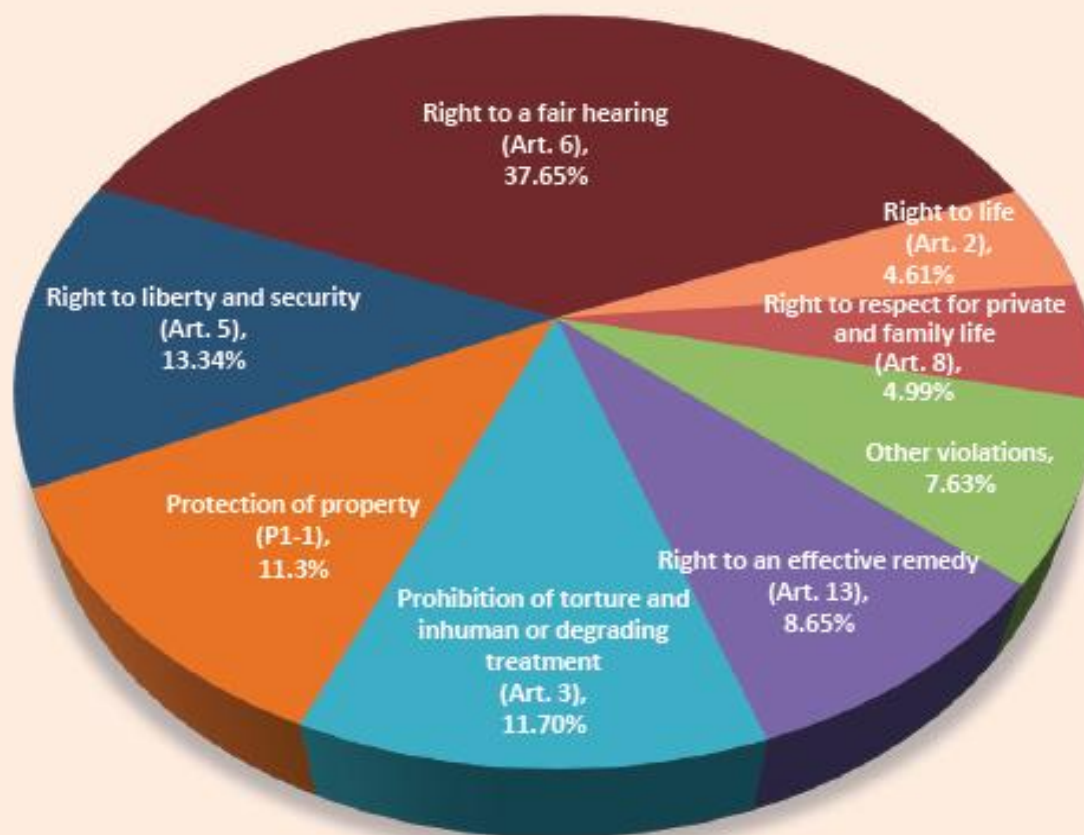
EU Criminal Law

Lecture **Criminal Procedure and Courts 3**

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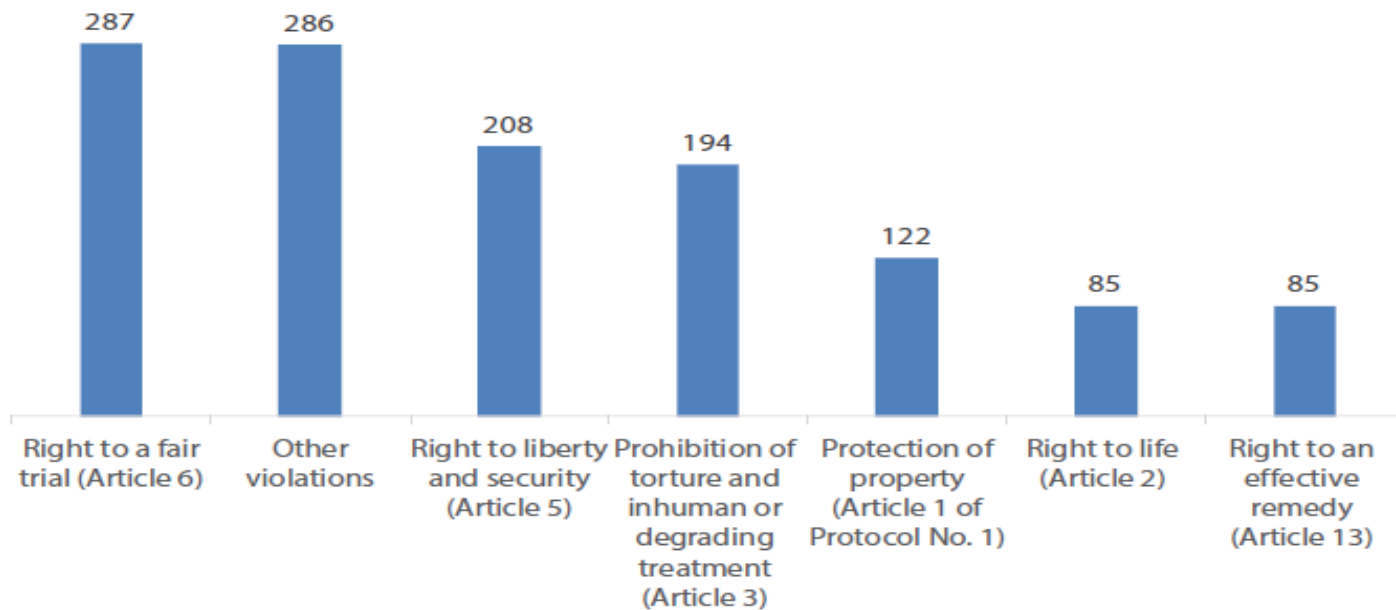


Right to a fair trial Violations of EHCR 1959-2020



Right to a fair trial - 2020

VIOLATIONS BY SUBJECT MATTER



Right to a fair trial

Article 6

Explicit rights: right to public trial, right to have a case heard in a reasonable time, defense rights (Article 6 par. 3), etc.

Implicit rights: right to be present at trial, right not to incriminate oneself, equality of arms, right to a reasoned decision of the court, etc.

Right to a fair trial

In general the **overall fairness of proceedings is assessed** by the ECtHR.

However, in some situations a single violation of the law may result in violation of the right to a fair trial.

Example: 'the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction'.



Right to a fair trial

The general requirements of fairness contained in Article 6 apply to **all criminal proceedings, irrespective of the type of offence in issue.** Nevertheless, when determining whether the proceedings as a whole have been fair **the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interests.** However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention.



Right to a fair trial

In making this assessment on the overall fairness of the proceedings 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.**

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.

Presumption of innocence

Article 6 § 2 safeguards the right to be “presumed innocent until proved guilty according to law”.

Two aspects of that presumption:

1) Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, inter alia:

- ❖ premature expressions, by the trial court or by other public officials, of a defendant's guilt
- ❖ pre-trial publicity
- ❖ the burden of proof
- ❖ legal presumptions of fact and law
- ❖ the privilege against self-incrimination



Presumption of innocence

2) In keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. **Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged.** In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. **Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory.** What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.

Presumption of innocence

Presumption of innocence after criminal case concluded with no attribution of guilt

The presumption of innocence will be violated if, without the accused's having previously been proved guilty in accordance with the law and, in particular, without his or her having had the opportunity to exercise his or her rights of defence, a judicial decision concerning him or her reflects an opinion that he or she is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty

Presumption of innocence

Presumption of innocence after criminal case concluded with no attribution of guilt

In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that **while exoneration from criminal liability ought to be respected in civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention.**

Presumption of innocence

Prejudicial statements

Where no criminal proceedings are or have been in existence, statements attributing criminal or other reprehensible conduct are more relevant to considerations of protection against defamation and adequate access to court to determine civil rights, raising potential issues under Articles 8 and 6 (civil aspect). Article 6 par. 2 is not applicable in such cases.

This standard of assessment is also applied to e.g. media coverage (in a wider context utterances of private individuals, as opposed to public officials) if they are not a reproduction of official statement of public officials. However hostile press campaign may violate the right to a fair trial, including presumption of innocence.

Presumption of innocence

Prejudicial statements

The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair trial that is required by paragraph 1. The presumption of innocence will be violated if a:

- ❖ judicial decision or
- ❖ statement by a public official
concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption.



Presumption of innocence

Prejudicial statements

A distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe “a state of suspicion”. The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable.

The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.



Presumption of innocence

Prejudicial statements

The Court has emphasises the importance of **the choice of words by public officials in their statements** before a person has been tried and found guilty of a particular criminal offence.

Nevertheless, whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined **in the context of the particular circumstances** in which the impugned statement was made. In any event, the opinions expressed cannot amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudice the assessment of the facts by the competent judicial authority.

Presumption of innocence

Prejudicial statements - examples

- ❑ Court's statement in decision prolonging detention that the suspect committed an offence which he was charged
- ❑ Public statements of police officials; President of the Republic; the Prime Minister or the Minister of the Interior; Minister of Justice; President of the Parliament; prosecutor and other prosecution officials (however, not a chairman of a political party which was legally and financially independent from the State in the political debate).

Presumption of innocence

Prejudicial statements - examples

□ Examples:

- referring to a suspect „as one of the instigators of a murder”; describing a person as a “bribe-taker”

- Garlicki v. Poland

‘Initially (...) I did not believe it. I could not get it into my mind that in the health service, in a very well known clinic, a very well known and, at least until recently, universally respected cardiac surgeon and professor could perpetrate shameful acts of this sort. But when I began to find out what evidence had been gathered ..., I changed my mind. I have changed my mind and, unfortunately, I am more and more overcome with sadness, but we can see this unfortunately sad discovery of the truth as an important event in the true sense of that expression, in that no-one else will ever again be deprived of life by this man’



Presumption of innocence

Burden of proof

Right to be presumed innocent entails that the prosecution bear **the onus of proving the allegations against him or her** forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention. The person has to also have a possibility of executing his or her defence rights.

The fundamental rule of criminal law, to the effect that criminal liability does not survive the person who committed the criminal acts, is a guarantee of the presumption of innocence enshrined in Article 6 § 2 of the Convention. Accordingly, Article 6 § 2 will be breached if an applicant did not stand trial and was convicted posthumously (Magnitskiy and Others v. Russia, § 284).

Presumption of innocence

Burden of proof

The Court has held that the **in dubio pro reo principle** (doubts should benefit the accused) is a specific expression of the presumption of innocence.

The court's right to hear evidence *ex officio* is not a violation of the presumption of innocence (burden of proof)



Presumption of innocence

Legal presumptions of facts and law

A person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since **presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention**, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim pursued

Presumption of innocence

Legal presumptions of facts and law

Examples of legitimate presumptions in criminal law:

- presumption of sanity while committing an offence (the accused has to prove that he or she was insane) – not a disproportionate burden on the accused
- confiscation of the proceeds of crime – presumption that certain assets were obtained by criminal means
- presumption that the owner of the car is a driver in case of road offences that were vide-recorded
- presumption that the possession of certain amount of drugs amount to possession with intent to deal

Presumption of innocence

Right not to incriminate oneself

The right to remain silent under police questioning and the privilege against self-incrimination are **generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6**. Their rationale lies, inter alia,

- in the protection of the accused against improper compulsion by the authorities,
- thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ECHR.

Presumption of innocence

Right not to incriminate oneself

The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

It is important to recognise that the privilege against self-incrimination does not protect against the making of an incriminating statement per se but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence

Presumption of innocence

Right not to incriminate oneself

The Court, through its case-law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6:

- 1) where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (*
- 2) where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements*
- 3) where the authorities use subterfuge to elicit information that they were unable to obtain during questioning*

Presumption of innocence

Right not to incriminate oneself

It is inherent in the privilege against self-incrimination, the right to silence that a person “charged with a criminal offence” for the purposes of Article 6 has the right to be notified of these rights. In the light of the nature of the privilege against self-incrimination and the right to silence, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair. Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination takes on a particular importance.

Presumption of innocence

Right not to incriminate oneself

The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing.

Presumption of innocence

Right not to incriminate oneself

The requirement for car owners to identify the driver at the time of a suspected traffic offence is not incompatible with Article 6 of the Convention (*O'Halloran and Francis v. the United Kingdom* [GC]).

Obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence (*Tirado Ortiz and Lozano Martin v. Spain* (dec.)).

Confession made to a police informer sharing the applicant's cell in detention centre if it could not be obtained during questioning is a violation of right to silence as well as voluntary statements made to police officers during road check if a person is in a situation where he or she is suspected of committing an offence

Presumption of innocence

Right not to incriminate oneself

The right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications. In common law countries drawing adverse inferences from silence is not a violation of Article 6(1) ECHR



Further reading:

Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) – p. 40-42, 63-70,

<https://prawo.uni.wroc.pl/node/45303>