



# The rights of the defence according to the ECtHR

– an illustration in the light of A.T. v. Luxembourg and the right to legal assistance

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# I. Introduction

## ARTICLE 6

### Right to a fair trial

1. In the determination of his civil rights and obligations and 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. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morality, national security or the protection of the private life of juveniles or the protection of the private life of the parties, or to the extent strictly necessary in the interests of justice.

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## Fair trial principle

2. Everyone charged with a criminal offence has the following minimum rights:  
a. to be informed promptly of the charges against him;  
b. to have adequate time and facilities to prepare his defence;  
c. to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, free of charge, if necessary, and in accordance with legal aid systems in force in the State;  
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.

## Presumption of innocence



"Your honor, could you please stop referring to me as 'counsel for the guilty?'"



# I. Introduction

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 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.

## Explicit rights of defence – art. 6 § 3

## Implicit rights of defence

- Right against self-incrimination and to remain silent (6 § 1)
- Right to fair use of evidence (6 § 1)
- Right to access to the case file (article 6 § 3 (b))
- Right to consult with his lawyer (article 6 § 3 (b) and (c))
- Right to a reasoned decision (article 6 § 1)



II. Scope of application

“criminal .....

“Engel-criteria”

- ✓ Legal classification of the measure in national law
- ✓ The very nature of the measure
- ✓ The nature and degree of severity of the “penalty”

e.g. administrative punitive law, disciplinary, etc.



(First Section judgment of 18.02.2010, application no. 39660/02)







## II. Scope of application

### Procedural stages

- ✓ Trial
- ✓ Pre-trial
- ✓ Sentencing

50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia*, cited above, § 36).

### *Salduz v. Turkey*

(Grand Chamber judgment of 27.11.2008, application no. 36391/02)





## II. Scope of application

### *Salduz v. Turkey*

(Grand Chamber  
judgment of  
27.11.2008,  
application no.  
36391/02)

54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (see *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-IX, and *Kolu v. Turkey*, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, mutatis mutandis, *Jalloh*, cited above, § 101). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (see paragraphs 39-40 above), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.



### III. The right to legal assistance in light of A.T. v. Luxembourg



#### *A.T. v. Luxembourg*

(Fifth Section judgment of April 9 2015, application no. 30460/13)

- i. waiver
- ii. right to consult with the lawyer before the interrogation
- iii. right to have access to the case files before questioning





### III. The right to legal assistance in light of A.T. v. Luxembourg

#### *Pishchalnikov v. Russia*

(First Section judgment of 24.09.2009,  
application no. 7025/04)

#### WAIVER

- Unequivocal
- Voluntarily
- Knowingly
- Intelligently

A.T. v. Luxembourg  
It is not possible

77. In this respect the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; *Kolu v. Turkey*, no. 35811/97, § 53, 2 August 2005, and *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, § 59, and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).





### III. The right to legal assistance in light of A.T. v. Luxembourg

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### III. The right to legal assistance in light of A.T. v. Luxembourg

#### LEGAL ASSISTANCE

Attaches at:

- First interrogation (Salduz v. Turkey)
- From arrest or detention irrespective of interrogation (Dayanan v. Turkey)
- From the moment when person is significantly affected (Shabelnik v. Ukraine) – “as soon as the suspicion against him is seriously investigated and the prosecution case is compiled, even if they are not formally placed in custody as a suspect”

If the law denies it outright, proceedings are automatically rendered unfair, irrespective of whether suspect remains silent, confesses or denies the facts (Dayanan)





### III. The right to legal assistance in light of A.T. v. Luxembourg

#### CONTENTS OF LEGAL ASSISTANCE (Dayanan v. Turkey)

- Discussion of the case
- Organisation of the defence
- Collection of evidence favourable to the accused
- Preparation for questioning
- Assistance during questioning
- Support of an accused in distress
- Checking of the conditions of detention

CONFIDENTIALITY – protected by article 6 § 3 (c) and article 8 (*Niemitz v. Germany, S. v. Switzerland, etc.* )





### III. The right to legal assistance in light of A.T. v. Luxembourg

A.T.'s police interview:

- He was arrested
- He had been charged (he was in detention and subject to police interrogation)
- The law / practice did not afford him the right to legal assistance
- The inconsistency of the statements with later statements was relied upon in the judgment

Breach of art. 6 § 3 (c) in conjunction with art. 6 § 1







### III. The right to legal assistance in light of A.T. v. Luxembourg

#### A.T.'s first interview by the investigative judge:

##### 1) Access to the case files

- Restriction of access until after conclusion of first interview, founded on the interests of justice in the search for the truth (namely to prevent the suspect of adapting his version of the facts to the evidence in the case files)
- ECtHR – restriction is justified and due to the fact that from the end of the interview there is full liberty in organisation of the defence there is a fair balance
- No violation of art. 6 (article 5 was not analysed)





### III. The right to legal assistance in light of A.T. v. Luxembourg

A.T.'s first interview by the investigative judge:

#### 2) Consultation with the lawyer before interrogation

- The right to legal assistance must be effective
- It is by means of previous consultation that the lawyer is able to inform the suspect of his rights
- In A.T. – the suspect had already given a statement and the lawyer was only appointed the same morning, making consultation at that point of high importance
- Violation of art. 6 § 3 (c)





### III. The right to legal assistance in light of A.T. v. Luxembourg

#### Remedies

Breach of right to legal assistance in pre-trial stage

- *Salduz* - “the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded”
- A.T. – reopen the case upon request and entitle A.T. To proceedings according to the requirements of article 6 § 1 – not using previous statements





### III. The right to legal assistance in light of A.T. v. Luxembourg

## Remedies – exclusionary rule?

### *Schenk v. Switzerland*

(Judgment of 12.08.1988 of the Plenary of the Court, application no. 10862/84)

## Traditional view

46. While Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.

The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.







### III. The right to legal assistance in light of A.T. v. Luxembourg

## Remedies – exclusionary rule?

### *Gäfgen v. Germany*

(Grand Chamber judgment of 01.06.2010, application no. 22978/05, §§163-164)

Determination of fairness in the use of unlawfully obtained evidence:

- Examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found
- Whether the rights of defence have been respected, in particular “whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use”.
- Quality of the evidence and the circumstances in which it was obtained and whether the latter cast doubts on its reliability or accuracy-
- Whether the evidence in question had a decisive role for the outcome of the proceedings.





### III. The right to legal assistance in light of A.T. v. Luxembourg

## Remedies – exclusionary rule?

- Violation of art. 3, the use of evidence obtained by means of torture or inhuman or degrading treatment is considered to render proceedings automatically unfair as a whole in light of article 6 § 1 and therefore such evidence must be excluded. This case law was established in *Jalloh v. Germany* and *Gäfgen v. Germany*.
- Violation of art. 6 right to silence or against self-incrimination or right to pre-trial legal-assistance, the use of evidence obtained by means of such a violation is considered to render proceedings unfair as a whole in light of article 6 § 1 (*Saunders and Salduz*)
- Violation of art. 8, the admissibility of the use of evidence obtained by means of such a violation is subject to a balancing test and is not likely to be considered to render proceedings unfair as a whole in light of article 6 § 1, unless the evidence is of doubtful probative value (*Bykov*).



### III. The right to legal assistance in light of A.T. v. Luxembourg

## Remedies – exclusionary rule?





# Thank you for your attention!

Questions, thoughts or  
comments:

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