



**Equality of arms – procedural
safeguards for defendants: the way
through and forward on the EU map**

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Equality of arms

I. Equality of arms

- i. The notion of a fair trial
- ii. What happened that we need to discuss this notion?
- iii. Returning the scales back to Justice

II. Trying to find a balance between Security and Justice

- i. Achievements
- ii. Prospects

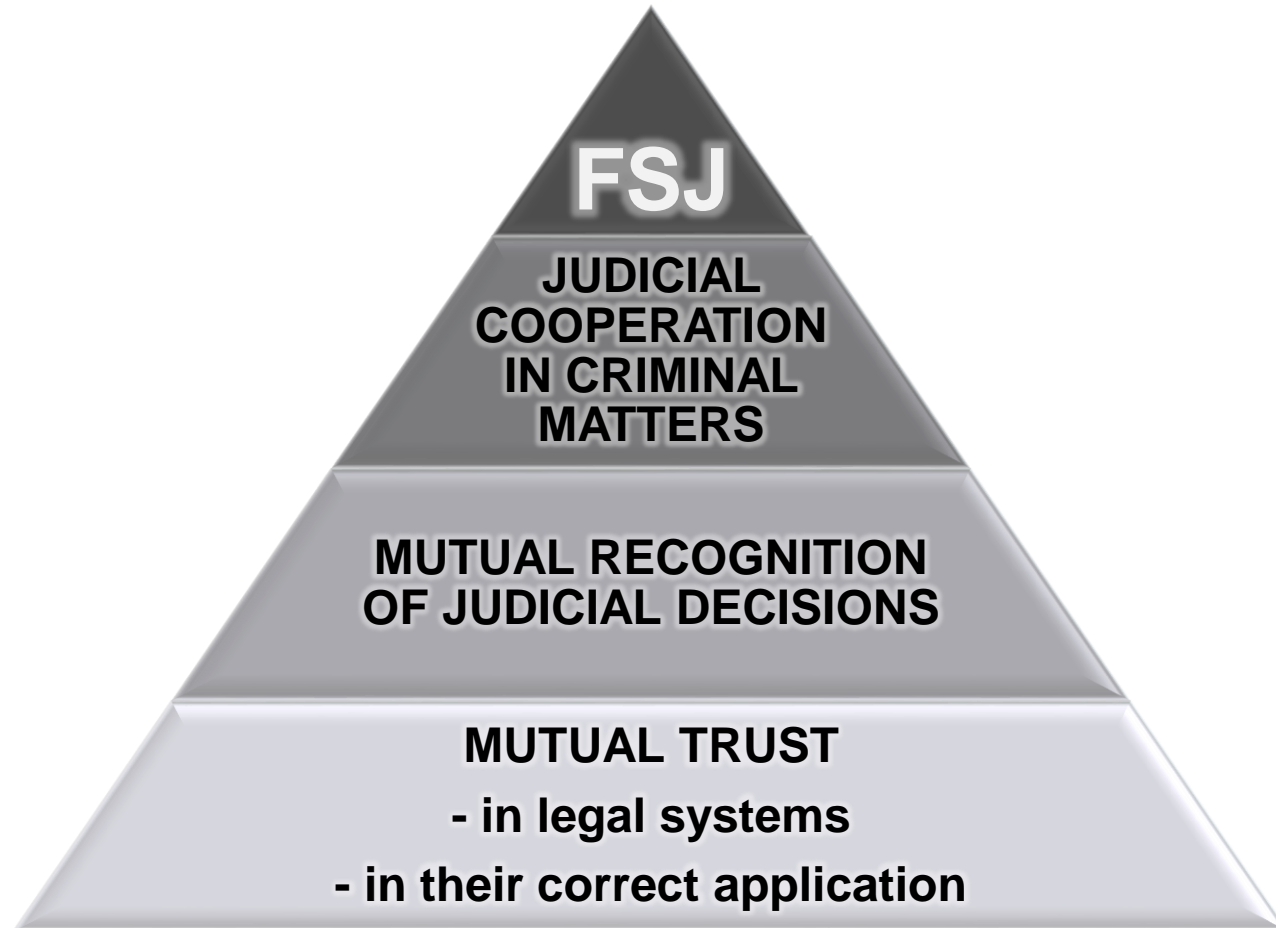


Equality of arms – the notion of a fair trial

- Sub-principle of fairness
- "Each party must have a reasonable opportunity to defend its interests" (*Prosecutor v Tadic* - ICTY Appeal Chamber)
- Understanding minimum stakes in the procedure
- Having the ability to effectively:
 - Participate in proceedings
 - Exercise one's rights
 - Benefit from the protection of privacy
- Balance



What happened?



What happened?

- The extent of mutual recognition → dependent on several parameters, including mechanisms for safeguarding the rights of individuals suspected or accused of a crime
- Bosphorus case law
- *Although the Member States are party to the ECHR [...], experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States – Recital (5) D 2013/48*
- 11/09 and EAW Framework Decision – *erosion*



Returning the scales back to Justice

- *"Before 2010, Lady Justice was holding two swords and no scales. [...] We are building a true European continent of justice"*

Vice-President Viviane Reding, EU Justice Commissioner, 27/11/2013

- **Stockholm Programme**

- Focus on strengthening the rights of individuals in criminal proceedings
 - Protection of the rights of individuals suspected and accused in criminal proceedings
 - A fundamental value of the Union
 - Essential in order to maintain mutual trust between the MS and public confidence in EU
- **AIM:** to bring to life the principle of the right to a fair trial



Road map for strengthening procedural rights of individuals suspected or accused in criminal proceedings

**Communication with
relatives, consular authorities**

**Special safeguards for
vulnerable individuals**

Information

Translation and interpretation

Legal advice and legal aid



Trying to find a balance between Security and Justice

■ Achievements

- The right to translation and interpretation – Directive 2010/64
- The right to information – Directive 2012/13
- The right of access to a lawyer – Directive 2013/48

■ Prospects

- The right to legal aid, including temporary legal assistance – COM (2013)824
- Procedural safeguards for children – COM (2013)822
- Procedural safeguards for vulnerable individuals – Recommendation 2013 C 378/02
- Strengthening the presumption of innocence – COM (2013) 821/2



Trying to find a balance between Security and Justice

- Only criminal proceedings
- Minor offences
- EAW proceedings covered
- Non-regression clause
 - Minimum rules to strengthen mutual trust
 - Without prejudice to existing standards
 - MS can provide for higher standards
 - Without obstructing judicial cooperation in criminal matters
- **Goal:** effective execution of the right to defence



Achievements



The right to translation and interpretation

- The right to translation and interpretation
 - An element of the right to defence and the right to a fair trial
 - It is crucial that the suspected or accused individual understands the language of criminal proceedings
- Free and proper linguistic assistance
- Provided promptly
- Monitoring the standard of interpretation and translation
- Possibility of a remedy if translation or interpretation refused



The right to translation and interpretation

- **Interpretation**

- Communication with a defence lawyer
 - Possibility of the suspected or accused individual explaining his/her version of events
 - In connection with being questioned or heard, and when submitting applications or appeals
- During interviews and court hearings

- **Translation :**

- Essential documents or at least their relevant parts
 - The decision to detain an individual
 - Decision on charges and indictment
 - Judgment
- Other documents can be considered essential upon request



The right to information

I. Information on one's rights

- i. For all suspected and accused individuals
- ii. For detained individuals [Letter of Rights]
- iii. For individuals arrested within the course of EAW proceedings

II. Information about charges [accusation]

III. Information on the reasons for detention

IV. Detailed information about the accusation

V. The right to access the case file

- i. Essential to challenging the legality of detention
- ii. To all material evidence, whether favorable or unfavorable for the suspected or accused individual, in order to prepare the defence



The right to information

- I. **General information on one's rights** → provided verbally or in writing
 - i. The right of access to a lawyer
 - ii. The right of free legal aid [free legal advice]
 - iii. The right to receive information on the charges
 - iv. The right to translation and interpretation
 - v. The right to remain silent
- II. **Letter of Rights** → provided verbally or in writing
 - i. The right to access the case file
 - ii. The right to inform the consular authorities or a relative
 - iii. The right to emergency medical assistance
 - iv. Maximum detention time-limits



Imparted in a simple, non-technical, language



**Instruction
concerning the rights and obligations of the suspect**

The suspect shall be entitled to the following:

- to give explanations;
- to refuse to give explanations or refuse to answer questions;
- to submit an application for permission to acknowledge liability of one's own free will (Art. 142 of the Tax and Revenue Code);
- to submit applications for an inquiry or investigation to be carried out and for participation in the evidence accumulating procedure;
- to receive assistance of a lawyer;
- to demand that a hearing is held with the participation of an appointed lawyer, the absence of whom does not hamper the hearing (Art. 300, 301 of the Code of the Penal Procedure);
- to submit an application or express consent for an application to be submitted by the wronged to an institution or a trustworthy person in order to carry out a conciliatory procedure between them (Art. 23a § 1 of the Code of the Penal Procedure);
- to get assistance of an interpreter/ translator free of charge, if he/ she has not got enough good command of spoken Polish (Art. 72 § 1 of the Code of the Penal Procedure);
- to get acquainted with the final materials for the procedure.

2. The suspect shall be obliged to undergo:

- a visual inspection of his/ her body and other examinations that do not violate the integrity of his/ her body; also it is permitted, in particular, to take the suspect's fingerprints, photographs and show to others persons for the purposes of recognition (Art. 74 § 2 Item 1 of the Code of the Penal Procedure);
- necessary psychological and psychiatric examinations necessary for the procedure and also examinations that require his/ her body to be subject to some treatment, except for surgical treatment, on condition that the treatment is given by an authorised member of health service and is not harmful to the suspect's health; in particular, the suspect shall be obliged to make it possible for the blood, hair or body excretions samples to be taken (Art. 74 § 2 Item 2 of the Code of the Penal Procedure)

3. The suspect who is at liberty:

- shall be obliged to appear at each summons in the course of the penal procedure and to notify the organ responsible for the procedure about each change of his/ her place of residence or stay that lasts more than seven days; in case of unreasonable absence, the suspect can be detained and brought with the use of coercive measures (Art. 75 § 1 and 2 of the Code of the Penal Procedure);
- if he/ she stays abroad, he/she shall be obliged to indicate an address for the service of proceedings in this country and in case he/ she fails to do so, a letter sent to the last known address in this country, if the address is not available, attached to the records of the proceedings in a case, shall be deemed to have been duly given (Art. 138 of the Code of the Penal Procedure);
- if the suspect, without notifying about his/her new address, changes the place of residence or does not live at the address he/ she has indicated, a letter sent in the course of preparatory proceedings at the address shall be deemed to have been duly given (Art. 139 of the Code of the Penal Procedure);

I hereby acknowledge the receipt of the Instruction concerning the rights and obligations before the first hearing.

Dated this

.....
(Suspect's signature)



Indicative model Letter of Rights

A. ASSISTANCE OF A LAWYER/ENTITLEMENT TO LEGAL AID

You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.

B. INFORMATION ABOUT THE ACCUSATION

You have the right to know why you have been arrested or detained and what you are suspected or accused of having done.

C. INTERPRETATION AND TRANSLATION

If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to translation of at least the relevant passages of essential documents, including any order by a judge allowing your arrest or keeping you in custody, any charge or indictment and any judgment. You may in some circumstances be provided with an oral translation or summary.

D. RIGHT TO REMAIN SILENT

While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. Your lawyer can help you to decide on that.

E. ACCESS TO DOCUMENTS

When you are arrested and detained, you (or your lawyer) have the right to access essential documents you need to challenge the arrest or detention. If your case goes to court, you (or your lawyer) have the right to access the material evidence for or against you.

F. INFORMING SOMEONE ELSE ABOUT YOUR ARREST OR DETENTION/INFORMING YOUR CONSULATE OR EMBASSY

When you are arrested or detained, you should tell the police if you want someone to be informed of your detention, for example a family member or your employer. In certain cases the right to inform another person of your detention may be temporarily restricted. In such cases the police will inform you of this.

If you are a foreigner, tell the police if you want your consular authority or embassy to be informed of your detention. Please also tell the police if you want to contact an official of your consular authority or embassy.

G. URGENT MEDICAL ASSISTANCE

When you are arrested or detained, you have the right to urgent medical assistance. Please let the police know if you are in need of such assistance.

H. PERIOD OF DEPRIVATION OF LIBERTY

After your arrest you may be deprived of liberty or detained for a maximum period of ... [fill in applicable number of hours/days]. At the end of that period you must either be released or be heard by a judge who will decide on your further detention. Ask your lawyer or the judge for information about the possibility to challenge your arrest, to review the detention or to ask for provisional release.



The right of access to a lawyer

- The right of the suspected or accused individual to a lawyer
 - In criminal proceedings
 - In EAW proceedings, both when issuing and executing MS
- The right to inform a relative, employer or a consular official
- The right to communicate with relatives or the consular authorities
- **Scope**
 - From the time the suspected or accused individual is notified of being suspected or accused of having committed an offence
 - Persons subject of EAW from the time of their arrest
 - Individuals who become suspected or accused during questioning



The right of access to a lawyer

- **Goal:** effective execution of the right to defence
- Without undue delay
 - Before questioning
 - Before carrying an investigative or evidence-gathering act
 - Upon detention
 - When summoned to appear before the court
- Confidentiality of communication & meeting in private
- Participation of a lawyer in questioning
- Participation of a lawyer in evidence collection → minimum :
 - Identification parades
 - Confrontations
 - Reconstruction of the crime scene



The right of access to a lawyer - exceptions

- Only at the pre-trial stage
- Strictly limited in time
- Justified by the circumstances
- Proportionate
- Without prejudice to the overall fairness of proceedings
- Reasons:
 - Serious adverse consequences to the life, freedom or physical integrity of an individual
 - Substantial jeopardy for the criminal proceedings
- When questioned, the suspect or the accused must be informed of the privilege not to incriminate oneself



The right of access to a lawyer – breaches and derogations – Recital (50)

- **Assessment** of statements or evidence
- The right to defence and to a fair trial must be observed
- The right to defence is irretrievably prejudiced when incriminating statements are used to get a conviction
- **However**, such statements can be used
 - To prevent the perpetration of other offences or avert serious negative consequences for third parties
 - To prevent substantial jeopardy of criminal proceedings when access to a lawyer or slow inquiry would irretrievably prejudice an ongoing investigation of a serious crime



Prospects



Prospects

- **Temporary legal aid** – before charges are laid
- **Children and vulnerable individuals**
 - Insufficient safeguards to guarantee their effective participation in criminal proceedings
 - Higher risk of discrimination
- Until now, legislation has been based on the **general assumption**
- *„A suspect or an accused that does **not have a broad understanding** of the nature of the accusation or the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed”*

ECtHr Judgment of 10 November 2004, Sc v UC, App no 60958/00
- **Presumption of innocence v presumption of guilt** [*Salabiaku* case]



Right to temporary legal aid and to legal assistance in EAW proceedings

- **Temporary legal aid**
 - Applied from the moment of being taken into custody
 - Even before charges are laid,
 - Until the decision on granting legal assistance is issued
 - In any case before the first questioning
- ***Salduz* case law**
- **Legal aid in EAW proceedings:**
 - In both issuing and executing MS
 - Legal aid should also extend to extradition/surrender proceedings – contrary to the ECtHR position



Procedural safeguards for children

- **Proposal for a directive** on procedural safeguards for children suspected or accused in criminal proceedings
- **Children**
 - Vulnerable by definition
 - 12% of all individuals dealt with by the criminal justice system
 - Individuals below the age of 18
 - Definition element but not a harmonisation rule
- **Goals:**
 - Restorative justice, rehabilitation and social re-intergration
 - Best interest of the child – a child-friendly justice system
- **Individual factors** need to be taken into account



Procedural safeguards for children

- The right to information about one's rights
- The right to inform the appropriate adult
- Mandatory access to a lawyer – no waiver
- The right to an individual assessment
- The right to medical examination
- Audio-visual recording of the questioning
- Detention as the measure of last resort
- Specific treatment in case of detention
- Training for people handling juvenile criminal cases



Procedural safeguards for vulnerable individuals

- COMMISSION **RECOMMENDATION** of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings
- No binding effect – why?
 - The subsidiarity requirement not met
 - No common definition of a vulnerable individual
- The recommendation **encourages** MS to establish procedural safeguards for vulnerable persons
- **Goal:** to ensure that vulnerabilities will be identified and matched with appropriate procedural safeguards



Procedural safeguards for vulnerable individuals

- Vulnerable individuals – **unable to participate effectively** in criminal proceedings due to age or mental/physical disability
- **Identification and presumption** of vulnerability
- Information – correct and imparted in an **accessible format**
- The need to inform the **legal representative** of the vulnerable individual
- The right of **access to a lawyer** – no waiver
- **Detention**
 - The measure of last resort
 - Reasonable accommodation



Strengthening the presumption of innocence – *codification of the ECtHR case law or a step farther?*

Rights following from the presumption

- No public references to guilt before final conviction
- Burden of proof on the prosecution
- *In dubio pro reo*
- *Nemo tenetur* → Not absolute
 - The right not to incriminate oneself
 - The right not to cooperate
 - The right to remain silent
 - No negative conclusions can be inferred from the above

→ Only **natural persons** are concerned

→ Only proceedings **labelled** criminal



Conclusions

Justice must not only be done, it must also be seen to be done

R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER rep 233)





Thank you for your attention

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