diritto&diritti dal 1996
diritto.it
direttore Francesco Brugaletta

ISSN 1127-8579

Pubblicato dal 03/11/2011

All'indirizzo http://xn--leggedistabilit2013-kub.diritto.it/docs/32522-the-suspect-as-stakeholder-in-pre-trial-criminal-proceedings

Autore: Richard Soyer

The suspect as stakeholder in pre-trial criminal proceedings

The suspect as 'stakeholder' in pre-trial criminal proceedings

Prof.ra Dr. Richard Soyer

Abstract.

Structure and law of criminal proceedings seems to be in transition in many European countries. Mostly there is a shift towards the pre-trial investigative stage under the auspices of a public prosecutor. In practice the pre-trial investigative phase often is driven by the police on its own. A significant number of cases are settled before the trial stage; whether investigations proved the suspect not to be guilty, whether the case was solved by diversion or even an order of summary punishment is issued. Even in those cases reaching the trial stage the information and proofs collected during the pre-trial stage predetermine the trial stage – there is a de facto continuum from investigation to trial ([1]).

Suspects' rights have to be guaranteed in whole criminal proceedings. The fairness of the trial as demanded by article 6 of the European Convention on Human Rights and Fundamental Freedoms is to be judged by reference to the procedure as a whole. According to the jurisprudence of the European Court of Human Rights unfairness or illegality at the investigative stage can be adequately compensated for at trial so that the procedure as a whole may nevertheless be regarded as fair. Yet that may only apply if the case enters the trial stage. Therefore suspects' rights in pre-trial stage must be guaranteed – both in law and in practice ([2]).

Taking both the Austrian reform of pre-trial criminal proceedings from 2008 and the European Union roadmap on suspects' rights from 2009 as references the paper will focus on the right to information, the access to a lawyer and participative rights in pre-trial criminal proceedings. It will be based on information collected by the EU funded study on "Pre-trial emergency defence – Best practice and effective emergency lawyer services", a study implemented by the Austrian Criminal Bar Association and its partners from the Universities of Graz, Ljubljana, Vienna, Zagreb and from the European Criminal Bar Association.

---

[1](*) *Prof. Dr. Richard Soyer, Institut für Strafrecht, Strafprozessrecht und Kriminologie Karl-Franzens-Universität Graz, A-8010 Graz, Universitätsstraße 15/B 3, richard.soyer@uni-graz.at.*

[2](**) Written version of the presentation at the "*International Conference: Penal protection of human dignity in the globalisation era,11 – 13 September 2010, Prishtina, Kosova*".

The text is the manuscript of my speech at this conference without relevant extensions and supplements (just adding a few footnotes). The overall results and recommendations of the PED project will be published at the end of 2010 separately after the presentation and discussions of the main project results at the ECBA (European Criminal Bar Association) – Conference on October 1-2, 2010, in Ljubljana. The author would like to thank Assessor *Stefan Schumann,* University of Graz, the coordinator of the PED-Project, cordially for his supportive assistance in the preparation of this contribution.

() *Artico v. Italy,* 13/05/1980 series A No 37 § 33.

Keywords: Effective rights; emergency defence lawyer services; empirical research on legal facts; pre-trial investigative stage; right to information; right to access to a lawyer.

Albert Einstein once said:

"*More than the past I am interested in the future, in which I intend to live*."

Nevertheless sometimes it may be helpful to take a look backwards: 30 years ago the European Court of Human Rights in the *Artico Case* recalled that "the convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

This appraisal is the underlying motto of my contribution on the suspect as a "stakeholder" in criminal proceedings which aims to bring together both parts of the conference topic: the "Efficiency of the criminal procedure and the protection of human dignity". In order to do so I will focus on the importance of guaranteeing suspects' rights already in pre-trial criminal proceedings and some new legislative developments in Austria and at the European Union level. These general observations will be underlined by some first results and conclusions of an EU-funded project on "Pre-trial Emergency Defence" (PED).

I. General Observations

Initially I would like to point out some general observations for the better understanding of the background and the circumstances of the project on "Pre-Trial Emergency Defence".

a) Pre-trial phase determining whole proceedings

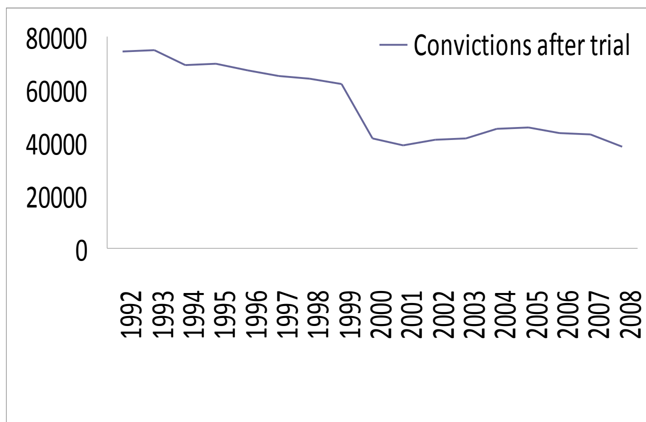
Structure and law of criminal proceedings seems to be in transition in many European countries. Mostly there is a shift towards the pre-trial investigative stage under the auspices of a public prosecutor. In practice the pre-trial investigative stage often is driven by the police on its own.

In many cases the pre-trail stage is also the final stage of the proceedings. This happens not only in case there is no sufficient proof for the suspect's guilt. A significant number of cases are settled before the trial stage; whether the case was solved by diversion or even an order of summary punishment is issued.

The importance of diversion can be proved by the figures on convictions after trial proceeding in Austria before and after the implementation of new possibilities for diversion in the Austrian CPA which entered into force in 2000. According to statistical data there has been a significant decrease of convictions in trial proceedings in Austria; the convictions after trial numbers, roughly spoken, decreased about 1/3.

Table 1(based on data provided by *Statistik Austria*[3]):

[3]( )http://www.statistik.at/web_de/statistiken/soziales/kriminalitaet/verurteilungen_gerichtliche_kriminalstatistik/index.html (last time visited: 13/09/2010).



Furthermore the importance of the pre-trial stage is underlined by the possibility for summary punishment orders, as recognized by the German CPP. Such a summary punishment order can be issued in case of misdemeanors and under certain preconditions. Most of them a public trial stage must not be seen as necessary and the variety of possible punishment is limited. Nevertheless even a custodial sentence up to one year can be issued as long as the suspect is represented by a lawyer and the enforcement of the sentence is placed on probation .[4]

Even in those cases reaching the trial stage the information and proofs collected during the pre-trial stage predetermine the trial stage – there is a de facto continuum from investigation to trial:[5] Defence Lawyers know very well: the defendant is bound by his first statement in the pre-trial phase. Changing the depositions he gave at the very beginning of the proceedings may regularly have a negative impact on his credibility.

b) 2008 CCP Austrian Reform

Legal developments must be seen and interpreted in the national and European context. In Austria there was 2008 a huge Reform of the Code of Criminal Procedure (CCP) with four cornerstones.

The structure of the pre-trial phase was shifted from the investigating judge model towards the public prosecutor being in charge of the pre-trial stage. The revised CCP recognizes the autonomous investigative powers of the police. Last but not least the legislator had strengthened victims' rights on the one hand and the rights of the suspects on the other.[6]

[4]() See §§ 407–12 German CPP. See further SCHUMANN, *Legal country report – Germany, PED report*, not yet being published.

[5]() This evaluation is supported by CAPE – HODGSON – PRAKKEN – SPRONKEN, *Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards,* in: Cape/Hodgson/Prakken/Spronken (eds.), *Suspects in Europa. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union (2007),* pp. 1-28.

[6]() See SOYER – KIER, *Die Reform des Strafverfahrensrechts. Grundzüge der Strukturreform und der neuen Verteidigungs- und Opferrechte*, AnwBl 3/2008, pp.105-19; LUEF-KOLBL – HAMMERSCHICK – SOYER – STANGL, *Zum Strafprozessreformgesetz: Die Sicht von Justizakteuren am Vorabend des strafprozessualen Vorverfahrens*, JSt 1/2009, p. 9.

c) EU legislative initiatives

As regards the EU level the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [7] has to be mentioned. The Roadmap is a political commitment for legislative efforts strengthening suspects' rights. [8] The Council agreed on a step-by-step approach; and the Roadmap contains an indicative order of rights: Measure A – the Directive on translation and interpretation in criminal proceedings – was informally agreed on in June 2010. [9] Measure B – the information on rights – a European Letter of Rights – and information about the charge has been drafted; [10] and this topic was discussed a few days ago at a Conference in Berlin. [11] Measure C1 on legal advice and D on the communication with relatives, employers and consular authorities will be the agenda for an Expert Meeting in Brussels in October 2010. The remaining measures (C2 – legal aid; E – special safeguards for suspected or accused persons who are vulnerable and F – a Green Paper on pre-trial detention [12]) shall be worked out within the next years.

It has to be pointed out again and again: Ensuring common minimal standards on suspects' rights are pre-condition for mutual trust and the use of mutual recognition instruments such as the European Arrest Warrant. Good legislation needs research; since it has to be evidence-based. A convincing example for such substantive research is the recently published project on „Effective Criminal Defence in Europe". [13]

---

[7]() OJ EU 2009 C 295/1.

[8]() On the legal nature of this 'resolution' see SCHUMANN – SOYER, *Zur Konzeption europäischer Integration zwischen Binnenmarkt und Strafjustiz – Das „Menschenbild im Strafrecht" der Europäischen Union*, in: *Geist (eds.), Das Menschenbild im Strafrecht, Series published by the Austrian Ministry of Justice,* No. 146 (2010), pp. 99-133 (124); see further SCHUMANN, *EU Police and Judicial Cooperation, the Lisbon Treaty Reform and the Stockholm Programme – Towards a Simulation of Intra-state Conditions?,* in: P. Bárd (eds.), *Terrorism and the Rule of Law* upcoming, 2010.

[9]() See the European Parliament legislative resolution of 16 June 2010 on the draft directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, Doc.00001/2010 – C7-0005/2010 – 2010/0801 – 2010/0801(COD), and the Council Doc. 10420/10 DROIPEN 58. In detail see Weratschnig, Europastrafrecht aktuell: Die RL über die Rechte auf Dolmetschleistungen und auf Übersetzungen – Ein erster Schritt zu Mindeststandards im Strafverfahren, JSt 4/2010, pp.140-5.

[10]() Proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392 final.

[11]() At this conference a Draft report of a research study on EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice was presented. This study was initiated by the German Federal Ministry of Justice, and implemented by Taru Spronken with assistance of Liesbeth Baetens and Anna Berlee from the University of Maastricht.

[12]() For a comparative analysis see VAN KALMTHOUT –KNAPPEN -MORGENSTERN (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU,* 2009.

[13]() Cape/Namoradze/Smith/Spronken, Effective Criminal Defence in Europe (2010).

The “Pre-trial Emergency Defence” project I will report about focuses on “Defence rights in pre-trial criminal proceedings – best practice and effective emergency lawyer schemes”; topics covered by measures B and C of the EU Roadmap. The project includes legal as well as empirical research on legal facts.

d) Empirical research on legal facts

The importance of empirical research on legal facts has to be stressed as last general observation:

The traditional understanding of legal research – i.e. analyzing and commenting on legal texts (rules, court decisions, papers of academics) – will remain the classic jurisprudent method in the present and the future. But there is a strong need to address in a scientific way the gap between law in theory and its application in practice – as evaluation of the effectiveness of legal provisions and as a pre-condition of better legislation.

II. Project on pre-trial emergency defence (PED)

a) Overview

The project focuses on the situation in three member states (Austria, Germany, Slovenia) and a future member state (Croatia). It aims to evaluate the defence rights in the pre-trial stage. The focus is on legal provisions and on legal facts – the de-facto standards – at the very beginning of proceedings.

The project inter alia will explore best practises of emergency defence lawyer schemes, and recommendations for legislative action will be made where needed. In Austria there is emergency defence lawyer services established as a pilot project since 2008.[14] Yet this service is used only 40-60 times a month mainly via telephone calls (a number which has to been seen in relation to about 1200 arrests a month). In Germany more than 50 locally emergency lawyer schemes are organized. None of such schemes is to be found in Slovenia. In Croatia a list of lawyers willing to do emergency work is provided to law enforcement agencies.

The PED project brings together partners the Universities of Graz, Vienna, Ljubljana and Zagreb as well as the Austrian and the European Criminal Bar Association. The project is financially supported by the EU Criminal Justice Programme 2008, the Austrian Ministry of Justice and the Austrian Bar Association.

The methodology of research is consisting of three parts: country reports on legal situation,[15] quantitative analysis by questionnaire, qualitative analysis by follow-up interviews.

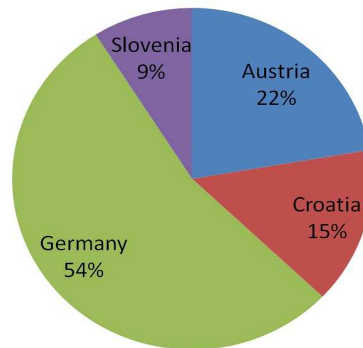
---

[14]() See SOYER, *The New Austrian Legal Aid Emergency Service: First Experiences,* JECL 2009, p. 59-64.

[15]() Austria by Dr. Karin Bruckmüller (University of Vienna); Croatia by Prof. Dr. Zlata Đurđević (University of Zagreb); Germany by Assessor Stefan Schumann (University of Graz) and Slovenia by Dr. Primož Gorkič (University of Ljubljana).

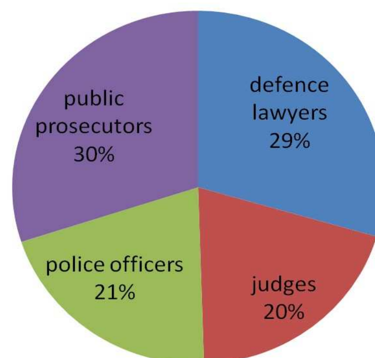
Using the online-questionnaire the project team received a valid set of 770 answers.[16] The distribution between the involved countries is shown by the following table 2.

Table 2 (Quantit



The next table shows the distribution between the occupational groups. All participants – judges, prosecutors, defence lawyers, police officers – have been practitioners.

Table 3 (Qualitative analysis: sample description – occupation):



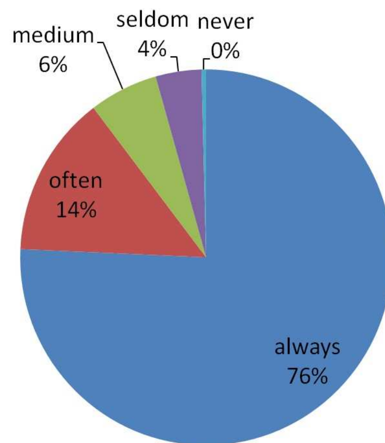
b) How often ght to access to a lawyer?

One of our main focuses in the questionnaire was the question whether detained suspects are informed about their right to access to a lawyer. Although 76 % of the participants answered that detained suspects always are informed about their right to access to a lawyer and additional 14 % said that the detained suspects are often informed about this, one has to point out that these figures on the

[16]() The author would like to thank Christian Grafl, Bernhard Klob and Jacques Huberty (all University of Vienna) for the preliminary analysis of the quantitative data used for that paper. The charts and analysis have been part of the PED project presentation at the German Ministry of Justice on 06/09/2010.

downside show that one quarter of the questioned professional experienced or believed, that detained suspects are not always informed about their right to access to a lawyer.

Table 3:



This figure is e… …n of suspects who are formally int…

c) Qualitative analysis: semi-structured interviews

Now let us point out some preliminary results from the qualitative analysis. We have been doing about 30 experts' interviews in Austria, 30 in Germany, 20 in Slovenia and 20 in Croatia. The problems we figured out are related both to the timing and the way suspects are given the information on their right to access to a lawyer.[17]

As regards the right to information interview partners mentioned a delay in providing the information due to informal questioning instead of or before interrogations or due to treatment as a witness instead of suspect and a delay due to incomplete information. Other difficulties are caused by the way the information is given. Problems may root in the use of judicial language not being adapted to the respective suspect. Written information, which shall support verbal information, often is just part of the interrogation protocol, so it is handed over to the suspect only after the interrogation. And interview partner reported on a weakening of information which was provided before. A crucial point seems to be the information on the availability of legal advice for free: Although the Austrian emergency lawyer scheme provides emergency legal advice by phone without any charge, suspects are not informed about this and therefore they are not aware of that chance.

The most important thing to do is to raise awareness of the public. Public most recognize that there are suspects' rights and if one makes use of suspects' rights he or she therefore must not be seen as being guilty: Taking suspect's rights does

[17]() These preliminary results are based on the Austrian and German interviews, and they are supported by comparable results in Slovenia. The interviews have been done by Assessor Stefan Schumann (in Austria and Germany); Dr. Karin Bruckmueller, Katrin Forstner (both in Austria); Zoran Burić M.A. (in Croatia) and Dr. Primož Gorkič in Slovenia.

not proof guilt. Not being guilty does not exclude the need of legal advice and representation. Legal representation may be of help even when guilt is proofed. And suspects must be aware of the impact of pre-trial proceedings.

There is a need for availability of legal advice and legal representation in case of emergency and on short notice. In the meantime access to a lawyer must not depend on financial resources of a suspect. Therefore suspects must not only be informed about the right to access to a lawyer, but additionally on the possibilities to get legal advice for free (e.g. first advice by phone, using the Austrian emergency lawyer service; pro bono work of lawyers; first advice of lawyers for free; legal aid).

d) Suspects' rights in pre-trial criminal proceedings

Suspects' rights have to be guaranteed in whole criminal proceedings. The fairness of the trial as demanded by article 6 of the European Convention on Human Rights and Fundamental Freedoms is to be judged by reference to the procedure as a whole. According to the jurisprudence of the European Court of Human Rights unfairness or illegality at the investigative stage can be adequately compensated for at trial so that the procedure as a whole may nevertheless be regarded as fair. Yet that may only apply if the case enters the trial stage. Therefore suspects' rights in pre-trial stage must be guaranteed – both in law and in practice.

How to do better?

Information should be provided – in regard of the timing – immediately when a suspect is faced with investigative measures or law enforcement agencies.

Furthermore: the information should be provided – regarding the way of information – in a clear and understandable language, adapted to the respective suspect (juveniles, drug addicts, etc). It should be easy accessible information (letter of rights handed over to and remaining by the suspect) and there has to be access to a lawyer at the very beginning (providing and informing about emergency lawyer schemes; legal aid).

Finally I would like to point out two benchmarks. Firstly: Not just giving information and explanation by police officers or prosecutors (or maybe judges) is the relevant criteria but the proper understanding of the suspect. And: Access to professional representation has to be provided already in pre-trial proceedings from the very beginning, supported by legal aid and effective emergency lawyer services where necessary.

Bibliography

CAPE – HODGSON – PRAKKEN – SPRONKEN, *Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards,* in: Cape/Hodgson/Prakken/Spronken (eds.), *Suspects in Europa. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union,* 2007.

SCHUMANN, *Legal country report – Germany, PED report*, not yet being published.

SOYER – KIER, *Die Reform des Strafverfahrensrechts. Grundzüge der Strukturreform und der neuen Verteidigungs- und Opferrechte*, AnwBl 3/2008, pp.105-19; LUEF-KOLBL – HAMMERSCHICK – SOYER – STANGL, *Zum Strafprozessreformgesetz: Die Sicht von Justizakteuren am Vorabend des strafprozessualen Vorverfahrens*, JSt 1/2009.

SCHUMANN – SOYER, *Zur Konzeption europäischer Integration zwischen Binnenmarkt und Strafjustiz – Das „Menschenbild im Strafrecht" der Europäischen Union*, in: *Geist (eds.), Das Menschenbild im Strafrecht, Series published by the Austrian Ministry of Justice,* No. 146, 2010.

SCHUMANN, *EU Police and Judicial Cooperation, the Lisbon Treaty Reform and the Stockholm Programme – Towards a Simulation of Intra-state Conditions?,* in: P. Bárd (eds.), *Terrorism and the Rule of Law,* upcoming, 2010.

SOYER, *The New Austrian Legal Aid Emergency Service: First Experiences,* JECL 2009.

VAN KALMTHOUT –KNAPPEN -MORGENSTERN (eds.), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU,* 2009.