The suspect as ‘stakeholder’ in pre-trial criminal proceedings

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30 years ago ...

„The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.“

*Artico v Italy, 13/05/1980, series A No. 37 § 33.*
Outline of the presentation

General observations

– Pre-trial phase determining whole proceedings
– 2008 CCP Austrian reform / Strenghtening defence rights
– EU legislative initiatives / Roadmap and its implementation
– Empirical research on legal facts

Project on Pre-trial Emergeny Defence (PED)

– Overview
– PED results:
  Information on the Right to legal advice / Access to legal advice
– Conclusions and recommendations
General Observations
Pre-trial phase determining whole proceedings

- Pre-trial stage often as the final stage
  - Missleading terminology

- De facto continuum from pre-trial stage to trial
  - Defendant regularly is bound by the first statement
Pre-trial stage as final stage – Austria

- Increased opportunities for diversion since 2000
- Decrease of convictions after trial

Pre-trial stage as final stage – Germany

Decisions of public prosecutors at the end of pre-trial stage

- Drop of case due to insufficient conviction probability (31%)
- Drop of case due to opportunity reasons (31%)
- Request for written summary sanctioning order (14%)
- Indictment (14%)
- Possibility for private prosecution or administrative penal procedure (10%)

Decisions in 2006 (4 191 000 cases in pre-trial stage)
2008 CCP Austrian reform

Shift from investigating judge model towards public prosecutor in charge of pre-trial stage

Autonomous investigative powers of police recognized by the revised CCP

Strengthening victims’ rights

Strengthening suspects’ rights

Project on
Pre-trial Emergency Defence
EU legislative initiatives

Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Council Doc. 15434/09)

– A: Translation and Interpretation
– B: Information on Rights and Information about the Charges
– C: Legal Advice and Legal Aid
– D: Communication with Relatives, Employers and Consular Authorities
– E: Special Safeguards for Suspected or Accused Persons who are Vulnerable
– F: A Green Paper on Pre-Trial Detention
Empirical research on legal facts

Traditional understanding of legal research:
- Analyzing and commenting of legal texts (rules, court decisions, scientific papers)

Need to address the gap between law in theory and its application in practice:
- As evaluation of effectiveness of legal provisions
- As precondition for better legislation

Project on Pre-trial Emergency Defence
Project on
Pre-trial Emergency Defence (PED)
Overview

Austria, Croatia, Germany and Slovenia:

Evaluation
– Defence rights in the pre-trial stage

Focus
– On legal provisions and legal de facto standards at the very beginning of the pre-trial stage

Output
– Best practice of emergency defence lawyer services
– Recommendations for legislative action where needed
PED Project Team

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With financial support from
Methodology of research

- Country reports on legal situation
- Quantitative analysis by questionnaire
- Qualitative analysis by follow up interviews
Quantitative analysis:
Sample description – countries

- Germany: 54%
- Austria: 22%
- Croatia: 15%
- Slovenia: 9%
Quantitative analysis: Sample description – occupation

- Public prosecutors: 30%
- Defence lawyers: 29%
- Police officers: 21%
- Judges: 20%
PED Results
Information on the Right to Access to legal advice
How often are detained suspects informed about their right to access to a lawyer?

- Always: 76%
- Often: 14%
- Medium: 6%
- Seldom: 4%
- Never: 0%
How often are suspects informed about their right to access to a lawyer? (%)

in case of detention / (before) interrogation / informal questioning-interrogation

never  | seldom | medium | often | always
--- | --- | --- | --- | ---
0,4 / 0,4 / 0,4 | 4 / 7 / 10 | 6 / 9 / 10 | 14 / 18 / 19 | 76 / 66 / 61
In which way are detained suspects informed about their right to access to a lawyer? (Multiple answers possible)

- Oral: 96%
- Written: 44%
- Information leaflet: 46%
Qualitative analysis

Right to information - Problems

- **Timing**
  - Delay due to informal questionings instead of or before interrogations
  - Delay due to treatment as a witness instead of suspect
  - Delayed or incomplete information

- **Way**
  - Judicial language (‘from lawyers to lawyers’)
  - Written information only as part of interrogation protocol
  - Weakening of provided information
Access to legal advice
### Access to legal advice – legal situation:

<table>
<thead>
<tr>
<th></th>
<th>Before first police interrogation</th>
<th>During first police interrogation</th>
<th>During arrest/detention</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Austria</strong></td>
<td>Yes</td>
<td>Presence</td>
<td>Might be supervised and/or restricted to legal advice</td>
</tr>
<tr>
<td></td>
<td>Might be supervised and/or restricted to legal advice</td>
<td>No consultation Questions afterwards</td>
<td></td>
</tr>
<tr>
<td><strong>Croatia</strong></td>
<td>Yes</td>
<td>Presence</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Consultation</td>
<td>Consultation Participation -/+</td>
<td></td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>Yes</td>
<td>No explicit legal provision on participation of a lawyer But right to access to legal advice at any time of proceedings</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Not supervised</td>
<td></td>
<td>Not supervised in exceptional cases written communication might be supervised</td>
</tr>
<tr>
<td><strong>Slovenia</strong></td>
<td>Yes</td>
<td>Obligatory Consultation Participation</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Not supervised</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Access of legal advice – in practice:

How often is a criminal defence lawyer consulted at this point in time?

Country:
- Austria
- Germany
- Croatia
- Slovenia

<table>
<thead>
<tr>
<th></th>
<th>Inquiry</th>
<th>Before Interrogation</th>
<th>Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>2.0</td>
<td>2.1</td>
<td>2.3</td>
</tr>
<tr>
<td>Often</td>
<td>2.4</td>
<td>2.7</td>
<td>3.6</td>
</tr>
<tr>
<td>Medium</td>
<td>2.7</td>
<td>2.9</td>
<td>3.1</td>
</tr>
<tr>
<td>Seldom</td>
<td>2.2</td>
<td>2.6</td>
<td>2.8</td>
</tr>
<tr>
<td>Never</td>
<td>2.8</td>
<td>3.1</td>
<td>3.0</td>
</tr>
</tbody>
</table>

N = 633
### Access of legal advice – in practice:

In which way is a consultation between the criminal defence lawyer and the suspect facilitated before the interrogation?

#### Overall view

<table>
<thead>
<tr>
<th></th>
<th>Austria percent</th>
<th>Germany percent</th>
<th>Croatia percent</th>
<th>Slovenia percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidential</td>
<td>45.9</td>
<td>89.6</td>
<td>76.7</td>
<td>87.0</td>
</tr>
<tr>
<td>Supervised</td>
<td>31.4</td>
<td>2.9</td>
<td>16.4</td>
<td>7.2</td>
</tr>
<tr>
<td>Not at all</td>
<td>3.5</td>
<td>0.2</td>
<td>1.7</td>
<td>5.8</td>
</tr>
<tr>
<td>Don’t know</td>
<td>18</td>
<td>7.0</td>
<td>5.2</td>
<td>5.8</td>
</tr>
<tr>
<td>Missing</td>
<td>1.2</td>
<td>0.2</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
Qualitative research:
Factors influencing suspect’s decision on access to legal advice

- Suspect recklessnes (information assimetry)
  - presuming justice will be done
  - “I did nothing wrong”
  - the need to clear his/her name
  - first time suspect vs. recidivist
  - Awareness that use of suspects’ right does not proof guilt

- Money (or the lack of it)
  - classic crime vs. economic crime
  - suspects of low socio-economic status vs. well-educated, white-collar suspects

- Underestimating the effect of police-gathered information

- Insufficient information
  - Orally provided information to cursory, written information overcrowded
  - Missing information on access to legal advice free of charge
  - Missing information on defence lawyer hotline

Project on Pre-trial Emergency Defence
Access to legal advice – supported by:

defence hotline / list of lawyers on duty / legal aid / mandatory defence

<table>
<thead>
<tr>
<th></th>
<th>Before first police interrogation</th>
<th>During first police interrogation</th>
<th>Judicial interrogation to decide on pre-trial detention</th>
<th>During pre-trial detention</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Austria</strong></td>
<td>Defence hotline</td>
<td>Defence hotline</td>
<td>None</td>
<td>Mandatory defence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Legal aid</td>
</tr>
<tr>
<td><strong>Croatia</strong></td>
<td>List of lawyers on duty</td>
<td>List of lawyers on duty</td>
<td>Mandatory defence if applicable</td>
<td>Mandatory defence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Legal aid</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>Defence hotline</td>
<td>(Defence hotline)</td>
<td>Defence hotline (List of mandatory defence lawyers)</td>
<td>Mandatory defence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>[=Under certain circumstances equivalent to legal aid]</td>
</tr>
<tr>
<td><strong>Slovenia</strong></td>
<td>Full list of lawyers</td>
<td>Full list of lawyers</td>
<td>Mandatory defence</td>
<td>Mandatory defence</td>
</tr>
<tr>
<td></td>
<td>(List of mandatory defence lawyers)</td>
<td>(List of mandatory defence lawyers)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Project on Pre-trial Emergency Defence
## Knowledge on defence hotlines

### Does an emergency lawyer service exist? – Overall view

<table>
<thead>
<tr>
<th></th>
<th>Austria percent</th>
<th>Germany percent</th>
<th>Croatia percent</th>
<th>Slovenia percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>1.7</td>
<td>10.8</td>
<td>19.0</td>
<td>24.6</td>
</tr>
<tr>
<td>24h</td>
<td>80.8</td>
<td>57.3</td>
<td>28.4</td>
<td>58.0</td>
</tr>
<tr>
<td>Part time during the day</td>
<td>0.6</td>
<td>1.2</td>
<td>4.3</td>
<td>1.4</td>
</tr>
<tr>
<td>Part time during the night</td>
<td>0.6</td>
<td>4.8</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Don’t know</td>
<td>16.3</td>
<td>25.3</td>
<td>46.6</td>
<td>15.9</td>
</tr>
<tr>
<td>Missing</td>
<td>0</td>
<td>0.5</td>
<td>1.7</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
Qualitative analysis

Right to access to lawyer - Problems

- **Missing information**
  - On availability of telephone contact to emergency lawyer schemes
    free of charge (Austria)

- **Missing awareness**
  - Taking suspect’s rights does 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
  - Suspects’ awareness of the impact of pre-trial proceedings

- **Infrastructure**
  - Availability / Accessability of emergency lawyer schemes
  - Availability / Use of legal aid already in pre-trial proceedings
Conclusions
Information on the right to access to legal advice

Information must be provided ...

... When
- Immediately, when a suspect is faced with investigative measures or law enforcement authorities (but at latest before any questioning)

... How
- In a clear and understandable language
- Adopted to the respective suspect (juveniles, drug addicts, ...)
- Accessible and lasting (letter of rights handed over to and remaining by the suspect)
- Underlining that use of suspects’ rights does not make suspicious

... Including
- Possibilities for legal advice / legal representation free of charge
- Information on emergency defence lawyer service

Benchmark: Information + explanation = understanding
Access to a lawyer

Access to a lawyer must be facilitated ...

... When

- In every phase of (pre-trial) proceedings
- Before first interrogation or any other form of questioning

... How

- In principle confidential
- Effective (participation rights during interrogation)
- Supported by legal aid already in pre-trial proceedings (mandatory in case of deprivation of liberty)
- De facto access guaranteed by emergency lawyer schemes

Benchmark: Enabling effective participation and defence

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Emergency lawyer schemes

Must ...

... be provided
- 24/7 and nationwide
- Accessable by phone immediately and in person in reasonable time

... assured by
- Information provided to the suspects immediately, understandable and verifyable
- Common understanding of all stakeholders in pre-trial proceedings
- Financial assets

... coordinated with
- Systems of legal aid and mandatory defence

→ Benchmark: Effectiveness
Project on
Pre-trial Emergency Defence

Austrian Criminal Bar
Association

University of Ljubljana

Institute of Criminal Law

Pravni Fakultet | Sveučilište u Zagrebu

ECBA

European Criminal Bar Association

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The suspect as a ‘stakeholder’
in criminal proceedings
New Zealand, XX/XX/2010

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