

The new Austrian legal aid emergency service:

First experiences*

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Before delivering a short report on the first experiences with the new legal aid emergency service, established in Austria in summer 2008, a short overview about the legal background – the Austrian legal aid system which was restructured but not improved at all at the beginning of 2008 – may be given.

1. The Austrian legal aid system

The Austrian legal aid system in criminal procedures mainly consists of providing a person with a legal aid lawyer. The Austrian Code of Criminal Procedure¹ grants this right of legal aid if the accused has insufficient financial means. It is the judge of the pre-trial procedure who decides whether a legal aid lawyer is provided. If the judge decides that there is such a need he will have to inform the regional bar which has to appoint the lawyer. This appointment procedure produces delayed contacts with the lawyer – the first contact in custody cases usually takes place ten days after arrestment.

Every Austrian lawyer has the duty to accept an appointment unless there is a good reason for exclusion. Exclusively attorneys at law are permitted and have the duty to work as legal aid lawyers. In our system we do not have public defenders, private offices etc doing legal aid work. Only attorneys at law who are registered in the list of the regional bar have the necessary accreditation. If somebody wants to be registered in this list he or she has to fulfil all criteria

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¹ Sec. 61 § 2 -4 and sec 62 Strafprozessordnung (StPO).

stated by law.² Being registered this colleague is enabled to work as a lawyer and to do any legal aid work. There are no additional trainings required after being a “registered” lawyer.

The appointment as a legal aid lawyer by the regional bar follows an alphabetical order – usually each lawyer is appointed four or five times a year, for either civil or criminal or maybe administrative cases. This may be one of the reasons why legal aid lawyers seem to have a lack of specialisation in the field for what they are appointed and a low motivation. Although the person to be provided with a legal aid lawyer can pronounce his or her wish concerning the concrete person usually the appointment follows the alphabetical order.

The legal aid lawyer does not get direct payment – neither from the client nor from the state. Instead of that the legal aid services are paid by a governmental fee to the lawyers’ pension fund of the regional bar.³ Only in very big cases (e.g. if the public hearings last for more than ten days) the lawyer gets direct payment, otherwise he would obviously break down financially.

In 1993 the so called “Pflichtverteidiger” was implemented into the Austrian Code of Criminal Procedure.⁴ Coincidentally since that time being in custody constitutes a case of “obligatory defence”, meaning that the detainee is obliged to have a lawyer. Therefore this kind of emergency defence lawyer was invented as a special version of the “normal legal aid counsel”. In the past the emergency legal aid lawyer had to represent the accused only in the first two weeks after arriving in the court detention center (this has to be within 48 hours after the arrestment). In reality and because of this structure the first contact of a detainee with the lawyer happened not earlier than five after arrestment. The law provided for a small payment to the “Pflichtverteidiger”. This regulation was in

² Sec. 1 Rechtsanwaltsordnung (RAO).

³ Sec. 47 RAO.

⁴ Sec. 42 § 2 StPO-alt.

force until December 31, 2007. Now also the defence at this early stage of a pre-trial procedure in custody cases is integrated in the job of the “traditional” legal aid lawyer as described before.

So let me assume that from January until July 2008 (when the new legal aid project started) there was no legal aid system at all working in custody cases in the first ten days after arrestment.

2. The new pre-trial procedure

Since the beginning of 2008 we have new regulations for the pre-trial procedure in Austria.⁵ Instead of the “old” investigating judge now the prosecutor is in charge of the pre-trial investigations. The new law guarantees the suspect the right of immediate consultation of a lawyer, who can be present at the first interrogation. The suspect has the right to talk to the lawyer in private before the start of the interview.⁶

But, as mentioned before, the former emergency legal aid service was abolished at the end of the last year and even this service did not provide any legal aid in the first five days after arrestment. So the new rights were very theoretical but not practical.

3. The new legal aid emergency service (“Anwaltlicher Journdienst”)

In this bad situation, characterised by a lack of regulation, the Austrian Ministry of Justice and the “ÖRAK” (the Austrian Bar)⁷ initiated a project called

⁵ Strafprozessreformgesetz BGBl. I 2004/19, Strafprozessreformbegleitgesetz I BGBl. I 2007/93, Strafprozessreformbegleitgesetz II BGBl. 2007/112.

⁶ Sec, 59, 164 StPO.

⁷ See www.rechtsanwaelte.at

“Anwaltlicher Journdienst” to search for a way an emergency lawyer service could work effectively.

The project started on July 1 and will terminated on October 31, 2008.

A telephone hot-line was installed by the Bar Association to make the new service available for all detainees, regardless of their financial background, nationwide and 24 hours a day. In general the service has to be paid by the detainee. In case he has no sufficient financial means the remuneration is paid by the ministry of justice via the Bar Association to the lawyer personally on an hourly basis of € 100.

It is possible to waive this right. Before reaching an agreement on this emergency service we had huge discussions how the waiver should be handled. I was proposing that it should be possible to waive this right only after a personal meeting with a lawyer. However, this was not accepted by the Ministry of Justice.

To make the contact with a lawyer easier for the suspect, the first call and conversation by phone is free of charge for a maximum duration of up to five minutes. Presently in every city with a court house two lawyers are on duty for a period of 24 hours.

The services consist of advice, consultation, and the lawyer’s presence during the first police interrogation. Another defence activity may be to fill a motion for legal aid. I have to point out in this concern that the services terminate when the detainee arrives at the court detention center (which has to be within 48 hours after arrestment).

4. First experiences and main issues for a discussion

I am coming to the end of my report addressing the main issues for a discussion from my point of view.

The first practical experience is that the new Austrian legal aid emergency service is not properly working. There are only a few contacts between detainees and lawyers, ie 39 in July 2008, 33 in August 2008 and 33 in September 2008 all over Austria in relation to approximately 1200 arrestment per month. On the average there is only one contact in relation to 40 arrestment daily.

I am seeing a great black box regarding the factual question how or even if the police inform the detainee about his rights and this service. It seems to me that the waiver of the right to contact and consult a lawyer takes place under incorrect circumstances: no proper information by the police, and maybe pressure, at least negative influence by the police. One more explanation may be the missing tradition of active defence work in Austria at the beginning of the pre-trial phase.

5. Excursus: EU-project “Pre-trial emergency service”

I would like to make a short sidestep now and point out that the European Commission was informing a few days ago the Austrian Criminal Bar Association that they will get a grant for a research project I would like to outline now. The project will complement the study of Taru Spronken and Ed Cape on “Suspects in Europe”⁸ and their follow-up project on “Effective defence rights in the EU and access to Justice”.

⁸ Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken (eds.), *Suspects in Europe*, Antwerpen – Oxford 2007.

The two year project will be a comparative analysis of defence rights in pre-trial procedures in Austria, Germany, Slovenia and Croatia. The goal is to evaluate defence rights especially in the first phase of pre-trial proceedings in law and practice.

The course for the subsequent trial is often set during this stage, so it is necessary to guarantee effective defence rights immediately after the arrest or during the first interrogations. Therefore the access to legal assistance and the participation of a defence lawyer are highly important. Practical measures as a defence counsel emergency service (day-and-night legal aid system) should be a support to guarantee these rights.

The information will be gathered by quantitative and qualitative empirical research (questionnaire with follow-up interviews). The questionnaire will be drafted at a starting workshop in Ljubljana in May 2009. The empirical research will focus on 50 up to 100 participants (mainly defence lawyers) answering the questionnaire in each of the four countries (in total approx 300). The total number of the follow-up expert interviews is 100.

All information about standards in law and in reality, especially the results of the empirical research, should be given by country reports, to be discussed at a mid-term workshop in April 2010. A general report will outline the main findings and policy recommendations and, together with the overall results, be presented and discussed at a joint conference with the European Criminal Bar Association (ECBA) in October 2010. The publication of all aspects will follow in November 2010. A highly qualified team of researchers and practitioners with long term experience will supervise the project.

Better information about defence rights in three (different) member states and an accession country will lead to the development of best practice and practical measures which will ultimately promote mutual trust. The results should help to find guidelines and best practice to establish effective lawyer emergency services in all member states.