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The Acceleration of Criminal Proceedings and the Rights of the Accused

Comparative Observations as to the Reform of Criminal Procedure in Europe

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§ 1. Introduction

The Crisis of Criminal Procedure - A Glance over the Borders

There has probably never been a time in which one was ever completely satisfied with criminal justice. As it is a creature of human devising, it is accordingly tainted with all human shortcomings. Perhaps, however, the complaints about the state of criminal justice were only seldom as harsh as they are now, when they are by no means limited to a single country, but rather may be observed virtually world-wide. Therefore it is hardly surprising that many and diverse efforts may be observed at present towards

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¹ The present article is an extended, substantiated version of a lecture delivered at the Law Faculty of the Charles University in Prague on 20th September 1995 and before the Supreme Court of the Czech Republic in Brno on 21st September 1995. It is largely based on the evaluation of material compiled by academic staff and research guests at the Max Planck Institute for Foreign and International Criminal Law (Freiburg, Germany) from the early 1980s onwards. Apart from the most recent developments, the material has been published as a series of regularly updated reports on the development of criminal law in Europe by: A. Eser and B. Huber (eds.), *Strafrechtsentwicklung in Europa. Landesberichte über Gesetzgebung, Rechtsprechung und Literatur*, vol. 1 (1982/1984), (edition iuscrim, Max-Planck-Institut für ausländische und internationales Strafrecht, 1985); vols. 2.1, 2.2 (1984/1986), (edition iuscrim, 1988); vols. 3.1, 3.2 (1986/1988), (edition iuscrim, 1990); vols. 4.1, 4.2, 4.3 (1989/1992), (edition iuscrim, 1993, 1994 and 1995 respectively). Unless otherwise stated or unless hitherto only available as unpublished material from the respective country divisions of the Max-Planck-Institute, the sources of the legal changes presented below may as a rule also be found in the aforementioned reports. Of the numerous colleagues at the Institute, who generously contributed to the compilation of the material, I am particularly indebted to *Ms Beate Weik*, *Mr Holger Barth* and *Mr Reinhard Dold* for their assistance in collecting and analysing the material. I would also like to thank *Ms Caterina Bolognese* for her translation of this paper into English.

reform in the area of criminal procedure. If one tries to identify the main purposes of these efforts, two are most evident: the greater efficiency of criminal proceedings and a better protection of human rights.

Since, on the one hand, the efficiency of criminal prosecution is primarily assessed according to the velocity of its implementation and the short duration of individual proceedings, many efforts towards reform are directed towards an acceleration of criminal proceedings. As for human rights on the other hand, since the focus is above all on those of the accused, the priority in many countries is to improve his position. It is true, however, that the attainment of these goals at present is no easy task; moreover, they can easily come into conflict with each other. For if, on the one hand, the proceedings are to be as brief as possible, then little time is left for considering the conflicting interests of the accused. On the other hand, if the accused is to be able to assert his rights fully, then this could prove to be very time-consuming.

Thus if the attainment of one goal should not completely undermine the other, certain compromises will be unavoidable. The fact that the priorities can be set - consciously or subconsciously - in different ways, may be explained by two examples in which the balancing issue was at any rate a conscious one: First, the original Swiss canton *Schwyz* legally entrenched an acceleration precept in its 1988 reform of criminal procedure and made it clear, through its particular treatment of custody cases,² that the right to a speedy trial, which is also proclaimed by the European Convention for the Protection of Human Rights and Freedoms (ECPHRF),³ is primarily meant to serve the interests of the accused. Secondly, at the 60th Conference of German Lawyers of 1994 in the *Federal Republic of Germany*, the only common objective as to the principle of acceleration which received majority support, was one in which the status afforded to 'the State interest in the speediest, least costly and time-consuming proceedings possible' and to 'the accused's interest in the speedy punishment of the crime which weighs upon him' would equal the status afforded to the 'protection of the accused from unnecessary State delays in proceedings'.⁴

Therefore, when looking at ways to reform criminal procedure in the European arena, the kind of individual changes which immediately suggest themselves for consideration are especially those which are directed towards an acceleration of criminal proceedings (§ 2) and/or a reinforcement of the rights of the accused (§ 3). In addition, an area will be examined as an example, in which the tension between efficiency in criminal prosecution and the rule of (criminal) law may be made particularly clear, namely, the use of undercover investigators in preliminary proceedings (§ 4).

2. Art. 3, para. 2 StPO-Schwyz, *Amtsblatt* (1988), 1221. Cf. Heine and Hein, 'Landesbericht Schweiz', in A. Eser and B. Huber (eds.) *Strafrechtsentwicklung*, vol. 3.2, 1020 ff.
3. Art. 6, para. 1 ECPHRF.
4. Resolution I. 2.2 of the Criminal Section of the 60th Conference of German Lawyers 1994, 47 *Neue Juristische Wochenschrift (NJW)* (1994), 3071.

Before launching into these issues, it would of course have been preferable to canvass the scope and direction of reform in Europe. However, due to length requirements, it must suffice to say that the features of criminal procedure in nearly all European countries have changed more or less drastically in recent years; the emphasis of these efforts at reform lies above all in the preliminary stage of proceedings, particularly insofar as the rights of the accused and the defence counsel, as well as pre-trial and police detention are concerned.⁵

However, I must not fail to warn against rash conclusions which may be drawn from sweeping legal comparisons. When dealing with reform, it is undoubtedly justified to glance over the borders and let oneself be inspired by alternative regulations or even put off by negative experiences. In an increasingly interconnected Europe the removal of national blinkers is also becoming a more urgent concern. Nevertheless, one must always keep in mind differences in procedural structure, which pose fundamental problems to the isolated transposition of one country's procedural elements to another country, or which at any rate could lead to unwanted distortions. The following considerations should therefore be kept in mind when comparing different legal systems:

- whether the system is *inquisitorial*, i.e. the scope of the hearing of evidence during the trial is essentially for the Court to decide. Apart from the German criminal procedure, this is also the case in Austria, Belgium, the Czech Republic, the Netherlands, Portugal, Spain and, last but not least, Turkey (largely having adopted the German criminal procedure);
- whether the process is *adversarial*, in which the discovery and presentation of evidence lies primarily in the hands of the parties: as in England and Ireland;
- or whether the system is a *mixed form*, developed in recent years, which does not clearly belong to the one or the other structural type, but, rather, has combined certain elements of each system: as in Italy and, due to the traditional English influence, also Denmark and Sweden.⁶

Due to these differences in structure, but also due to the shifting emphasis between the investigatory and trial stages of proceedings, the search for particular tendencies in the development of criminal procedure at a level that encompasses several countries is both challenging and difficult.

5. For a more detailed analysis, cf. my article on the development of the law of criminal procedure in Europe: A. Eser, 'Entwicklung des Strafverfahrensrechts in Europa - Orientierung an polizeilicher Effektivität oder an rechtsstaatlichen Grundsätzen?', 108 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* (1996), 86.
6. Further explanation of these different procedure models may be found in W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht des Auslands*, (edition iuscrim, Max-Planck-Institut für ausländische und internationales Strafrecht, 1995), 560 ff.

§ 2. The Acceleration of Criminal Proceedings

The various European efforts at speeding up criminal proceedings seem to have a common goal, in that the public interest in the 'shortest possible trial' prevails. However, the method varies between accelerating preliminary proceedings (A.), introducing new forms of proceedings (B.), increasing the recognition of arrangements during criminal proceedings (C.), reducing the sentencing body (D.), rendering the trial more informal (E.) and restricting the means of legal redress (F.).

A. MEASURES TO ACCELERATE PRELIMINARY PROCEEDINGS

This option has, for instance, been taken by the *Czech Republic* when it amended its Code of Criminal Procedure (CCP) in 1993. The amendment established that during preliminary proceedings only such evidence can be raised which is 'relevant' to bringing the charge or which is in danger of not being available later on, whereas an extensive hearing of evidence only takes place during the main proceedings. The aim of this reform is to tighten up criminal proceedings on the whole, in that the usual doubling of evidence in preliminary and main proceedings can be avoided as far as possible. Moreover, the public prosecutor was given a limited opportunity, on certain conditions, to drop charges already during preliminary proceedings.

In the *Federal Republic of Germany* the principle of mandatory prosecution was also slackened in the area of low and middle-level crime by introducing possibilities for withdrawing charges already during preliminary proceedings. By virtue of s.153(1) of the CCP, the public prosecutor can refrain from prosecuting, if the offender's guilt is considered minimal and there is no public interest in prosecuting. In principle, the court's consent is required in order to 'abandon a case because of the trifling nature of the offence;' until recently, the court's consent could only be dispensed with where a property offence was involved.

However, by the 1993 *Act to Reduce the Burden of Justice Administration*, this exception was extended to include all offences and misdemeanours which do not attract a raised minimum penalty and which have minor consequences. Thus the prosecution's power to abandon a case without judicial influence has been broadened considerably.

The possibility to abandon a case during preliminary proceedings by fulfilling certain conditions in accordance with s.153a(1) has also attained importance in practice. In the case of a mere misdemeanour, proceedings may be abandoned temporarily by setting conditions for rulings; upon fulfilment of the conditions, the case is finally abandoned. These simplified proceedings always require the consent of the accused and normally also that of the court (s.153a(1) in combination with s.153(1) par.2, CCP). Furthermore, in these dismissal proceedings, the conditions and rulings need only eliminate the public interest in prosecuting crime and the gravity of the accused's guilt must not be an obstacle to abandoning the case. Possible conditions or rulings are that

the accused perform a deed to benefit the public or to compensate for the damage done. The accused may also be required to pay maintenance at a certain rate or to make a payment to a public utility or to the treasury. The area of application of this simplified dismissal proceedings, which was introduced in the Code of Criminal Procedure in 1974, has increasingly stretched beyond lower-level and into middle-level crime.⁷ The German legislator has essentially followed this broad practice by amending (in its 1993 *Act to Reduce the Burden of Justice Administration*) the former requirement of minimal guilt to a mere requirement that the gravity of the accused's guilt must not be an obstacle to abandoning the case.

In Austria a 1992 ministerial draft was put forth to introduce *exceptions to the principle of mandatory prosecution* in order to allow the *public prosecutor* to refrain from prosecuting in certain cases of theft in self-service shops. This corresponds to a low level of wrongdoing on the one hand, and relieves the judiciary's burden on the other.⁸

In the Netherlands a *transaction* has been a practice of the *public prosecutor* for a long time. This transaction is more or less equivalent to a s.153a (German CCP) abandonment in exchange for a money payment, but it is also allowed for graver offences. The interests of the injured person are respected to the extent that the transaction may only occur if the damage is compensated or an arrangement has been made between the parties for the compensation of damages. Furthermore, *police discretion* is thought to be extended in this context. In July 1991, the Dutch Ministerial Council agreed on a draft Act to give *police*, in the context of so-called 'prompt reaction policy,' the power to react to lower-level offences with a 'transaction'. Drunken driving and low-level shop theft are two offences for which such a transaction may be appropriate.⁹ Quite apart from the question whether such an extension of police discretion will actually reduce police workload, since they must also check whether the offenders keep their part of the bargain, this regulation will, at any rate legally, be exposed to the risks of arbitrary use of power and the greater distance from court.

In the Swiss canton of *Nidwalden*, an attempt at speeding up the investigatory process is being made, by strengthening the position of the public prosecution.¹⁰

7. T. Kleinknecht and L. Meyer-Goßner, *Strafprozeßordnung*, 42nd ed., (Beck, 1995), para. 153a, margin n. 1.
8. Höpfel, 'Landesbericht Österreich', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1040 f.
9. Van de Reyt *et al.*, 'Landesbericht Niederlande', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 936.
10. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1019; Act of 1/4/89.

B. THE INTRODUCTION OF NEW FORMS OF PROCEEDINGS

Beyond the burdens of preliminary proceedings, some countries attempt to obtain acceleration by introducing or broadening the scope of new forms of proceedings. This sometimes involves a complete avoidance of the main proceedings. The requirement of the accused's consent in these cases is somewhat reassuring.

A step towards reform in the *Czech Republic*, which has recently become law, allows for conclusive abandonment by the court of criminal proceedings on certain conditions. By a CCP amendment of 1993, the possibility of ordering summary punishment, which had been abolished in 1990, was reintroduced. Its area of application was clearly broadened at the same time.

A similar tendency may be observed in the *Federal Republic of Germany*, where summary proceedings may also take an accelerated form, in which the court, in cases of sufficient suspicion, may set punishment without holding main proceedings or passing judgment. The area of application of summary proceedings was markedly broadened by the 1993 *Act to Reduce the Burden of Justice Administration*. Henceforth an order of summary punishment cannot only lead to a fine, but also up to one year's imprisonment as per s.407 CCP in the case of a suspended sentence. Even though this reform requires that the suspect either already had a defence lawyer or one had been appointed to him according to s.408b CCP due to the possible impact of the decision, it appears dubious, in terms of the rule of law, to sanction the accused in this way without having informed him of this procedure (s.407(3) CCP). This is not to say that the accused would not have received a hearing beforehand at all; for, as in any other case, the accused is to be examined at the very latest before the investigation is closed (s.163a par.1 CCP). However, if this has already occurred, the accused may suddenly be served with an order for a suspended prison sentence, against which he may only object *ex post facto* (s.410 CCP), and not by prior motions for the admission of evidence or any other declarations, which would otherwise be available at a trial stage before the delivery of judgment (ss.240, 243 par.4, 244, 245 CCP). This German reform is no singular case, though. The possibility of ordering a summary sentence has also been extended in other countries, as e.g. in the Swiss canton of *Nidwalden*, in which judges at the pre-trial investigatory stage may now independently make orders for summary sentences.¹¹

Similarly, the *Swedish* public prosecutor's power to make orders of summary sentences against young persons has been extended, where those persons would only receive a fine if tried.¹²

11. Ibid.

12. Cornils, 'Landesbericht Schweden', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 979.

Mention should also be made of a special type of *accelerated proceeding* in the *Federal Republic of Germany* (ss.417-420 CCP), although this alternative has not attained any great importance in practice to date.¹³ A special feature of this procedure, as compared with normal proceedings, is that the charge can be brought orally and a formal summons of the accused - reduced to a 24 hour limit - will only be necessary if he does not appear at trial of his own free will or if he is not brought before the court. Nor is the normally required court decision to commence a criminal trial necessary, so that a judicial examination of the accusation prior to the trial will not take place. The 1994 *Crime-Fighting Act* has introduced a particularly extensive alleviation of accelerated proceedings by allowing the judge of first instance - who at any rate has jurisdiction as to offences with an expected sentence of up to two years - to reject motions to hear evidence (s.420 par.4 CCP) without having to abide by the strict grounds for rejection in s.244 par.3-5 CCP. This seems particularly questionable in light of the 1993 *Act to Reduce the Burden of Justice Administration*, which reduced the right of appeal in trials for minor offences to cases in which the appeal court allows the appeal as not clearly ill-founded (s.313 CCP). This, however, may lead to a consequence which is hardly acceptable, namely that an accused may not be able to raise evidence which he considers relevant to the defence.

Italy has shown itself to be particularly versatile in its new Code of Criminal Procedure of 1988, by introducing *three consensual forms of procedure*,¹⁴ one aim of which was to accelerate the course of criminal proceedings. All three are independent of an accused's confession: *Abbreviated proceedings*¹⁵ take place *in camera* before the judge in preparatory hearing with the agreement of the public prosecutor. In such cases the parties must renounce the hearing of evidence at trial. The judgment will be simplified and the sentence will be reduced by a third. *Summary proceedings*¹⁶ is roughly the same as the German regulation. As for the *negotiation of the penalty* amongst the parties ('*patteggiamento*')¹⁷ the accused and the prosecution may apply to reduce the pecuniary or prison sentence by up to a third, though the reduction of the prison sentence may not exceed two years. The accused may make the effectiveness of his application depend on the conditional deferment of the sentence. The decision of the court will contain neither a verdict of guilt nor a formal judgment, but, rather, only the sentence applied for will be delivered. These types of proceedings were, however, refuted in many important respects in the decisions of the Italian Constitutional Court. Thus, *abbreviated proceedings* are no longer available in cases in which life

13. G. Schäfer, *Die Praxis des Strafverfahrens*, 5th ed., (Kohlhammer, 1992), 146.

14. Bosch, 'Landesbericht Italien', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.1, 611 f.

15. S.438 ff. *codice di procedura penale* (CPP).

16. S.459 ff. CPP.

17. S.444 ff. CPP.

imprisonment may come into question.¹⁸ The exclusion of an appeal in abbreviated proceedings - in cases of suspended sentences or pecuniary penalties - was also found unconstitutional.¹⁹

So-called *abbreviated proceedings* were likewise introduced in *Spain* in 1988. This version, however, does not require the accused's consent and now constitutes the norm, since it is applied to about 90% of all criminal offences. It is excluded in offences which may attract a penalty of over 12 years' imprisonment.²⁰ This abbreviated procedure was accelerated further by a law of 1992, under which preliminary investigations by the examining magistrate may be dispensed with.²¹

The new 1987 *Portuguese* code of criminal procedure introduces *summary* and *highly summary proceedings*. The former is applied to offences which may attract a penalty of no more than three years' imprisonment. The investigatory process is dispensed with in these cases, if the accused was apprehended in the act and the sentence is passed within the following 48 hours. In 'highly summary' proceedings, which may apply to offences attracting a penalty of up to six months' imprisonment, a formal trial may also be dispensed with. The prosecution applies for a particular penalty, which is immediately fixed by the court if the accused agrees to it; the accused may not appeal against this sentence. If the accused does not agree, then the case goes into normal proceedings.²² Moreover, proceedings for petty offences were reformed in 1991 by limiting the availability of obligatory defence counsel to offences which may attract a prison sentence or a safety measure, or even by excluding the enforcement of civil claims in criminal proceedings or by abandoning the proceedings in cases of prevailing and immediately due pecuniary penalties, but also by assuming the accuracy of police records of events.²³

French criminal law also has several types of *summary trial* before correctional courts responsible for the sentencing of misdemeanours. The harshest of these is the '*comparution immédiate*' (direct presentation), which replaced a precursor of this procedure in 1983²⁴ and was modified again in 1986.²⁵ By this procedure the

18. Bosch, 'Landesbericht Italien', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 816; decision of 23/04/91, no. 176.

19. Ibid, 817; decision of 23/07/91, no. 363.

20. Madlener, 'Landesbericht Spanien', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1103 f.

21. Madlener, 'Landesbericht Spanien', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1401.

22. Figueiredo Dias, 'Die Reform des Strafverfahrens in Portugal', 104 *ZStW* (1992), 454 f.

23. Hünerfeld, 'Landesbericht Portugal', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1175.

24. Spaniol, 'Landesbericht Frankreich', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 1, 265.

prosecutor may have the apprehended accused produced before the responsible correctional court on the day of apprehension where the body of evidence is sufficient and the penalty has been raised from two to a maximum of seven years. The correctional court may immediately proceed to sentence if the accused agrees in the presence of his lawyer, or of a lawyer assigned to him if need be. Otherwise the court will decide within a time limit of at least two and at most six weeks, though the accused may waive the minimum time limit requirement. If the accused contests the immediate sentence, then he will risk detention while awaiting trial, which the court itself may impose if regular grounds for detention are given. If the court does not convene on the day of the presentation of the accused, the chief magistrate may make a detention order, which, however, must be quashed if the presentation before the court cannot occur within the next two working days.²⁶ This is an unmistakably effective procedure, admittedly with an alarmingly broad scope of application, which, by the way, extends well beyond the German accelerated proceedings²⁷ with its penal authority limited to one year's imprisonment. Statistics show that French criminal law practice is making increasing use of the possibility of accelerated proceedings.²⁸

In contrast, the efforts at reform in the *Netherlands* are directed towards introducing simplified criminal proceedings for defendants who have already confessed.²⁹

C. PARTY ARRANGEMENTS IN CRIMINAL PROCEEDINGS

If dispensing with trial or some other step towards abbreviated proceedings is dependent upon the consent of the accused, then this method is a clear opportunity for *arrangements between the parties*. Without being able to pursue here the more or less overt or covert factual expansion of this phenomenon in various countries,³⁰ *Great Britain* is the foremost example of legal recognition - in addition to the above-mentioned *Italian 'patteggiamento'* - whereby a trial may be increasingly shortened or even avoided (by way of guilty plea or plea bargaining) by party arrangement. Although the courts have developed formal requirements for such negotiations in order to afford the

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25. Rath and Spaniol, 'Landesbericht Frankreich', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 2.1, 499.
26. Ibid.
27. S.419 para. 1 German CCP in the scope of the *Crime-Fighting Act* of 28/10/94.
28. Müller, 'Das beschleunigte Verfahren im französischen Strafprozeßrecht', *Goltdammer's Archiv für Strafrecht (GA)* (1995), 169 ff., 176.
29. Van de Reydt *et al.*, 'Landesbericht Niederlande', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 948; Van Kalmthout and Waling, 'Landesbericht Niederlande', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.1, 776; Waling and Van Kalmthout, 'Landesbericht Niederlande', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 2.2, 977.
30. See further: T. Weigend, *Absprachen in ausländischen Strafverfahren*, (edition iuscrim, Max-Planck-Institut für ausländische und internationales Strafrecht, 1990).

accused greater protection,³¹ such arrangements have proved to be disadvantageous for the accused, in light of the abolition of committal proceedings by the *Criminal Justice and Public Order Act 1994* in *England and Wales*. Such committal proceedings constituted an oral or written preliminary examination, in order to sift out charges with a negligible probability of conviction and to inform the accused of the charge and the evidence available to the prosecution.³² This protection has thus been dispensed with.

D. DIMINUTION OF THE BODY OF JUDGES

The diminution of the body of judges is often seen as a further measure for the simplification of trials, likewise the enlargement of the jurisdiction of a judge sitting alone.

The single judge's decision-making powers were thus considerably increased in the *Czech Republic*.

The jurisdiction of the county or district court was also considerably increased in the *Federal Republic of Germany* by the 1993 *Act to Reduce the Burden of Justice Administration*. Thus the penal authority of the county court was increased from three to four years.³³ Here the single judge is competent as regards the subject matter, and not the *Schöffengericht* (composed of one professional and two lay judges) in cases of an expected prison sentence not exceeding two years.³⁴ Before the change in the law the single judge only had competence with respect to cases of an expected prison sentence not exceeding one year. On appeal against decisions of the lowest courts the decision-making power has now been transferred exclusively to the 'minor criminal division' (*Kleine Strafkammer*), consisting of one professional judge and two lay judges.³⁵ Previously, the 'major criminal division' (*Große Strafkammer*), consisting of three professional and two lay judges, had competence to decide appeals against decisions of the *Schöffengericht*. Insofar as the 'major criminal division' is the first instance, it may now decide to constitute itself with two instead of three professional judges for the trial, unless it is acting in its competence as a so-called 'jury court' (*Schwurgericht*) or the collaboration of a third professional judge seems necessary in light of the scope or difficulty of the matter.

31. Huber, 'Beobachtungen zur Strafrechtsentwicklung in Europa zwischen 1989 und 1993', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1911 f.

32. Ibid, 1911.

33. S.24 para. 2 *Gerichtsverfassungsgesetz (GVG)*.

34. S.25 no. 2 *GVG*.

35. S.76 para. 1 *GVG*.

In *Finland* a judge sitting alone may now pass judgment for offences with an expected penalty of up to 18 months. However, he may only impose a fine.³⁶

The role of a judge sitting alone in *Austria* has been considerably broadened by a change in subject-matter jurisdiction.³⁷

In the *Netherlands* judges sitting alone have recently been given competence for minor criminal matters at the appellate stage.³⁸

In *Russia*, single judges were introduced to replace jury trials by Act of 29 April 1992. However, such replacement depends on the consent of the accused for serious offences.³⁹

Moreover, in *England* and *Wales* a debate has evolved for some time as to whether to abolish the hitherto highly valued right of the accused to opt for or against a trial by jury for moderately serious offences.⁴⁰

E. DECREASING THE FORMALITY OF CRIMINAL TRIALS

Some countries hope to decrease the burden and therefore also the duration of criminal procedure by *reducing the formal rules of trial process*. At the same time legislative efforts to tighten up and reduce the hearing of evidence at the trial stage may be widely observed. The development of the accused's and/or defence counsel's right to produce evidence is particularly important in this context. This right may be seen as the most compelling evidence of an active attempt by the accused to influence the hearing of evidence and is also exceedingly important for the course and outcome of the trial.

In the *Czech Republic* for instance, the 1993 CCP amendment lays down the principle that organs involved in the criminal procedure may only take evidence to the extent that it is 'indispensable' for the decision at hand.

In the *Federal Republic of Germany* the development of the accused's and defence counsel's right to produce evidence has been the subject of considerable controversy for

36. Joutsen, 'Landesbericht Finnland', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 444; cf. Act of 14/12/90, 1109.

37. Höpfel, 'Landesbericht Österreich', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 840 f.

38. This is the case for certain road traffic offences; cf. Art. 9 of the *Act on the Administration of Road Traffic Regulations* of 03/07/89, *Staatsblatt* (1989), 300.

39. Schittenhelm, 'Landesbericht Rußland', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1228.

40. Huber, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1911; cf. also Bohlander, 'Zur Reform des englischen Strafverfahrens - Der Bericht der Royal Commission on Criminal Justice', 106 *ZStW* (1994), 448 ff., 453.

some time. This right for the accused to become involved is rather strong by comparison with other European jurisdictions, a fact that has been confirmed in *Walter Perron's* most recent studies in the area.⁴¹ The accused's (and the prosecution's) applications to have a witness examination heard may only be rejected by the court on grounds provided by law. A motion for the admission of evidence should be denied when the evidence is inadmissible. Otherwise, such a motion may only be denied (a) if the evidence would be superfluous due to its being obvious, (b) if the fact to be proven has no significance for the decision or has already been proven, (c) if the evidence is completely inappropriate or unattainable, (d) if the motion has been made for the purpose of delaying the proceedings, or (e) if a weighty statement in support of the defence is to be proven, which could be treated as though the fact claimed were true (s.244 par.3 CCP).

However, several deviations in German criminal procedure may be observed lately, in which efforts at relaxing the rules of evidence become apparent against the backdrop of more stringent regulations. The examination of witnesses who are abroad was limited by the 1993 *Act to Reduce the Burden of Justice Administration*: a motion to examine a witness who would have to be summoned abroad may be denied if, by the court's due discretion, the examination of the witness would not be necessary to uncover the facts (s.244 par.5 CCP). As mentioned above, the 1994 *Crime-Fighting Act* provides for a facilitated taking of evidence for accelerated proceedings. This bears the distinct feature of allowing a judge, when sitting alone, to determine the scope of evidence to be heard, without being bound by the strict prerequisites listed above for the rejection of motions for the admission of evidence (ss.411 par.2, 420 CCP).

France is an example of the extent to which other countries encounter difficulties with the establishment of the right to produce evidence. On the one hand, it certainly has been an improvement that now, for the first time, the *juge d'instruction* is obliged to substantiate a rejection of an application to produce evidence, and that rejection must then be reviewed by the indictment chamber of the appeal court on the initiative of the accused.⁴² However, only expediency checks have been carried out so far, as legal criteria for the rejection of applications to produce evidence have not been regulated.⁴³ By virtue of this right, the accused may, if applicable, obtain a face-to-face confrontation with a witness, which would be important, since defence counsel, who normally has no right to be present during witness examinations in investigatory proceedings (contrary to the proposals of the *Delmas-Marty Commission*), is allowed to be present and to pose questions to the witness through the judge.⁴⁴

41. W. Perron, *Das Beweisantragsrecht des Beschuldigten im deutschen Strafprozeß*, (Duncker & Humblot, 1995).

42. Barth, 'Landesbericht Frankreich', in W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht*, 105; cf. Art. 82-1 para. 1, Art. 81 paras. 8-9 CPP.

43. Cf. Art.82-1 CPP.

44. Barth, in W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht*, 133 f.

However, in French *trial proceedings*, which are determined in principle by the court's overall discretion to reject evidence applications,⁴⁵ the *Cour de Cassation's* reception since 1989 of the European Court of Human Rights' case law on Article 6 par.3 lit. d of the European Convention on Human Rights, presented in rather rare but explosive case scenarios, has led to a kind of 'inner reform' of the right to present evidence. An application to examine a witness may now, on principle, no longer be refused, if the hearing of an important witness for the prosecution is desired, who had not yet been confronted with the accused at any stage of the proceedings.⁴⁶ However, the *Cour de Cassation* places such high requirements on the admissibility of such applications and generously allows so-called 'impossibility reasons' with regard to the availability and reliability of the witness,⁴⁷ that it is highly debatable, whether the standards of the European Court of Human Rights are seriously being met.

In *Scotland* the rules for tendering evidence were also simplified by the *Prisoners and Criminal Proceedings Act* in 1993 with the express aim of accelerating proceedings.⁴⁸

Furthermore, in *Greece* the number of witnesses for the defence may be limited to the number of witnesses presented by the prosecution and the civil plaintiff.⁴⁹ At the same time an acceleration of criminal proceedings may be expected from the limitation of the possibility of challenging a judge.⁵⁰

A limitation to the principle of oral proceedings for the trial stage was made in the *Federal Republic of Germany* by the 1994 *Crime-Fighting Act*. According to s.257a CCP the Court may compel those involved in the proceedings to submit applications and questions regarding proceedings in writing, as long as they do not come at the final summing up stage. According to the legislative intention,⁵¹ the requirement is to allow a 'tighter handling' of larger cases, in which those involved in the proceedings take note of the applications by way of a (mere) reading (as opposed to an oral presentation) of the pleadings. However, the requirement is far from problem-free, as its limitation to the relatively rare category of larger cases is not expressed in the legislation. If criminal procedural practice nevertheless extended the scope of this requirement, this would constitute a disregard of basic principles of our criminal proceedings. For, on the one hand, German criminal proceedings distinguish themselves by the principles of *orality* and *immediacy*: for the granting of a 'legal hearing', those involved in the proceedings must on principle in criminal proceedings be heard in the literal sense, so that they may

45. Ibid, 121 f.

46. Ibid, 124 f.

47. Ibid, 124 ff.

48. Huber, in A. Eser and B. Huber, *Strafrechtsentwicklung*, vol. 4.2, 1910.

49. Kareklás, 'Landesbericht Griechenland', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 572; Art. 327 para. 5, Greek CCP.

50. Ibid; Art. 20 para. 4, Greek CCP.

51. *Bundestag-Drucksache* 12/6853, 60, 102, 103.

also take note of the court's reaction to the proceedings executed.⁵² On the other hand, criminal proceedings are also influenced by the principle of *public trial*: It is, however, considerably more difficult for representatives of the public, who attend the trial, to follow or observe critically the content of the proceedings, if they do not receive notice of the applications made. This provision has also, in part, encountered harsh criticism in criminal procedural literature for these reasons. Therefore, it is feared that a 'ghost trial' was introduced by this change in the law,⁵³ and a 'deathly silence' will reign in the courtroom in the future.⁵⁴ That is why the judicial discretion to compel the participants of the trial to submit applications in writing rather than to present them orally will only satisfy legal requirements if the area of application of this measure is reduced teleologically: the enforcement of the writing requirement may only be reconsidered when the duration of the proceedings is considerably delayed - i.e. by hours or days - either by several applications of considerable length or by a multitude of applications as to questions of procedure. If the writing requirement were extended to all future applications, one would have to establish a prior abuse of the right to present applications.⁵⁵ It would, of course, be desirable, from a legal policy point of view, for this makeshift change in the law to be revised by the legislature and for its limited area of application to be clearly defined.

In Sweden it is also possible to require the accused to express himself in writing before the commencement of the trial, and the court may then hold a preparatory meeting.⁵⁶ At the same time an attempt is being made to accelerate proceedings by allowing the use of telephones for court examinations at the trial stage.

Furthermore, 'judgments *in absentia*' may, according to a 1991 Bill of the Danish Ministry of Justice, be made where the penalty would not exceed six months' imprisonment, if the court does not consider the presence of the accused to be necessary.⁵⁷

52. Kleinknecht and Meyer-Goßner, *Strafprozeßordnung*, para.257a, margin n. 1; cf. also Bandisch, 'Zum Entwurf eines Kriminalitätsbekämpfungsgesetzes der Fraktionen der CDU/CSU und FDP vom 4.2.1994. Eine vorläufige Stellungnahme des Strafrechtsausschusses des Deutschen Rechtsanwaltsvereins', 14 *Strafverteidiger* (StV) (1994), 153 ff., 158.

53. Hamm, 'Was wird aus der Hauptverhandlung nach Inkrafttreten des Verbrechen-bekämpfungsgesetzes?', 14 *StV* (1994), 456 ff., 457.

54. Scheffler, 'Kurzer Prozeß mit rechtsstaatlichen Grundsätzen?', 47 *NJW* (1994), 2191 ff., 2194.

55. Kleinknecht and Meyer-Goßner, *Strafprozeßordnung*, para.257a margin n. 2; cf. also Schlüchter, 'Beschleunigung des Strafprozesses und insbesondere der Hauptverhandlung ohne Rechtsstaatsverlust', *GA* (1994), 397 ff., 427.

56. Cornils, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 977.

57. Vestergaard, 'Landesbericht Dänemark', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 117; Bill L 100 of 6/11/1991.

F. RESTRICTING THE MEANS OF LEGAL REDRESS

The *restriction of legal remedies* is also regarded as a way of accelerating proceedings.

As outlined above, the possibility of lodging an appeal against a decision regarding petty crime in the *Federal Republic of Germany* was limited by the 1993 *Act to Reduce the Burden of Justice Administration*. If the accused is fined at no more than 15 penalty units or if, in the case of a warning, the suspended sentence carries no more than 15 penalty units, then the appeal will only be allowed if it is accepted by decision of the appellate court. The same applies for when the accused is acquitted or the proceedings are abandoned and the prosecution had not applied for a fine of more than 30 penalty units. The appeal will be accepted unless it is patently unfounded. Otherwise the appeal is refused as inadmissible. The decision may not be challenged (ss.313, 322a CCP). As early as 1990 an *Act to Simplify the Administration of Justice* provided that a grievance against decisions that impose the burden of costs or necessary expenses would only be admissible if the sum in question exceeded 200 Deutsch Marks as opposed to the previous 100 Deutsch Marks limitation.

In *Portugal* only one instance of legal redress and one unified right to appeal have been available since 1987.⁵⁸

So, too, in *Greece* the means of legal redress were restricted; the decision to open a trial may, for example, no longer be challenged.⁵⁹

§ 3. The Rights of the Accused and of Defence Counsel

Needless to say, efforts at accelerating criminal proceedings may easily be at the expense of the accused. Nevertheless, such disadvantages are apparently not for the most part intentional, but, rather, they are taken for granted as unavoidable. For, otherwise, one could not explain why the efforts to strengthen the position of the accused may also be observed in areas other than those treated above, although the more attentive public conscience calling for greater respect for human rights must clearly have an inspiring effect. Contrary tendencies may, of course, be observed especially where the rights of the accused have already been fully developed.

Without intending to be complete, the following appraisal shall cover above all the changes in the accused's position at the *pre-trial* stage, although possible effects on the trial itself will also be taken into account.

58. Figueiredo Dias, 'Die Reform des Strafverfahrens in Portugal,' 104 ZStW (1992), 452 f.

59. Kareklás, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 572 f.

A. GENERAL OBSERVATIONS AS TO THE LEGAL POSITION OF THE ACCUSED AND HIS DEFENCE COUNSEL

In general, diverse improvements may certainly be detected in some countries, although, the standard achieved, for example, in the *Federal Republic of Germany* has been matched if not even superseded.

A notable step in this direction was already made with the 1990 CCP-Amendment in the *Czech Republic*, by ensuring for the accused the right to consult a lawyer during all of the pre-trial proceedings and, in case of the accused's lack of means, to have a lawyer appointed for him. Extensive rights to be present at or to collaborate in investigatory proceedings were also granted to defence counsel as well as to the accused.

By comparison, the accused in the *Federal Republic of Germany* has been allowed for a long time to have his lawyer present at any stage of proceedings, i.e. also at the investigatory stage (s.137 par.1 CCP). Unhindered and unsupervised communication between defence counsel and the accused is an indispensable requirement for such a defence (s.148 CCP). If the accused cannot afford a defence lawyer due to his financial situation, one will be appointed for him according to certain prerequisites. The collaboration of a defence lawyer is particularly necessary if the defendant is accused of a crime punishable with imprisonment of not less than one year or if the collaboration of a defence lawyer is advisable due to the severity of the act or the difficulty of the factual or legal position. The same is true if it may be observed that the accused cannot defend himself (s.140 CCP). In practice, however, the requirements of necessary defence are often set out too narrowly by the case law. For example, the appointment of defence counsel due to the severity of the act will only be considered necessary by some *Länder* supreme courts when a prison sentence of two years or more is expected in the case at hand.⁶⁰ It also seems regrettable that, in cases of necessary defence, the appointment of a lawyer often only eventuates in practice when the preliminary proceedings have already been concluded.⁶¹ The law does provide that the defence lawyer may already be appointed during the pre-trial stage (s.141 par.3 CCP). However, this presupposes that the prosecution applies to the court for the appointment of counsel, and such procedure is only rarely made use of.⁶² This procedure is questionable, since the course and outcome of the whole criminal proceedings are often pre-determined precisely by the preliminary proceedings. Mistakes and omissions at the pre-trial stage are often no longer identifiable later in the criminal proceedings, or if they are, they can only be rectified with great difficulty.⁶³

60. *Oberlandesgericht (OLG) Celle*, 5 *StV* (1985), 184; *OLG Frankfurt* 3 *StV* (1983), 497; (1984), 370.

61. Oellerich, 'Voraussetzungen einer notwendigen Verteidigung und Zeitpunkt der Pflichtverteidigerbestellung,' 1 *StV* (1981), 434 ff., 441; cf. also Weider, 'Pflichtverteidigerbestellung im Ermittlungsverfahren und Opferschutzgesetz', 7 *StV* (1987), 317 ff., 319.

62. Oellerich, 1 *StV* (1981), 441.

63. Peters, K., *Fehlerquellen im Strafprozeß*, vol. 1 (C.F. Müller, 1970), 195, 295 ff.

For this reason, the right to be *present at the investigatory stage* is also of the greatest practical importance. During examination of the accused by a *judge*, counsel for the defence and for the prosecution have the right to be present where appropriate, and therefore also the right to pose questions and to make comments (s.168c par.1 CCP). Those who have the right to be present must be informed of the time and date of the hearing. The same applies to examinations of the accused by the *prosecution* (s.163a par.3 in connection with s.168c paras.1 and 5 CCP). As for examinations of the accused by the *police*, defence counsel has no right to be present.⁶⁴ Nevertheless, quite a few authors do not consider this to be wrong; after all, the accused is not forced to appear or make a statement before the police, so that he may always demand the presence of a lawyer by refusing to appear or to make a statement without one.⁶⁵ However, this argument overlooks the fact that the accused may well also have a strong personal interest in an early examination during preliminary proceedings, if incriminating evidence must be weakened or attention must be drawn towards facts that support his case and he can rely on the advice of a lawyer who is present.

Certain limitations to the right to be present also apply to accused persons in custody. If he has a lawyer, then he may only be present at such hearings which take place before the court of the place of custody. Moreover, the judge may preclude the accused from being present at the hearing or taking of evidence, the purpose of which would be endangered if it is seen by the accused. This applies to hearings, particularly in cases in which it is feared that a witness may not speak the truth in the presence of the accused (ss.168c, 168d CCP). However, the law does not provide for defence counsel to be excluded for the same reasons. Criminal procedure does, however, allow for a 'factual exclusion' - albeit through the back door - of defence counsel from examinations by the judge, by not informing him of the examination, if his presence would constitute a threat to the purpose of the examination.⁶⁶ This procedure is based on s.168 par.5 CCP, according to which the necessity to notify those who have the right to be present may cease where such notification would endanger the success of the examination. In fact, however, the legislature only had such cases in mind, in which the time loss occurring between the notification - even by telephone - and the arrival of those eligible to be present, would constitute a danger to the investigatory proceedings.⁶⁷ The extension of this regulation to a virtually 'material' threat to the success of the fact-finding procedure seems highly questionable.

A notable reinforcement of the *defence counsel's right to be present at police hearings* may be observed in *Italy* by the decision of the constitutional court of 12/06/91: The

64. Prevailing opinion; cf. e.g. Rieß, 'Vorbereitung der öffentlichen Klage', in E. Löwe & W. Rosenberg, *StPO*, 24th ed. (Walter de Gruyter, 1989), 163a, margin n. 95.

65. See e.g. G. Schäfer, *Die Praxis des Strafverfahrens*, 121 and further references.

66. Decisions of the *Bundesgerichtshof* on criminal matters (BGHSt) vol. 29 (1980), 1 ff., 4; vol. 32 (1984), 115 ff., 129.

67. Welp, 'Anwesenheitsrechte und Benachrichtigungspflichten', *Juristenzeitung (JZ)* (1980), 134 ff.

legal rule was that a defence lawyer must necessarily be present at every police examination of the accused. 'Spontaneous' utterances by the accused were then excluded from this protection. The Constitutional Court found this exception to be unconstitutional and prohibited at the same time the exploitation of the absence of a lawyer for the purpose of examining the accused.⁶⁸

Albeit to a lesser extent, the *Turkish* CCP-Reform of 1992 sets out at least the defence counsel's *right* to communicate freely with his client during the whole of the proceedings - this includes, therefore, the police investigation stage -, to be present during the statements of the accused and to advise the accused on legal matters.⁶⁹ Counsel is now appointed by the court to represent young persons of up to 18 years of age, and not just up to 15 years, as previously the case. In the case of a necessary defence (or if someone demands a lawyer), if none is provided, then one is appointed by the Bar Council and not by the court. This lawyer then serves until the accused chooses a lawyer himself or herself.⁷⁰ However, this seemingly positive development in Turkey is undermined by the fact that such reforms do not apply for offences which fall under 'Anti-terrorist legislation'.⁷¹ Reports on hearing and apprehension practices in Turkey also prompt the question to what extent reality reflects the legal situation. In spite of justified scepticism, reference is often made to rather progressive instances of reform aimed at improving the status of Turkey's rule of law. Such references are, however, made in the hope that the Turkish justice system, while sensing that its self-imposed demands are taken seriously, will actually feel this challenge and indeed try to meet it in reality.

Instances of reform in this area may also be observed in some *Swiss* cantons, as e.g. in *Solothurn*, where the accused has enjoyed the express right to consult a lawyer during police preliminary proceedings since 1990,⁷² or in *Nidwalden*, where the appointment of legal aid lawyers has been legally regulated since 1989.⁷³ A *Zurich* Bill of 1988 proposes extending the rights of defence lawyers, without, however, affording them the right to be present at police hearings.⁷⁴

68. Bosch, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 814 f.; decision of 12.06.91, no. 259.

69. Tellenbach, 'Landesbericht Türkei', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1595 f.

70. Ibid, 1596.

71. Ibid, 1597.

72. Heine and Roulet, 'Landesbericht Schweiz', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1300; cf. s.7 para. 2 CCP.

73. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1020; cf. Art. 31 CCP.

74. Ibid, 1031.

The *Austrian* Miklau/Szymanski reform model of 1989 allows, on the contrary, for defence counsel to be present at formal (reported) examinations of the accused during preliminary proceedings.⁷⁵

England and *Wales* seem to run counter to this remarkable trend of improvement. There, the right to have one's lawyer present during preliminary proceedings has been weakened by the fact that since 1989 legal consultation at police stations may be delegated to an employee of the defence lawyer.⁷⁶

B. DUTIES TO INFORM OR CAUTION

The investigatory bodies' duty to caution, which is in reality particularly important for the legal position of the accused, has also experienced some improvement in certain countries, namely *France*,⁷⁷ *Austria*,⁷⁸ in the Swiss canton of *Zurich*,⁷⁹ and in *Turkey*,⁸⁰ although one may still note in criticism that preliminary police proceedings were not touched by many instances of these reforms. In *Zurich*, only the district attorney's duty to caution was put in place by the 1992 partial revision of the CCP.⁸¹

Similarly, the *Austrian* security service's pre-trial proceedings were left unaltered by the 1993 Act to amend the criminal procedure.⁸² Nevertheless, the legal reform brought forward the duty to inform about the carrying out of pre-criminal trial proceedings, together with a duty to instruct on the fundamental rights of the accused, which no longer apply exclusively to the person formally accused, but are now expressly extended to the suspect. The decisive factor is the point in time, from which 'court enquiries are carried out or preliminary investigations are initiated,' unless the notification would 'endanger the purpose of the examination'. A further novelty is that the instruction about the right to consult a lawyer must occur at the first examination by a judge at the latest, and no longer up until the deposition of the indictment.⁸³

In this context it is also interesting to note the new conception contained in the 1993 CCP Amendment of the structure of pre-trial proceedings in the *Czech Republic*, according to which the suspect is informed of the fact that he will be questioned as a potential accused before his first examination.

75. Höpfel, in A. Eser and B. Huber, *Strafrechtsentwicklung*, vol. 3.2, 851.

76. Huber, 'Landesbericht England und Wales', in W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht*, 57, fn. 182.

77. Cf. Arts. 63-1 and 116 CPP in the 24/08/93 version.

78. Steininger, 'Ausgewählte Probleme des Strafprozeßänderungsgesetzes (StPÄG) 1993 aus praktischer Sicht', 56 *Österreichisches Anwaltsblatt* (1994), 77 ff., 77.

79. Heine and Roulet, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1299.

80. Tellenbach, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1595; but cf. also 1597.

81. Heine and Roulet, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1299.

82. Steininger, 56 *Österreichisches Anwaltsblatt* (1994), 77, 79 f.

83. Ibid, 77 f.

In the *Federal Republic of Germany* the accused is thoroughly informed of his rights before the first examination, regardless of whether the first examination is carried out by a judge, the prosecution or the police (ss.136, 163a par.3, 4 CCP). After having been informed of the charge, the accused is informed that, by law, he is free to respond to the accusation or to say nothing about the matter and to consult a lawyer of his choice at any time, i.e. even before his examination. Thus, the position of being an 'accused' is rather crucial. It is held by the person against whom proceedings are instituted. In this respect, it is not so important, whether the suspect is already 'formally' treated as an accused, but, rather, whether preliminary proceedings have actually been instituted against him as a particular suspect (and not as a mere witness or other type of informant). The line of division may well become blurred if the suspicion of a crime exists at the beginning of investigations, without it, however, having sufficiently clearly attached to a particular person. In such cases the suspect must be treated as an accused and duly cautioned as such, if sufficiently firm suspicion has formed against him, so that he may seriously be considered as a culprit. To this extent the investigatory arm does have some room for manoeuvre.⁸⁴ However, as soon as a person seems to fit the role of the 'accused' in the eyes of the prosecuting body, an informal 'informative' questioning in particular will even become inadmissible; if such questioning is nonetheless carried out, the use of the evidence so obtained will be prohibited.⁸⁵

C. THE RIGHT TO INSPECT FILES

This right is especially significant in inquisitorial legal systems, in which the investigations are primarily carried out by the prosecution or the police.

In the *German Federal CCP* only the defence lawyer, and not the accused, is afforded the right to inspect files. The defence lawyer has the power to inspect files which have been submitted to the court or should be submitted to it if the formal indictment is brought, or to inspect evidence which is stored officially. However, the prosecution may deny defence counsel an inspection before the conclusion of investigations, if the inspection may put at risk the purpose of the investigation. This does not apply, however, to inspections of a) the records of the examination of the accused or b) of examination hearings before the judge, for which the defence lawyer was granted the right to be present or should have been granted such a right, or c) of expert witnesses' testimonies. In such cases, the defence lawyer may not be fully denied access to documents at any stage in the proceedings. The defence lawyer has, at any rate, an unlimited right to inspect files after the conclusion of investigations (s.147 CCP).

In several countries in which the right to inspect files had not as yet been guaranteed to the same degree, the right has recently been extended, e.g. in *France*, where this

84. G. Schäfer, *Die Praxis des Strafverfahrens*, 105 f.

85. Cf. for greater detail Kleinknecht and Meyer-Goßner, *Strafprozeßordnung*, introd. 79.

right has been afforded consistently after the first appearance of the accused before the *juge d'instruction* since 1993.⁸⁶ Of course, if one is mindful of the fact that only a fraction of French cases lead, to an examination by a *juge d'instruction*, then the *Turkish* 1992 CCP Reform will appear, by comparison, much more generous. There, counsel for the defence previously had the right to inspect files only from the moment at which the formal indictment was brought. Before this stage of the proceedings, the defence lawyer's unlimited right to inspect documents only applied to files which had to do with examinations of the accused, the testimony of expert witnesses and minutes of official proceedings at which the lawyer had a right to be present. Other files were only made available to counsel for the defence if they would not hinder the investigatory proceedings. The new regulation has now transformed this 'prohibition with the reservation to grant permission,' into a 'permission with the reservation to prohibit' the inspection of files. Counsel for the defence now has, on principle, the right to inspect files from the very beginning. This right may only be limited if its exercise would put at risk the success of the investigatory measures. It is worthy of note that these decisions are to be made by the *Justice of the Peace*, who steps in at the request of the prosecution.⁸⁷ Again, however, these changes do not apply to investigations initiated under the 'Anti-terrorism legislation'.⁸⁸

D. THE DEVELOPMENT OF LEGAL REMEDIES

The accused's control and review options are, of course, significant for the question of how effectively rights may be asserted. The *Austrian* Miklau/Szymanski reform package of 1989 tries to take this concern into account, by proposing that the accused should be able to turn to the public prosecutor and ultimately to the judge if his fundamental rights have been impaired.⁸⁹ The revision in the canton of *Schwyz* also aims at rendering existing options for legal protection more effective, by providing for the *ex post facto* notification of the transgression to the person concerned through official monitoring mechanisms.⁹⁰ In *France* the accused was given a new right to have grounds of voidness at the pre-trial stage reviewed by the indictment chamber by way of a special means of personal redress.⁹¹ This advantage, however, is accompanied by more stringent requirements which may preclude such complaints from being admitted if they are only raised at the trial stage.⁹²

The picture is rather positive, as far as improvements of the accused's options for legal protection against the order and continuation of pre-trial detention are concerned. This

86. Barth, in: W. Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrecht*, 105; cf. Art. 114 *CPP*.

87. Tellenbach, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1596.

88. *Ibid.*, 1597.

89. Höpfel, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 851.

90. Heine and Hein, in A. Eser and B. Huber, *Strafrechtsentwicklung*, vol. 3.2, 1021; cf. Art. 41 *CCP*.

91. Art. 173 para. 3 *CPP* from the 24/08/93 version.

92. Cf. Art. 174 para. 1 from the 04/01/93 version.

development may be in part attributed to the case-law of the European Court of Human Rights (ECtHR) on Art.5 paras. 3 and 4 ECHR, which requires arrested persons to be immediately brought before a judge and gives detained persons the right to have their remand in custody reviewed by contradictory proceedings, in which a court must decide without delay on the legitimacy of the detention.⁹³ After the ECtHR decided against Great Britain in the *Brogan* case in 1988, that it is contrary to the ECHR to detain a person for 4 days without bringing him before a judge,⁹⁴ the Court forced a host of Member States of the Convention to review their deadlines for production before the judge and for reviewing remands in custody. Thus, in recent years deadlines for production before the judge were shortened in the *Netherlands*,⁹⁵ in *Finland*,⁹⁶ and in *Turkey*⁹⁷ and deadlines for reviewing the legitimacy of remands in custody were shortened in *Sweden*⁹⁸ and in *Finland*.⁹⁹

Changes were also undertaken in this area in numerous Swiss cantons. In *Lucerne* examining magistrates were obliged from 1990 to review periodically the legitimacy of remands in custody.¹⁰⁰ In *Zurich* an obligatory detention magistrate was introduced in 1992, to rule on the continuation or cessation of custody while awaiting trial.¹⁰¹ In *St. Gallen*, custody appeal proceedings were reformed by law of 1989, because they did not meet the requirements of Art.5 par.4 ECHR. The stages of appeal for custody appeal proceedings were reduced by the removal of the public prosecutor as one stage of appeal. Account was taken of the requirement of Art.5 par.4 ECHR for proceedings on the merits to review remands in custody, in that the appellant would always be given the opportunity to respond to the investigatory body's claim in writing or orally.¹⁰²

In *Austria* the 1993 CCP-Amendment provided for the taking of evidence on the question of custody in the scope of proceedings to review remands in custody, so that it is now possible to have witnesses examined. However, the trial judge is only required to allow claims which he 'considers to be useful'. In this context, the right to pose

93. Cf. Lagodny, 'Die Aktivitäten des Europarats auf strafrechtlichem Gebiet unter besonderer Berücksichtigung der Europäischen Menschenrechtskonvention', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1718 ff., vol. 3.2, 1346 ff.
94. *Europäische Grundrechte* (1989), 387; Lagodny, 'Die Aktivitäten des Europarats auf strafrechtlichem Gebiet unter besonderer Berücksichtigung der Europäischen Menschenrechtskonvention', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1346.
95. Van de Reynt *et al.*, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 919.
96. Joutsen, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 442.
97. Tellenbach, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1594 (but cf. also 1597 for the limitations set by the 'Anti-terrorist' legislation).
98. Cornils, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 977 f.
99. Joutsen, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 422.
100. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1020.
101. Heine and Roulet, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1299; cf. s.24a GVG together with s.62 CCP.
102. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1020.

questions to witnesses may also be exercised.¹⁰³ By introducing legal time-limits for detention, the expiry of which would result in compulsory release from custody unless the limit was not extended in time, one can ensure that the fulfilment of custody requirements is regularly reviewed by a judge.¹⁰⁴

In *France* proceedings before the *juge d'instruction* to decide on the order of custody while awaiting trial were rendered adversarial in 1984.¹⁰⁵ The reform proposal to transfer the competence to make the order to a body of judges (instead of a single magistrate) was unable to assert itself, due to the change in government and to economic considerations.¹⁰⁶

Appeal procedure was improved in *Belgium* in 1990. The right to have a lawyer present already at the issue of a warrant was also granted.¹⁰⁷

The *Turkish* CCP was also reformed in this area in 1992. It is now established that an accused who is present at the issue of his warrant should be heard. A defence lawyer may also be present at the request of the accused, and he should also be heard. However, if the accused is not present, then the judge will decide as before according to the documentary evidence before him.¹⁰⁸ Again such changes do not apply, of course, to offences which fall under the 1991 'Anti-terrorist legislation'.¹⁰⁹

In the *Federal Republic of Germany* no legislative changes of note in this area may be observed in recent years. A positive change in attitude in legal practice may, however, be noted, as far as the frequency of orders and enforcements of custody while awaiting trial are concerned. Since 1983 an intense debate has ensued, triggered by complaints from the legal profession, as to whether arrests are made too often and too quickly in the Federal Republic. This debate - along with numerous studies¹¹⁰ - has finally led to a change in detention practice; in particular, the possibility of exemption from imprisonment under s.116 CCP conditions is increasingly put to use.¹¹¹

103. Steininger, 56 *Österreichisches Anwaltsblatt* (1994), 77, 89.

104. Ibid; cf. s.181 Austrian CCP.

105. Rath and Spaniol, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 2.1, 488.

106. Steindorff, 'Frankreich-bedeutsame Neuerungen', 5 *Neue Kriminalpolitik* (November, 1993), 15, 16.

107. Tulkens and Van de Kerchove, 'Landesbericht Belgien', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.1, 27.

108. Tellenbach, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1593.

109. Ibid, 1597.

110. U. Gebauer, 'Die Rechtswirklichkeit der Untersuchungshaft in der Bundesrepublik Deutschland', 7 *Neue Kriminologische Studien* (1987); Hilger, 'Die Entwicklung der Untersuchungshaft - Zahlen von 1981 bis 1987', 9 *Neue Zeitschrift für Strafrecht (NSiZ)* (1989), 107 ff. and further references; cf. also F. Dünkel, *Freiheitsentzug für junge Rechtsbrecher* (Forum Verlag Godesberg, 1990), 368 ff.

111. G. Schäfer, *Die Praxis des Strafverfahrens*, 170.

E. THE STRENGTHENING OF THE POSITION OF DETAINED PERSONS

All such legal improvements of the accused's options for legal protection against the order and continuation of custody pending trial also depend, of course, on the actual ability to use these options as against the investigatory bodies. The accused, who is hindered by detention, may not be able to influence the course of investigatory proceedings. It is important, here, to assess the extent to which the actual hindrance of the accused is at least partly compensated, in particular by the fact that a defence lawyer will be appointed for him.

In the *Czech Republic* an accused who does not have the means to pay a lawyer has had since 1961 the right to demand - already at the pre-trial stage - the appointment of a lawyer free of charge or for a reduced fee. This rule, which has been further strengthened by the 1993 CCP-Amendment, stands out in a European comparison by virtue of the fact that it applies to all accused persons and not only to those in custody.

In the Swiss canton of *Schaffhausen* the right to have a lawyer appointed has been ensured since 1988, where the custody pending trial is to exceed the ten-day limit.¹¹² Since 1992 in *Zurich*, the necessity of a defence lawyer will arise after a maximum of five days' detention awaiting trial,¹¹³ and in *Vaud* a defence lawyer is required after 30 days' detention.¹¹⁴

In *Austria* a case of necessary defence only arose before the 1993 reform if the accused had been held in custody awaiting trial for two months. Since the reform, a defence lawyer is already required at the beginning of detention.¹¹⁵ Since it was additionally provided by law that the decision to impose an order of custody pending trial would have to be reviewed before the expiry of 14 days after the arrest,¹¹⁶ and it was necessary to ensure that the accused already be represented during such custody proceedings, legal changes were also introduced with the aim of allowing such an accelerated appointment of defence counsel.¹¹⁷

It would be asking a lot to expect other countries to follow these examples. In particular, the *German Federal* legislature would have good reason to rethink its unfortunate regulation in s.117 par.4 CCP. This section gives the accused in custody

112. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1019, cf. Art. 48 CCP.

113. Heine and Roulet, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1299; cf. s.11 para. 2 CCP.

114. Ibid, 1300; cf. Art. 104 CCP.

115. Tipold, 'Notwendige Verteidigung und Verfahrenshilfe im Lichte des Strafprozeßänderungsgesetzes 1993', 49 *Österreichische Juristen-Zeitung* (1994), 1 ff., 2.

116. Steininger, 56 *Österreichisches Anwaltsblatt* (1994), 77, 89 (custody deadlines); cf. s.181 Austrian CCP.

117. Tipold, 49 *Österreichische Juristen-Zeitung* (1994), 1 ff., 7.

the right to have a lawyer appointed to him, insofar as he does not already have one, only after three months' imprisonment. The situation is only different for 14 to 17 year old prisoners awaiting trial, to whom a lawyer is appointed as soon as the custody pending trial begins (s.68 Nr.4 *Jugendgerichtsgesetz* (JGG)).

The right of the imprisoned accused to *communicate* with his lawyer may also be considered in conjunction with the accused's actual ability to assert rights.

By virtue of the 1990 CCP-Amendment in the *Czech Republic*, the right of accused persons in custody to consult their lawyer without others present was reinforced.

In the *Federal Republic of Germany*, accused persons in custody have the right to unhindered and unsupervised communication with their lawyer (s.148 CCP).

In *Hungary* uncensored correspondence in writing was allowed by the law of 1987 between prisoners awaiting trial and their lawyers.¹¹⁸

Unsupervised oral and written communication between lawyer and accused has also been allowed in *Turkey* since 1992,¹¹⁹ again insofar as preliminary proceedings not pursuant to the 'Anti-terrorist legislation' are concerned.¹²⁰

In the Swiss canton of *Schaffhausen*, the accused's right to contact his lawyer was also extended by law of 1988: Written and oral communication is also to be permitted. Supervision of the contents of written and oral correspondence is no longer permissible after the first examination of the accused by the examining magistrate, or 15 days after the issue of the custody order.¹²¹

Austria has expanded the scope of unsupervised communication between the accused and his lawyer by its CCP-Amendment of 1987, pursuant to an undertaking towards the European Commission on Human Rights (EComHR). This resulted from the Commission's complaint of an infringement by the Austrian law of the defendant's right to defend himself, contained in Art.6 par.3 lit. d ECHR. Under the previous law, the discussion - up until the delivery of the indictment - between the accused and his lawyer could only ever take place in the presence of an employee of the court. It is now established that a supervision of the discussion may only be permissible where there is danger of evidence being suppressed. In such cases regular supervision of discussions takes place during the first 14 days of custody ordered by the court, unless it may be ruled out that these discussions could impair the evidence. Thereafter, the supervision

118. Farkas, 'Landesbericht Ungarn', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1660.

119. Tellenbach, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 1596 f.

120. Ibid, 1597.

121. Heine and Hein, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 3.2, 1019, fn. 64.

of discussions may be ordered if particular circumstances indicate that the evidence may be prejudiced.¹²²

F. THE RIGHT TO SILENCE

Although certain improvements for the accused have been outlined above, restrictions to the rights of the accused may also be observed in an area which has traditionally been considered sacrosanct, namely the accused's right to silence. It is worthy of note that this right has suffered unparalleled legal restriction in England of all places: its country of origin. By virtue of the *Criminal Justice and Public Order Act* 1994, the right to silence in *England and Wales* may be rendered futile by the fact that a person's silence may be exploited extensively: thus, all sorts of disadvantageous conclusions may now be drawn from the silence of the defendant.

In *France*, too, where the accused is allowed not to comment on the matter, but is not to be expressly informed of this,¹²³ there is nothing to oppose the exploitation of silence in the scope of the free evaluation of evidence. The extent to which a silent defendant may prejudice himself was made clear by an appeal court judge's choice of words, when he was careful to insist that silence may give a bad impression, but the defendant may, of course, be acquitted in case of doubt, *despite* his asserting the right to silence.¹²⁴

On the other hand, it is important to underscore the fact that, by the *Czech CCP-Amendment* of April 1990, it has now been established that the accused has the right, during preliminary proceedings, to refuse to give testimony.

In the *Federal Republic of Germany* the accused also has the constitutional right to be silent (S.136 CCP).¹²⁵

§ 4. The Use of Undercover Investigators

Finally, a brief analysis shall be attempted of an area of particularly clear tension between the efficacy of criminal prosecution (particularly at the police level) and the safeguarding of the accused's and uninvolved third parties' legal positions: namely the use of undercover investigators. 'Undercover investigators' in the sense of police officers working on the scene, have found their way into various criminal procedures,

122. Berger, 'Landesbericht Österreich', in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 2.2, 1117 ff.

123. Barth, in W. Perron (ed.), *Die Beweisaufnahme*, 103.

124. Braunschweig, 'La procédure pénale en droit Français', 64 *Revue internationale de droit pénal* (1993), 1089 ff., 1110.

125. *Bundesverfassungsgericht*, 34 *NJW* (1981), 1431.

as far as they are not tolerated - as is the case, apparently, in *Austria*¹²⁶ - even without special permission provisions contained in the CCP. However, these cases of infiltration have more to do with exonerating the investigator than with the question of the admissibility of evidence so obtained, which is vital for the accused.

In the *Czech Republic* law reforms have been completed, which regulate the use of undercover investigators and grant them the power to commit certain offences.

In the *Federal Republic of Germany*, the use of undercover investigators was given a legal basis in the 1992 *Organised Crime Act* (s.110a CCP), but from the outset it was only permitted for uncovering certain serious offences. Undercover investigators may only be used if sufficient concrete points of reference indicate that an offence of considerable importance has been committed either by a member of a group or in an organized way at an economic or customary level in the areas of illegal trafficking in drugs or weapons, the counterfeiting of money or the forgery of stamps and in the area of State security. Beyond this repressive function, undercover investigators may also be used on a preventive basis to a certain extent, as long as the danger of the investigated offence's being repeated persists due to particular facts. In any case, undercover investigators may, however, only be engaged as long as an alternative way of solving the case would offer little or no prospects of success. A further obstacle exists in that the use of an undercover investigator requires the prior consent of the prosecution or, in certain cases, that of the judge, namely where the investigation is directed at a particular accused or if premises are to be entered, which would not be generally accessible (s.110b CCP). On the other hand, the exemption from punishment called for by police for offences committed on the scene was not granted by the German legislature, in contrast to the Czech regulation.

By comparison, far-reaching reform proposals may be observed in this area, especially in *Russia*. There, undercover investigators are to be exempt from punishment on certain conditions, if they commit manslaughter in the course of their activities 'in the heat of the moment,' whether or not they can rely on a general justification or defence. However, it is rather improbable at present, that this reform proposal, though it has already been introduced into the legislative procedure, will actually be followed through.

In *Italy* not only were undercover investigators exonerated in the drug-trafficking area in 1990,¹²⁷ but special grounds for exoneration were also introduced in 1992 for *agents provocateurs* acting in the areas of money laundering and organized crime.¹²⁸

126. Ebert, 'Landesbericht Österreich', in W. Gropp (ed.), *Besondere Ermittlungsmaßnahmen zur Bekämpfung der Organisierten Kriminalität*, (edition iuscrim, Max-Planck-Institut für ausländische und internationales Strafrecht, 1993), 621 ff., 623.

127. Orlandi, 'Landesbericht Italien', in W. Gropp (ed.), *Besondere Ermittlungsmaßnahmen*, 439f; cf. Art. 97L. Nr. 309/1990.

128. Ibid. 446.

Other countries do not seem to wish to go quite so far. In France, for example specialized customs investigation officers or court police have had the power since 1992, for the purpose of infiltrating undercover investigators into the drug scene, to purchase, possess, deliver, and transport or supervise the transport of drugs; however, this is only supposed to legalize acts which take place within the inner circle of drug cartels. The sale of drugs to consumers or drug dealers is also unlawful according to consistent precedent, as is provocation, the purpose of which is to incite consumers into purchasing drugs. According to the official reasoning, offences that are *crime-scene* related should only be justifiable on principle, if they serve the purpose of avoiding an uncovering of the investigator, which might lead to death or injury. However, this should not apply to the infiltration itself, due to the final regulation. The use of an undercover investigator must first be allowed by the director of public prosecutions or by the examining magistrate, according to the case at hand.¹²⁹

The highest court in the *Netherlands* has also drawn narrow boundaries delimiting the activities of undercover investigators and collaborators since 1989. Similarly to France and Belgium, these limits also contain a prohibition against provocation, which provides that the undercover investigator must not have caused the suspect to commit any acts other than those which he intended to commit all along. Moreover, the person provoked must be given the opportunity to withdraw from attempting the offence up until the last moment.¹³⁰ In the last three countries mentioned, low-level offences that are *scene-related* may be covered by the principle of discretionary prosecution, which is why this issue does not pose such an urgent demand for regulation as it does in Italy, where the principle of mandatory prosecution is just as binding as it is in German criminal procedure.

§ 5. Concluding Observations

After this concerted effort to canvass the European state of criminal procedural reform, I would like to conclude with a necessarily simplified outline of the general tendencies:

- First, the Europe-wide trend towards a better observance of the rule of law is to be seen in countries which had previously lagged behind in this respect. This applies to defence rights (including the right to positive intervention by asking questions and making statements), to reductions in the duration of custody, to the reinforcement of options to have remand in custody reviewed, and insofar as efforts to develop police powers seem to coincide with the inclusion of safeguards.
- Secondly, however, damage to the rule of law caused in part by an excessive acceleration of criminal proceedings may be complained of. This acceleration is often

129. Lorenz, 'Landesbericht Frankreich', in W. Gropp (ed.), *Besondere Ermittlungsmaßnahmen*, 352 ff.

130. Van de Reynt *et al.*, in A. Eser and B. Huber (eds.), *Strafrechtsentwicklung*, vol. 4.2, 975 f.

won at the cost of compromising the rights of the accused and of defence counsel. Damage is even caused by dramatic infringements of rights that have traditionally been firmly upheld, namely the accused's right to silence.

- As much as this balance may still appear tolerable as a whole, a third phenomenon must cause some concern: Whereas an increase of constitutionality may be observed in the area of 'normal' every day crime, so to speak, nearly every defence barrier is in danger of being lowered against serious and, in particular, organized crime. This problem could only be presented in this paper by means of examples from the European reform attempts at increasing the use of undercover investigators for uncovering offences and giving undercover investigators greater powers. At the same time, one would hope for an increase in police efficiency in the European development of criminal procedure by the use of modern surveillance and spying techniques. The fact that such special measures, which are specific and may be justified by standards of organized crime, do not at least make their way through the general structure of proceedings, will definitely be one of the most important and difficult legal policy concerns of the near future.

This walk on the ridge of legal reform will only be able to succeed if the guiding principle is not to insist on extremes, but to look for a reasonably happy medium. Just as prosecution should not be allowed at every price - and it may even be the conviction of an innocent person -, I am equally precluded from seeing a victory of justice in the aim of freeing a suspect at every price - as it may be an acquittal known to be unfounded. What is necessary, therefore, is a sense of proportion from both sides: guidance for an efficient combating of crime is to be drawn from the foundations of the rule of law in the sense of 'practical concordance'.