

Safeguarding Human Rights in Europe

THE RIGHTS OF SUSPECTS/ACCUSED AND THEIR DEFENCE IN CRIMINAL PROCEEDINGS IN SOUTH EAST EUROPE – SPEECH BY PROF. HAJRIJA SIJERCIC-COLIC

Discussing the rights of suspects/accused and their defence in criminal proceedings illustrates the real mixture of basic human rights and effective criminal procedure in the legal regulation of criminal proceedings and the relationship between national and international law.

Since the law “places human behaviour in a subordinate position to the rule of law”¹, the law has to ensure a just dispute-resolution and the establishment of a just proceeding. In the context of the criminal procedure law, this means the promotion of legal mechanisms for the protection of human rights in criminal proceedings, which should result in an increased knowledge of those rights (especially for those parties involved in criminal proceedings who are entitled to those rights!). At the same time, a national legal system in any country is affected by an inevitable cooperation between the states and also by cooperation which is being established at an ever faster pace at the regional and global levels. Finally, the last decade of the 20th century and the first decade of the new millennium are characterized, among other things, by the phenomena of organized crime, terrorism, illegal trade in arms and narcotics, trafficking in human beings and treasures of art, money laundering, and corruption. These phenomena have a noticeable destabilizing effect on the states and their legal struc-

tures, and a weakening effect on society’s controlling mechanisms, all of which causes a proportionately larger crisis of morale. The danger is thus widespread. Or, to speak in more graphic terms: The cancer of organized crime is spreading across the globe like a plague, removing, quite skilfully, all obstacles in its way.²

We also know that the efforts to combat complex forms of organized crime, terrorism, and corruption are said to be the priority and the main objective in modern states and the modern world as a whole. In this regard, various conventions, treaties (multilateral and bilateral), guidelines, recommendations, and pieces of legislation are being made to help combat organized crime and corruption, terrorism, illegal trade in arms, narcotics, trafficking in human beings and organs, illegal trade in treasures of art, and money laundering. Actions are being planned and implemented in a harmonized way, when possible, at the universal level (within the United Nations), at the regional level (within regional organizations such as, for instance, the Council of Europe and the

² For more information on the image of organized crime, crime without frontiers, corruption, money laundering, and the creation of a collective image of threats posed by those forms of crime, see *Threats and Phantoms of Organised Crime, Corruption and Terrorism: Critical and European Perspectives*. Edited with Petrus Van Duyne, Klaus Von Lampe and Matjaž Jagar. Wolf Legal Publishers, 2004.

¹ Fuller, L.: *The Morality of Law*. Yale University Press, 1969, p. 96-151.

May 2007

www.kas.de/rspsoe
www.kas.de

European Union), and at the national level (within a state), with the aim of suppressing modern forms of organized crime and their damaging effects. Modern forms of organized crime are changing the principles and structure of criminal law (both substantive and procedural criminal law). Namely, certain legal reforms made it clear that one purpose of criminal (both substantive and procedural) law is to react to the phenomenon of organized crime and its forms. This criminal law-based response to organized crime is not limited only to national frameworks; it is already assuming the proportions of a global action.

In such an environment of established values and priorities (i.e. human rights protection and the defence of a society from crime), the German Justice Ministry has developed a proposal for the Framework Decision on the Rights of Suspects/Accused and their Defence in Criminal Proceedings in the European Union Member-States.³ The proposal requests that the European Union member-states ensure the minimum rights to which suspects/accused, and their defence in criminal proceedings, are entitled.

The document focuses on the following rights of suspects/accused and of their defence: The right to be informed in a language which the suspects/accused understand about the criminal offences with which they are charged and the reasons thereof; the rights to which they are entitled (including the right to legal assistance⁴); the right to a defence counsel (which

³ According to the statement by Germany's Federal Minister of Justice, Brigitte Zypries, one of the priorities of the German Presidency of the European Union is to achieve a resolved progress on the proposal, which was presented to the European Commission in 2004 and has been discussed at length in the EU member-states.

⁴ Article 2 of the proposed "Framework Decision": The Right to Information: Any person who is faced with criminal prosecution or is even arrested in a country whose language he

includes a sufficient period of time necessary for the preparation of a defence), and the right to select a defence counsel of their own choosing. Also, if the person lacks sufficient means of payment and thus cannot afford a defence counsel, he or she must be given pro bono legal assistance. Additionally, if the person is deprived of liberty, he or she must be allowed to establish and have contact with his or her defence counsel.⁵ Finally, the right to interpretation and translation of documents must be insured, as the suspect/accused has to understand what he or she is charged with. The person who cannot understand the language in official use has the right to interpretation services and to translation of documents necessary for a fair trial.⁶ As a result, all police stations will maintain written forms of the above-mentioned rights in all languages in use in the current 27 European Union mem-

or she does not understand shall be informed of the following, in a language which he or she understands: What he or she is charged with, the reasons thereof, and the rights to which he or she is entitled (such as the right to legal assistance).

⁵ Article 3 of the proposed "Framework Decision": The Right of Defence: Any person charged with a criminal offence must have adequate time for the preparation of his or her defence and must have the option to receive assistance from a defence counsel of his or her choosing. If he or she lacks sufficient means of payment, such assistance must be provided free of charge. If a person is arrested, it must be ensured that he or she has the opportunity to establish contact with a defence counsel.

⁶ Articles 4 and 5 of the proposed "Framework Decision": The Right to Interpretation and to Translation of Documents: Any person charged with an offence must be able to understand why he or she is being charged with that offence. A person who does not understand the language used in court is entitled to the assistance of an interpreter, as well as the translation of documents necessary to ensure fair proceedings.

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

PROF. HAJRIJA SIJERIC-
COLIC

May 2007

www.kas.de/rspsoe

www.kas.de

berstates. That requirement will also be an opportunity for the police stations to create lists containing the contact details of defence counsels who will provide legal assistance in criminal cases, and to establish legal assistance units which will provide services as and when necessary, and maintain quality interpretation and translation standards.

In the short run, the above-mentioned proposals refer to the European Union member-states.

However, in the long-run, the proposals are also relevant for the states which aspire to join the European Union in the future. Finally, ensuring the minimum rights in criminal proceedings to every person who is suspected of or charged with a criminal offence is not only the responsibility of the European Union but also of the national legal systems and their creators (at the political and legislative levels) and of the authorities which implement them (the criminal law institutions).

The proposed Framework Decision on the Minimum Rights of Suspects and their Defence in Criminal Proceedings contains a series of interesting questions from within a complex of national and international law and their inter-relations in the area of protection and promotion of the minimum rights of suspected/accused persons and their defence in the European criminal proceedings. In this regard, the scope of diversities in the national law regarding the minimum rights of defence is a very special and important issue. That issue was a starting point which ended in the Regional Expert Conference on Safeguarding the Minimum Standards in Criminal Proceedings in Europe. The main message from the Conference says that the criminal legislation and judiciary continue to be burdened with some obstacles preventing the full protection of basic human rights in criminal proceedings; it thus recommends that in view of the standards which have been set in the proposed Framework Decision, the process should receive decisive support. Keeping in mind that cooperation among the states on crime suppression is as necessary as the

ensuring of effective human rights protection in criminal proceedings (and that the balance depends on both national and international endeavours), a brief account of the procedure of the Conference is presented below.

The project which the Rule of Law Program South East Europe of the Konrad Adenauer Foundation has launched in South East European countries⁷ contributed to the dis-

⁷ The Rule of Law Program South East Europe of the Konrad Adenauer Foundation officially began in the summer of 2005 by an inception conference entitled "Democracy and the Rule of Law in Romania and South East Europe: Prospects and Challenges". It is one of five regional programs focusing on the rule of law, which the Foundation promotes across the world. The Program is a supplement which enriches the activities of the Foundation's Offices in South East Europe. The seat of the Regional Program is in Bucharest. The Rule of Law Program South East Europe focuses on areas with a pronounced need for reforms in: constitutional law (both institutional and substantive) and constitutional jurisprudence, procedural law insofar as it secures respect for fundamental rights and principles of the rule of law, protection of human and minority rights, particularly the promotion and strengthening of national and international human rights protection systems, independence and integrity in the justice system, and reconciliation with the past by legal means. Within the above-mentioned areas, the Konrad Adenauer Foundation organizes seminars, training sessions, advanced training, and conferences at the regional and national levels within the Rule of Law Program in all the countries in the region. The Program's target group contains persons who are tasked with applying legal norms (judges, prosecutors, attorneys, defence counsels) and also members of the executive branch (especially politicians dealing primarily with legislation), non-governmental organizations, university professors, and representatives of civil society. The measures to be implemented will be presented to young lawyers, law students, and students of related sciences.

May 2007

www.kas.de/rspsoe
www.kas.de

cussion of the minimum rights of suspected/accused persons and their defence in criminal proceedings in the European states. On the basis of the Framework Decision on Safeguarding Human Rights in Criminal Proceedings in Europe, which was explained to the audience, an analysis was made of the present national law in South East European states. The project includes two new member-states (Bulgaria and Romania) and six states which are not EU members yet (Albania, Bosnia and Herzegovina,⁸ Montenegro, Croatia, Macedonia, and Serbia). The manner in which these countries' legal systems treat the protection of the basic human rights and freedoms was studied through the questions which the project initiator asked the national rapporteurs. The following aspects were discussed:

- a) the right of the defendant to a fair trial,
- b) the right to the presumption of innocence,⁹

This is the only way in which it will be possible to ensure a successful long-term implementation and functioning of the rule of law structures.

⁸ The analysis of the present legislation in Bosnia and Herzegovina which refers to the rights of suspects/accused and their defence in criminal proceedings was made by Professor Hajrija Sijercic-Colic, Ph.D. The monograph with the study about Bosnia and Herzegovina and other states is available in the Library of the Law School in Sarajevo. The title of the publication is "Safeguarding Human Rights in Europe: The Rights of Suspects and their Defence in Criminal Proceedings in South East Europe." Editor: Stefanie Ricarda Roos. Konrad Adenauer Stiftung. Rule of Law Program South East Europe. Romania, 2007. Page 239.

⁹ The questions which sought responses were: Does the presumption of innocence exist as a guarantee in the national law and legislation? If a response is positive, how is this right protected? Are the preliminary measures (such as,

c) the right of the suspect and the accused to remain silent and not to respond to questions,¹⁰

d) the right to be absent from trial and legality of court procedures and judgments reached in trial in absentia,¹¹

for instance, searches of homes and offices, wire-tapping, confiscation of properties, detention) allowed regardless of whether the presumption of innocence exists or not? If a response is positive, do those measures have to correspond to the specific requests for presumption of innocence? Does the national law prescribe the shifting of the burden of proof, for instance, in such a way that the suspect or the defendant has to prove that he or she acquired the confiscated properties by legal means? Does the national law prescribe compensation in case of a groundless criminal prosecution (e.g., rehabilitation, deletion of data from the criminal records)?

¹⁰ The questions which sought responses were: Does the right to remain silent exist under the national law and legislation? If a response is positive, What are the specific features of this right? Does the right to remain silent apply in the course of interrogation by the police, a prosecutor, a judge and during a trial? Which information does this right refer to? Does it refer to the information about the identity and to the facts related to the criminal case? Does the right to remain silent apply only to some questions? Can a partial silence be used at trial in favour of or against the defendant? What happens if the suspect gives a statement during investigation, and refuses to give a statement in later stages of the criminal proceedings? Can the results of a secret criminal investigation be used against a suspect at court? Let us assume that the suspect gives a comment on the facts related to the crime outside criminal proceedings or writes something about the crime in his or her diary: can this be used against him or her at court by questioning an individual who heard the comment or by a loud reading a specific paragraph of the diary?

May 2007

www.kas.de/rspsoe
www.kas.de

e) the right of the defendant to legal advice by a qualified lawyer,¹²

f) the right of the suspect to be informed about his or her rights,¹³

g) the right to interpretation,¹⁴

h) the right to communication with the outside world in case of deprivation of liberty and detention¹⁵ and

i) the right to defence.¹⁶

For the purpose of making an analysis of the guarantees of freedom and protection of safety of citizens, the national rapporteurs submitted their studies for later compilation in a publication presented in Bucharest.

For a number of reasons, each study should examine the national law and the practice of implementing the procedural rights of suspects and of their defence and the implementation of defence in criminal proceedings.

As already mentioned, the Regional Conference entitled "Safeguarding Human Rights in Europe: The Rights of Suspects/Accused and their Defence in Criminal Proceedings in

¹¹ The following questions were also asked: Does the national legislation envisage trials and judgments in absentia? If a response is positive, What are the conditions? How does the national legislation address the problem regarding investigations of crimes committed by foreigners visiting/transiting through a country? Under which conditions it is not possible to appeal a judgment reached in the so-called expedient procedure?

¹² The following questions were asked: Does the national legislation give the suspect the right to legal advice from a qualified attorney? Does the national legislation impose restrictions on legal assistance? Is there a period of time during which a suspect has no right to receive professional assistance from a lawyer? Is the presence of an attorney during the police interrogation ensured? Does the law prescribe a 24-hour-presence of attorneys so that the persons arrested during the night or at weekends also have access to legal advice at least on a temporary basis? Does the law prescribe the criteria and procedures for the provision of legal assistance? Under the national legislation, who covers the costs of legal advice if the suspect or his or her family cannot afford paying the costs? Does the law prescribe the payment of costs of legal assistance by the court if the person lacks financial means necessary for payment of legal assistance?

¹³ The following was discussed: Does the applicable national legislation guarantee that the person under investigation is fully aware of his or her rights?

¹⁴ The following questions sought responses: Does the national legislation envisage the right of the suspect to interpretation services free of charge if he or she does not understand or does not speak the language used in court?

Does the national legislation envisage the right to the translation of the relevant documents free of charge?

¹⁵ The questions which sought responses were: Does a detained person have the right to visits by family members, persons close to his or her family and the employer who has been informed about the detention under the national law? Does the national legislation envisage the right of a detained person to communicate to the consular office staff? Does this ensure that all foreign suspects are able to inform their respective consular offices about detention, if they wish so?

¹⁶ The following was discussed: Does the national legislation envisage guarantees which ensure that the rights of defence are fully protected in the interest of fair proceedings? Does the national legislation guarantee independence of defence? Does the national legislation envisage the protection of confidentiality between the persons who are entitled to legal assistance and their defence? Does the law prescribe the full support, assistance and the information to all defence counsels? The analysis of the rights of defended versus the rights of witnesses.

South East Europe” took place in Bucharest, Romania, on 13-15 May, 2007. The Conference was organized by the Konrad Adenauer Foundation’s Rule of Law Program South East Europe. It was attended by the authors of national studies;¹⁷ the representative of the Federal Minister of Justice of Germany, Mr. Eberhard Siegismund; the Director of the Rule of Law Program South East Europe, dr. Stefanie Ricarda Roos; the Head of the SPOC Secretariat Initiative to fight Organized Crime of the Stability Pact, Mr. Sorin Sterie; representatives of the judiciary in Romania; the Minister of Justice of Romania, Mr. Tudor Alexandru Chiuariu; and ambassadors of the states involved in the project (among them, the Ambassador

of Bosnia and Herzegovina to Romania, H.E. Branko T. Neskovic).

The Conference was roughly divided into two blocks: The first block focused on common standards in criminal proceedings in the European Union member-states and the second block focused on the protection of the rights in criminal proceedings in non-member states.

Among the states represented within the first block were Bulgaria and Romania, as European Union member-states from January 1th, 2007. In addition to those two national procedural law systems, the Conference also focused on the legal systems in Albania, Bosnia and Herzegovina, Montenegro, Croatia, Macedonia, and Serbia. Regarding the impact of the proposed Framework Decision on the Minimum Rights of Suspects/Accused and their Defence in Criminal Proceedings, the impact could be followed in both the European Union member-states and in the non-member states. Within the globalization process, such a concept of the Conference shows that the integration processes cover all the states and inevitably reflect on their legal systems. Also, the participants discussed during the working part of the Conference the responsibilities of the states for the formulation and promotion of the minimum standards and rights relevant for criminal proceedings and cooperation between national criminal law systems, especially among prosecutors.

According to tradition, the above-mentioned issues were discussed not only within presentations by national and other responsible rapporteurs but also at plenary discussions which explored both stronger and weaker negative confrontation between the interests of anti-crime efforts and the protection of recognized rights and freedoms in criminal proceedings.

Among the specific results of the efforts towards harmonizing national legislation regarding the protection of the rights of defence in criminal proceedings, the participants stressed the need to develop a joint programme for the protection of those rights. Thereby, the Regional Expert Con-

¹⁷ The following persons were involved in the development of the national studies and in the Conference: Albania

- Professor Skender Kapuci, Ph.D., Law School of University of Tirana; Bosnia and Herzegovina
- Professor Hajrija Sijercic-Colic, Ph.D., Law School of the University of Sarajevo; Bulgaria
- Ivan Dimov, Judge of the District Court Sliven and President of the Managing Board of the Association of Lawyers; Montenegro
- Docent Dr. Branko Vuckovic, President of the Basic Court in Kotor; Croatia
- Professor Josip Kregar, Ph.D., Dean of the Law School of the University of Zagreb; Macedonia
- Emil Miftari, attorney and Vice President of the Association of Young Lawyers of Macedonian (the study was presented on his behalf by Elena Jovanovska, Helsinki Committee for Human Rights, Macedonia); Romania
- Docent dr. Sergiu Bogdan, Law School of Babes-Boyai University, Cluj-Napoca; and Serbia
- Professor Milan Škulic, Ph.D., Law School of the University of Belgrade (the study was presented on behalf of the author by Vanja Bajovic, Law School of the University of Belgrade).

[Konrad-Adenauer-Stiftung e. V.](#)

**RULE OF LAW PROGRAM
SOUTH EAST EUROPE**

PROF. HAJRIJA SIJERCIC-
COLIC

May 2007

www.kas.de/rspsoe

www.kas.de

ference on "Safeguarding Human Rights in Europe: The Rights of Suspects/Accused and their Defence in Criminal Proceedings in South East Europe" showed that the current trends in the efforts to combat crime require not only the establishment of coercive measures, but also the instruments of supervision over their use with a view to ensuring fair trials. The proposed Framework Decision on the Minimum Rights of Suspects/Accused and their Defence in Criminal Proceedings speaks precisely about that!

About the author

Hajrija Sijercic-Colic, Ph.D., associate professor, University of Sarajevo Law School. This report is the translated version of the original Bosnian text. The original report has been translated by Mrs. Svjetlana Pavicic. The translation has been proof-read by Mr. Vincent O'Neil.