

# ***The JUDGE***

- betwixt and between  
**Public Prosecutor and Defence Counsel**

*Or: Of trying to be impartial...*

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*“It is only about things that do not interest one, that one can give a really unbiased opinion; and this is no doubt the reason why an unbiased opinion is always valueless.”*

*- Oscar Wilde -*

## **I. Introduction**

We as future judges and public prosecutors could not agree less with this quote. Not only is it possible to be highly interested in a matter and nevertheless hold an unbiased opinion, but also this opinion is extraordinarily valuable as far as our professions are concerned. In this paper our aim mainly is to investigate several challenges and difficulties legal professionals are confronted with concerning their impartiality, but we'll also highlight safeguards to maintain objectivity throughout a legal proceeding. Although the focus clearly lies on criminal trials, most of the results are also valid for other matters (e.g. civil procedure). Obviously, we are not in a position to set general ethical standards, for this would go beyond the scope of this paper. All that can be achieved is to raise the awareness for problematic influences or situations and to suggest practical solutions.

One of our main goals while outlining this paper not only was to point out theoretical considerations, but also to allow those people this paper focuses at to express their views and opinions: judges, public prosecutors and lawyers. For this purpose we decided to interview individuals from each of these three legal professions. We picked out eight judges, eight public prosecutors and seven lawyers, preferably those who worked in more than one legal profession during their careers. All of them willingly answered our questions and gave us some interesting points of view, which we possibly wouldn't have considered ourselves. Of course these interviews were anonymized and may not meet every conventional scientific standard, but nevertheless the results of our applied research shall underline, scrutinize or contradict some of the aspects we are going to examine in the following chapters.

## **II. Historical Facts**

In the Middle Ages criminal and civil procedure were separated. Subsequently both of them developed relatively independently. There was still no investigation and prosecution *ex officio*. The penal procedure was just a dispute between the parties and was led by the judge in a very formal way. Judges decided on the facts proposed by the arguing. The main duty of the court was to gain a fair balance between the parties' interests and to establish legal certainty. There also was no investigation of the substantive truth *ex officio*. The sanctions were basically penance and fines, as the prior aim was to satisfy the victim and not to penalize the defendant.

The God-peace-movement was responsible for the transformation of the penal procedure and the occurrence of painful punishments (“life and limb”), which should scare off future criminals.<sup>1</sup> Simultaneously the universities started the education of the different legal professions.<sup>2</sup>

Due to the reception of Roman and Canon Law the principle of substantive truth moved into focus.<sup>3</sup> In the 13<sup>th</sup> century the municipal laws of some cities regulated the compulsive accusation of their authorities, which was the beginning of the inquisitorial process and the investigation of the substantive truth *ex officio*. Therefore, and due to the importance of confessions, torture was used frequently in the penal procedure. Finally in the 15<sup>th</sup> century the penal procedure was held behind closed doors and very much out of the public gaze.

In the 18<sup>th</sup> century demands concerning the reformation of the inquisitorial process – e.g. judicial independence, orality, immediacy and publicity of the trial – were raised, but only realized one century later.<sup>4</sup> The main interest of the political authorities was to maintain influence on the prosecution and the courts by exercising their comprehensive right of direction.<sup>5</sup>

The Revolution in 1848 was the reason why Austria implemented the Code of Criminal Procedure (short: StPO) in 1850 which eliminated the inquisitorial process and founded the reformed criminal proceedings.<sup>6</sup> The public prosecutor was integrated in the extended preliminary proceedings that were and even now are constructed as a private investigation procedure. The principle of legality was implemented afterwards. When the formal charges are brought before the court the judge is responsible for the course of the proceedings. The reformed criminal proceedings also eliminated the rules of evidence allowing judges to freely evaluate the evidence and obliging them to reason their judgement.<sup>7</sup>

In 2008 the StPO was reformed dramatically. The investigating judge as the leader of the preliminary investigation was removed by the public prosecutor as the new ruler and the criminal investigation department subordinated to him.<sup>8</sup> Nearly 100% (from 99,6 % in less serious cases and 88,7 % in more serious cases) of the examinations are done by the criminal investigation department.<sup>9</sup> Due to the Austrian dichotomy of the penal procedure the investigating activity of the judge during the main trial refers substantially to the inquiries of the criminal investigation department and also the treatment and assessment of the case by the public prosecutor. Therefore, failures in the preliminary proceedings have a strong effect on the main proceedings and in particular on its result.<sup>10</sup>

### III. Criminal Proceedings in Austria

#### A. Basic Principles

Undoubtedly, several of the problems that will be pointed out in this paper can be applied to civil procedure as well. However, as the focus lies on criminal procedure, its basic principles and course shall be outlined briefly.

According to § 3 StPO the criminal investigation department, the public prosecution and the court have to investigate the (substantive) truth and to clarify all facts, which are important to the judgement of the crime and whether it was committed by the accused. All judges, public prosecutors and criminal police officers have to administer their office impartially and in an unbiased way and they are obliged to avoid any appearance of bias. They have to investigate all circumstances against the accused/defendants or on their behalf with the same care. § 14 StPO deals with the free evaluation of evidence by the judge and states that if there is any doubt the judge always has to decide in favour of the defendant (*in dubio pro reo*).

#### B. The Judge

According to Austria's constitution (short: B-VG) - precisely Art 87 Abs 1 B-VG – judges are independent in exercising their judicial office. They can only be removed from their office in the cases prescribed by the law and on account of a formal judicial conviction (Art 88 Abs 2 B-VG).

The Austrian Judges additionally declared in the Wels Declaration of Ethics in 2007 that they would be guided in their work, among other ethical principles, by independence and fairness:

**“Art. II. Independence:**

*We decide exclusively on the basis of statutory law and our free inner conviction. We reject any form of unlawful exertion of influence, invitations and gifts, and disclose all attempts to intervene. Judicial independence serves the protection of people seeking of justice, and may never be abused as a pretext for arbitrariness or for behaviour that is intellectually or socially detached from reality. [...]*

**Art. VI. Fairness:**

*Judicial impartiality also includes the ability to recognize one's own prejudices and to pay attention to the effect one's words and actions have on others. We encounter all parties objectively, respectfully, and equidistantly, and grant everyone a fair hearing. Discriminating attitudes and statements during the proceedings are unconditionally rejected.“*

Whereas Austria's disciplinary law is legally enforceable and can, in the most severe cases, lead to a

judge's dismissal, the Wels Declaration of Ethics is a moral code without direct legal binding. However, almost all Austrian judges declared that they would follow these principles voluntarily.

According to § 39 StPO the court has the authority to lead the main proceedings, especially the main trial. The judge leads the negotiations (§ 232 StPO). Judges are obliged to support the investigation of the truth and to prevent any delay. They question defendants and witnesses. § 254 StPO authorises judges to summon and question witnesses and experts without the need for an application by the defendant or the public prosecutor. They can also order new experts or arrange the taking of new evidence if they consider it necessary - even against the will of the public prosecutor and the defence counsel. Judges can base their judgement only on evidence that was presented in court (§ 258 StPO). The comprehensive and important role of judges during the main trial leads to the concentration of power and to a passive role of the public prosecutor, who was the main actor during the preliminary proceedings.<sup>11</sup>

### ***C. The Public Prosecutor***

According to Art 90a B-VG public prosecutors are organs in the judicial process. They are also bound by the instructions of higher authorities. Public prosecutors lead the preliminary proceedings (§ 20 StPO). Only they are allowed to bring charges against people. They decide whether to file a charge, withdraw prosecution or close the proceedings. The opinion of the public prosecutor determines the proceedings at least until the end of the preliminary proceedings and also affects the main proceedings. The public prosecutor's decisions massively depend on the report-discipline and report-quality of the criminal investigation department subordinated to the public prosecutor.<sup>12</sup>

The public prosecutor and the defence counsel often represent contradicting opinions and pursue divergent aims, but the most significant difference is that public prosecutors are obliged to be objective and to investigate the substantive truth. The “double-job” of public prosecutors requires high professional conduct and professionalism.<sup>13</sup>

Public prosecutors perform for the judiciary, they are basically trained the same way as judges, they are able to become judges (or might actually have been judges before) and their office is located at the court. As they are bound to directives some consider the public prosecution to be an administrative authority. Public prosecutors also have to be impartial, neutral and must not think about convenience. They have to raise legal remedies in favour as well as to the detriment of the defendant. Many call the public prosecution the “most impartial authority in the world“ or the “guardian of the law“.<sup>14</sup>

## ***D. The Defence Counsel***

Defence counsels advise and support the defendant as laid down in § 57 StPO. They are entitled and obliged to use all defensive means and they also have to plead – without any constraints - everything on behalf of the defendant, as far as this does not contradict the law, their order and their conscience. The defence counsel practices the procedural rights entitled to the defendant.

For many criminal proceedings the presence of a defence counsel is optional, but not required. According to § 61 StPO a defence counsel is obligatory as long as the accused is on remand or in detention, in proceedings about the confinement of criminals in special psychiatric wards, in main trials on crimes with a statutory range of punishment higher than three years of imprisonment and for appeals against verdicts in trials with lay judges or a jury. In trials without counsel, the defendants execute their rights on their own. In such cases, judges have to explain their rights to them. However, in proceedings on more serious crimes or complicated cases, defence counsels are usually hired to represent the accused. To achieve this goal, they have extensive rights in preliminary investigations and the main trial, e.g. they can file motions to take evidence or question all witnesses, experts and the defendant.

## **IV. Impartiality**

### ***A. Art 6 § 1 ECHR***

Art 6 § 1 ECHR states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”. Impartiality as the absence of prejudice and bias is a fundamental criterion for any fair trial and for democratic societies in general, because it “inspires confidence in the public and [...] in the accused”.<sup>15</sup> For the sake of developing this confidence to the full, it is not enough for justice only to be done – it must also be seen to be done. Therefore, to establish public and - in the case of criminal proceedings - the accused's trust in a fair trial as required by Art 6 ECHR, courts must not only be impartial, their impartiality must also be visible in the eye of the reasonable, external observer.<sup>16</sup>

### ***B. European Court of Human Rights***

As the European Court of Human Rights has pointed out consistently in various cases, the court's impartiality basically has to stand two tests: the subjective test and the objective test.<sup>17</sup> If judges hold personal prejudice or bias of any kind concerning one party, they aren't subjectively impartial. The European Court of Human Rights has held that “the personal impartiality of a judge or a jury member must be presumed until there is proof to the contrary”,<sup>18</sup> but naturally, such a mindset is difficult to

prove, unless the judge openly shows hostility or ill will towards one party.<sup>19</sup> Therefore, the European Court of Human Rights has focussed its case-law mainly on the objective approach and the question, whether a court *can be seen to be* impartial rather than investigating whether it actually *is* impartial. For this objective test, the standpoint of the accused is, albeit important, not decisive. Whether or not the high standards of objective impartiality are fulfilled depends on the point of view of an external observer: if under the given circumstances of each individual case the fear of prejudice must appear reasonable to him, the court is objectively biased.<sup>20</sup>

This objective test has led the European Court of Human Rights to point out the lack of impartiality in numerous cases, especially concerning hierarchical or other links between the judge and other actors in the proceedings or cases where the judge fulfilled a dual role. In the case of *Miller and Others v. the United Kingdom*<sup>21</sup> the three applicants complained that they had not been afforded a fair trial as they considered the court-martial to lack structural independence and objective impartiality, which the Court confirmed as follows: “In particular, in that case, the court was mainly concerned about the significant and conflicting role of the convening officer in court-martial proceedings: he had a key prosecuting role and at the same time appointed members of the court-martial who were subordinate in rank to him and fell within his chain of command. He also had the power 'albeit in prescribed circumstances' to dissolve the court-martial either before or during the trial. It was further considered 'significant' that he acted as 'confirming officer' after the trial: the court-martial's verdict and sentence were not effective until 'confirmed' by that officer and he could vary the sentence imposed by court-martial as he saw fit.”

In another case, no breach of Art 6 ECHR was seen in the fact that a jury member who himself was a police officer knew a police officer who had been investigating the case.<sup>22</sup>

According to the European Court of Human Rights the mere fact that judges have also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to their impartiality.<sup>23</sup> As it held in the case *Fey v. Austria*, what "matters is the extent and nature of the pre-trial measures taken by the judge".<sup>24</sup> In this case, an investigating judge of the Regional Court had sent a rogatory letter to District Court Judge Kohlegger, asking her to question a witness located in her district, which she did. After further preliminary proceedings done by the prosecutor and the investigating judge, several charges were dropped. As a result, the case no longer lay in the jurisdiction of the Regional Court, but fell into the competence of the District Court, and namely Judge Kohlegger. After several smaller investigating acts *ex officio* (telephone calls etc.), Judge Kohlegger led the main trial as a single judge. Although she had been assisting the investigating judge in the preliminary proceedings and, later on, done some research on her own, the European Court of Human Rights held that there was no

reasonable doubt of her (subjective and objective) impartiality.

Nevertheless, in another case it held that a judge who had already been member of a deciding panel in second-instance could not be a member of the panel of third-instance in the same case without raising doubt concerning their objective impartiality.<sup>25</sup>

### C. *Austria's Supreme Court*

The actual jurisdiction of Austria's Supreme Court (short: OGH) concerning impartiality is basically consistent with the European Court of Human Rights,<sup>26</sup> although the distinction between the objective and the subjective test is usually not pointed out that explicitly.

As for showing ill will towards one party, the OGH has held that mere spontaneous physical reactions like gestures and facial expressions, but also explicit declarations of scepticism and doubt concerning someone's statement, are not *per se* sufficient for the assumption of bias, as judges are not only allowed to point out contradictions; they are even taught to present conflicting statements or pieces of evidence when questioning witnesses and the defendant with the aim to give them the chance to react to that, to give explanations etc. Therefore, more and specific clues are needed to have well-founded doubt concerning their (subjective) impartiality.<sup>27</sup>

However, over decades the OGH has held in numerous cases that the appearance that the judge is led by other than objective aspects must be avoided at any rate.<sup>28</sup> The principle that justice must not only be done but also be seen to be done is firmly established in Austria's legislation and jurisdiction.<sup>29</sup> Comparable to the decisions of the European Court of Human Rights - and clearly under their influence -, the criterion for considering a judge's appearance biased is the point of view of a rational and objective observer.<sup>30</sup> Due to the immense importance of the reputation of justice in a democratic society, the OGH is not restrictive in its evaluation of (objective) bias.<sup>31</sup> The OGH has pointed out failures to pass the "objective test" in rather obvious cases, e.g. when a judge on second-instance was the father of the judge in first-instance whose sentence was to be examined,<sup>32</sup> but also in cases with less strong ties, as it declared a judge (one in a panel) as objectively biased in a civil trial where a bank was party, because he had had a bank account at that institution for 45 years.<sup>33</sup>

Concerning relationships between the judge and one party (be it a lawyer or a public prosecutor), an expert or another judge (concerning appeals or when that judge has already passed the case due to bias) the OGH takes a differentiated approach: Kinships, friendships, long-lasting personal acquaintance or anything that can be considered as a "private, personal relationship", obviously indicate reasonable doubt concerning (at least) the judge's objective impartiality.<sup>34</sup> Nevertheless, anything qualified as a "relationship between colleagues" that is based on the same work environment



and mutual training is - according to the OGH - *per se* not enough to raise reasonable doubt<sup>35</sup> (an exception to this is only set by the law in cases of public liability, where the OGH holds colleagues of a judge biased in the decision whether or not they have done anything that can be reason for public liability<sup>36</sup>). However, the OGH has already explicitly held that, "friendly" contact, although as colleagues, between a judge and - in this case - an expert called by one party is regularly unproblematic in terms of impartiality,<sup>37</sup> if judges don't declare themselves biased and pass on the case. The OGH hasn't given any detailed distinction between merely "friendly" relationships among colleagues, which don't indicate bias, and real friendships, which do. Obviously, this would be a difficult task anyway: Where do you draw the line? When does a colleague turn into a friend?

Our interview partners, when asked if they had ever felt biased, mostly answered that a "friendly" contact between the judge, the lawyer and/or the public prosecutor was not a reason for them to feel biased. In a general sense they said that private interaction have to be blanked out when it comes to professional matters and must have no influence at all. Quite another matter is a friendly contact between the judge or public prosecutor and the accused/defendant, which would indicate bias by all means, according to some interview partners who mentioned this particular situation.

## V. The Judicial Training

### A. In Austria

In Austria according to § 2a RStDG (*Richter- und Staatsanwaltschaftsdienstgesetz*, "Employment Law For Judges and Public Prosecutors") Austrian citizens with a university degree in legal studies have the basic right to work as court interns for five months. Court interns who want to become judges or public prosecutors declare themselves as "applicants". In the circuit of the Innsbruck Court of Appeal those "applicants" have to pass several written, psychological and oral exams. Then, the President of the Innsbruck Court of Appeal decides whom he/she wants to suggest as a future judge to the Minister of Justice. Then, the Minister of Justice chooses which court interns the Federal President should assign to trainee judges (§§ 1, 4 RStDG). In Austria trainee judges are trained for becoming both judges and public prosecutors alike.

According to §§ 9, 9a RStDG trainee judges have to pass a four years training period that includes six months at the public prosecution office, four months in a law firm and the remaining time is divided into training at different parts of the justice system. Besides the focus on a very practical training, there are a number of seminars trainee judges attend. The seminars offer a wide range of topics from specific legal problems and best-practice-classes on how to run a department to soft skill workshops (e.g. rhetorics, examination techniques, analysis of credibility, ethics). During the assignment to a law

firm the trainee judges catch a glimpse of a lawyer's point of view, which enhances mutual understanding. Trainee judges notice that the lawyer's work is similar to the judges' in many ways but also depends on some rather challenging clients. The purpose of this assignment is that both, the lawyer and the trainee judge, should benefit.<sup>38</sup>

So, while future judges and public prosecutors generally share the same training process, attend the same classes and have the same training experience, which turns them into colleagues in the same work environment for years, future lawyers leave the mutual training after the five-months internship and usually join a law firm, where they are trained for at least three years. Especially in regions with smaller courts, like Innsbruck, where there are actually only about 35 trainee judges, they naturally tend to know each other very well.

### ***B. In Other Countries***

In the Netherlands the selection process for trainee judges differs according to their previous legal experience. Candidates who come directly from university first have to undergo a selection process consisting of an intelligence test, an assessment test and two different interviews. For candidates with at least six years of experience in any legal profession the selection process consists of three different interviews – no assessment test or intelligence test is needed. The judicial training for trainee judges in the Netherlands takes place at the “Studiecentrum Rechtspleging” (short: SSR) during a six year time period. After 38 months the trainee judges have to decide whether they want to become judges or public prosecutors and then get the specific legal training according to their choice.<sup>39</sup>

In Germany candidates for every legal profession undergo a uniform training process after their graduation from university. Afterwards, they have to pass the so called “*Zweite Staatsexamen*” (second state examination) in order to be qualified for any legal profession (e.g. judge, public prosecutor, lawyer), depending on their personal interest and examination outcome.

In England and Wales the qualification for judicial posts can only be achieved by someone who has a certain amount of experience in another legal profession. For example a District Judge has to have five years of experience as a barrister or solicitor and two years of experience as a Deputy District Judge. Other judicial posts may require at least ten years of experience.<sup>40</sup>

These examples show that there are different approaches throughout Europe when it comes to the selection process and professional training. While in Germany the candidates for all legal professions are trained the same way and take the same exam, Austria's future lawyers are trained separately from future judges and public prosecutors. In the Netherlands the professional careers of future judges and public prosecutors already split up during their time as trainee judges, while in England and Wales the

training process is more or less replaced by a certain amount of experience in other legal professions.

## VI. Changing the Position

### A. *The legal Situation in Austria*

The legal basis for the mutual recognition of training and professional examinations between the legal professions (judges/public prosecutors, lawyers and notaries) in Austria is the ABAG (*Ausbildungs- und Berufsprüfungs-Anrechnungsgesetz*, “Law Governing Transferring From One Legal Profession To Another”). When it came into force in 1987, it was the first time that the professional examinations of the different legal professions were given equal status in Austria. Until then the professional examination for lawyers (*Advokaturprüfung*) replaced those for both judges/public prosecutors and notaries, while the latter one replaced none, meaning as a lawyer one could become a judge/public prosecutor without another exam, whereas judges and public prosecutors had to take another exam if they wanted to become lawyers.<sup>41</sup>

§§ 9 to 15 ABAG among other things define the conditions under which lawyers can be assigned as judges/public prosecutors and vice versa – in other words “change the position”. If a lawyer wants to become a judge/public prosecutor or a public prosecutor/judge wants to become a lawyer, they are required to pass a so called *“Ergänzungsprüfung”* (a supplementary test), whose requirements differ according to the needs of the legal profession the candidate intends to switch to.

### B. *Austrian Everyday Facts*

In practice the opportunities and chances created by the ABAG are seized quite frequently. From 1997 to 2006 for example the supplementary test for lawyers in Austria was taken 118 times, the supplementary test for judges/public prosecutors 59 times. Such numbers led the former Austrian Minister of Justice Egmont Foregger into stating that the ABAG hit the “bull’s eye”.<sup>42</sup>

The most important question is: How many judges, public prosecutors and lawyers do not only take the supplementary test but in fact actually “change the position”? As for the circuit of the Innsbruck Court of Appeal and the circuit of the Innsbruck Senior Public Prosecutor’s Office – both of which cover the area of the two Austrian federal states of Tirol and Vorarlberg – the following can be said: In the past five years since 2010 there have been 19 former lawyers who entered the court system, 14 of them as judges, 5 as public prosecutors. Interestingly enough during the same time period nobody has switched from the position of a judge/public prosecutor into that of a lawyer.

In the same time period the numbers concerning the “changing of positions” within the court system –

from judges to public prosecutors and vice versa – are similar, despite no supplementary test is needed: 14 public prosecutors have become judges, 8 judges have become public prosecutors. To put these facts in perspective: The circuit of the Innsbruck Court of Appeal currently has 215 posts for judges, the circuit of the Innsbruck Senior Public Prosecutor's Office 47 posts for public prosecutors.

These facts are also reflected by our personal experience while picking out probable candidates for the interviews: While it cost hardly any effort to find judges or public prosecutors who formerly were lawyers and even less effort to find judges and prosecutors who switched positions within the court system, we were only able to get into contact with one former judge who now works as a lawyer.

When asked for the motifs of their decision to change position the answers varied considerably: For some it was simply personal as for example the post as a judge/public prosecutor was bound to the city they lived in. For some it was a matter of interest, especially as you have to deal with criminal matters only as a public prosecutor. Some former lawyers appreciated the financial safety and the fact that it is not necessary to acquire new clients in the judiciary. Interestingly the one interview partner who switched from judge to lawyer also raised economic reasons for the change. He argued that the earning possibilities were bigger for lawyers.

The possibility of "switching positions" quite easily, especially between judges and public prosecutors, leads to situations where they meet their former colleagues in the courtroom fulfilling a new function. Our interview partners, however, to a great extent saw no danger of bias resulting from the fact of having worked together closely before and now meeting as "opponents", as long as it was about another case. They neither found it difficult to intellectually adjust to the new position, nor described any greater change in professional and private interaction. While some pointed out that their contact to their former colleagues had not changed at all (e.g. having lunch together sometimes), others indicated a change. However, the different attitude they mentioned never had to do directly with problems accepting the former colleague's "new role", but were simply the result of less casual meetings in the work environment. Especially the (former) lawyers pointed out that adapting to ever changing positions had been part of their job before, anyway, and so they were used to it. Only one judge pointed out that a friend of hers she knew from the common training years had recently switched from being a public prosecutor to being a judge. Now they had much more contact, because they did not have to think about their contact making a bad impression to the public.

## VII. Closeness

### A. *File-sharing*

In Austria public prosecutors lead the preliminary proceedings. After they have filed a charge the criminal file – which until then was kept by the prosecution – is transferred without any modification to the judge, who is responsible for the main trial. Therefore, the judge's first impression concerning the case is based on the public prosecutor's files, although the public prosecutor is only a party in the main trial.

So, in fact, professional closeness, close proximity and private relationships to the public prosecutor can lead to judges being less critical than they should be. According to the theory of social comparative processes, in an ambiguous situation people tend to follow the precedent judgement of a person they consider competent. The “shoulder-to-shoulder-stance” effect says that judges often subconsciously follow the evaluation of the evidence put forward by the public prosecutor. To avoid contradiction between facts gathered from the files and reality, information that confirm the present hypothesis are going to be overestimated and information that speak against it are going to be underestimated.

Not only the above mentioned file-sharing can distort the judges' opinions, but also the fact that they might know the actors in the preliminary proceedings, especially the public prosecutors. They often follow the preceding actor's evaluation of evidence. In this case the main trial degenerates to a ceremonial repetition and blessing of the preliminary proceedings, e.g. the protocols. This is the so-called “inertia effect”.<sup>43</sup>

*Schünemann*<sup>44</sup> carried out an investigation on these effects in Germany and interrogated 58 criminal judges and public prosecutors. All participants condemned the defendant, when they knew the preliminary proceedings and the criminal files, whereas without knowledge of these files but with the same information on the case the judgements were extremely ambivalent. The knowledge of the incriminating inquiry acts in many cases leads to a guilty verdict regardless of the results of the main trial. Although the results of this investigation might have been different in Austria, as Austrian judges always work with the criminal files they get from the public prosecution and therefore are used to critically analyse them - which leads to a rather high percentage of acquittals -, judges should always bear in mind the possibility of being subconsciously influenced by that.

### ***B. Judges and Public Prosecutors – Office Mates and Coffee Fellows?***

In Austria the closeness between judges and public prosecutors often also finds expression in the venues of court. In Innsbruck e.g. the Regional Court, the Court of Appeal, the Public Prosecutor's Office and the Senior Public Prosecutor's Office are all located in the same building. Most of our interview partners agreed that this spatial closeness might make a problematic impression on the public, although in fact it has no influence on the outcome of legal proceedings. However, for many the advantages of the "short distances" prevail. Only a minority explicitly said that a spatial separation particularly between the Courts and the Public Prosecutor's Offices would be necessary and desirable.

Another aspect we confronted our interview partners with was their conduct when it comes to the so called "coffee breaks" – small conversations before, between and after the court hearings when the judge, the public prosecutor and the defence counsel necessarily meet outside the hearing room. Most of the judges and some of the public prosecutors try to restrict the contact to the other courtroom actors outside the hearing room to a minimum and are very sceptical about these "coffee breaks". Others who are more open for this topic said that "coffee breaks" are okay if all participants have the chance to join the conversation and if there is no talk about the specific case. Lawyers in the majority stated that they usually stay with the client but accept "coffee breaks" as long as there is no evidence of the judge and the public prosecutor standing together and talking underhand about the case.

Generally speaking, lawyers seem to be much more aware of the closeness between judges and public prosecutors than they are themselves. This could be a result of the feedback they might get from their clients. While some found it not problematic, as for them it had no effect on the outcome, others thought that the closeness between judges and public prosecutors might raise doubts on the court's impartiality, and one lawyer openly stated that sometimes the judge and the public prosecutor appear to be "two peas in a pod".

## **VIII. Plea Bargaining**

### ***A. The Investigation of the Substantive Truth***

The investigation of the truth or the avoidance of errors during the legal procedure plays an important role in the criminal trial. Investigating the substantive truth is a necessary, though insufficient condition of justice. Nevertheless, the historical truth is merely reconstructed in the criminal trial.<sup>45</sup> Therefore the one and only right judicial decision does not exist.<sup>46</sup>

The investigation of the substantive truth in the criminal trial is also limited to the question whether the accused/defendant has committed the crime in a criminally relevant manner. The penal procedure

therefore does not light up a criminal case in all its facets.<sup>47</sup> The judge only considers details relevant to the case. So, the judicial truth differs from reality. This selective way of investigating the substantive truth can form the basis for a condemnation, when extended by the concept pair of doubt and conviction.<sup>48</sup>

In the Austrian civil action parties can hinder the judge and the taking of evidence by admitting facts relevant for the decision. Judges are not allowed to prove these admitted facts, which is called the “formal truth”.<sup>49</sup> This free disposition over the parties' allegations in the civil context stands in contrast to the investigation of the substantive truth in the Austrian criminal procedure.<sup>50</sup>

Which value should the investigation of the substantive truth receive in today's criminal trial? Both extreme positions of the inquisitorial investigation of the substantive truth without boundaries on the one hand and the pure accusation process on the other hand face each other.<sup>51</sup> The StPO rests on Art 6 ECHR which is part of Austria's constitution. There is no scope for any balancing of interests, because only a fair trial according to Art 6 ECHR can lead to the right result.<sup>52</sup>

### ***B. Plea Bargaining in General***

Regulations concerning plea bargaining are spreading in Europe. Nevertheless, past decisions of Austria's courts are very restrictive. The arranged acceptance of a judgement opposes the investigation of the substantial truth.<sup>53</sup> Nevertheless, process arrangements exist in the Austrian legal practice and are allowed within certain limits.<sup>54</sup>

Due to the Austrian system of file-sharing and the symbiotic relationship between judges and public prosecutors concerning the same traineeships and in most cases the same buildings their offices are in, the fairness of the proceedings for many defence counsels is doubtful. Arrangements between them are, as some say, unavoidable.<sup>55</sup>

There are three different types of arrangements. Plea bargaining concerning the question of guilt is definitely not compatible with the principle of the investigation of the substantive truth *ex officio* and therefore not allowed in Austria. More ambiguous is the question about arrangements concerning the legal qualification of the crime or the extent of the penalty. Organizational arrangements are accepted in general, whereas all other arrangements may violate the rule of law. However, they have process-economic advantages.<sup>56</sup> The informal consultation between judges, public prosecutors and defence counsels before the main trial nevertheless is, as some say, legal reality in Austria. This also promotes the communication and spreads “good mood”.<sup>57</sup>

The European Court of Human Rights does not consider plea bargaining in general to be a violation of

the Convention. It outlines the practice of thirty Council of Europe member states and "subscribes to the idea that plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organized crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners".<sup>58</sup> As it held on various occasions, a plea bargain is, substantially, a waiver of a number of procedural rights, but no breach in itself of Art 6 ECHR, as long as the waiving of safeguards follows the defendant's free will, it is established in an unequivocal manner and attended by minimum safeguards commensurate with its importance.<sup>59</sup>

The opinions our interview partners gave us on this subject were very heterogeneous. While for some there is absolutely no scope for plea bargaining, the majority finds it legitimate to coordinate organizational matters especially in large court proceedings. Others said, plea bargaining should be allowed, when it comes to the extent of the penalty. Only very few argued that plea bargaining in general should be allowed as long as it is transparent and comprehensible. They explained this with the need for procedural economy. "Why should one be more royalist than the king if all parties involved are satisfied?", one judge wondered.

### ***C. Minister's Committee of the Council of Europe***

An impulse on the legal regulation of plea bargaining comes from the Minister's Committee of the Council of Europe. The 1987 Recommendation concerning the simplification of the penal justice (No. R. [87] 18 from the 17.9.1987) asked the member states to plan procedures of guilty pleas in the respective criminal procedure codes, as long as they are not incompatible with their constitutions and judicial traditions.<sup>60</sup>

### ***D. Benefits and Disadvantages***

There clearly are advantages of plea bargaining: it does have a great practical and financial meaning and avoids or shortens the main trial. Also, it can improve security, prevent danger and guarantee legal certainty. Finally, it provides cooperation, efficiency and an economic procedure.

However, in the light of the traditional principles of the criminal law plea bargaining can also be considered quite problematic: The pressure situation for the accused/defendant limits the *nemo-tenetur*-principle. The presumption of innocence becomes irrelevant as the investigation of substantive truth might be conducted only half-heartedly. So, plea bargaining could easily end up being an interplay between threats and promises instead of finding the true culprit and an adequate punishment.



When it comes to the actors in criminal proceedings, plea bargaining can lead to judges neglecting their very own competence, if they limit their job to arranging such agreements rather than study cases and literature. It also encourages “lazy” judges to use (maybe false) confessions to gain more leisure time. If the defendant confesses and no arrangement is reached, the judge - although not allowed to use the confession - certainly will bear it in mind. The investigation of the truth is not any more done by the judge, but by the public prosecutor and the sentences would differ extremely between guilty verdicts after a confession and convictions without a confession. Also, lawyers are under pressure to smooth-talk judges to get better deals for their clients.

Under the light of deterrence plea bargaining can be problematic, as the possibility for the defendant of getting a chance to speak up during the main trial is very important for specific deterrence and also for the (defendant's and the public's) understanding of the court's decision.

### ***E. Austria – a State among many or the “Landmark Decision” of the OGH<sup>61</sup>***

In the last decades a seemingly unstoppable spread of the practise of plea bargaining is to be observed in the continental-European countries. Everywhere these arrangements are limited to misdemeanors and petty crimes. The different national regulations all contain the unreserved acceptance of a conviction, not necessarily on account of a confession. The defendants are offered the possibility to waive a certain amount of their rights in order to influence the proceedings’ duration, course and result.

In 1981 the Italian legislator regulated the „*patteggiamento*“, in 1987 the Portuguese criminal trial order substantially extended "*confissão*" and in 1988 the Spanish legislator regulated the "*conformidad*" as forms of plea bargaining. France also knows similar institutes, namely "*composition pénale*" as well as "*la comparution sur reconnaissance préalable de culpabilité*", which were taken up in the years 1999 and in 2004 in the French Code de Procédure Pénale. An up-to-date example is Germany, where plea bargaining was legalized in 2009 by § 257c ("*Verständigungen zwischen Gericht und Verfahrensbeteiligten*") of the German Code of Criminal Procedure.

An exception is Austria, where the OGH in 2004 declined any arrangement in the criminal trial:<sup>62</sup> Amongst other things, in his appeal the defendant explained that before the main trial his defence counsel had called the judge. They had agreed that, if the defendant confessed, he'd face three years of imprisonment. In spite of that, the judge had broken his side of the bargain: the final sentence was higher.

The OGH declared that already at the beginning of such an arrangement the judge violates the law. An arrangement stands in striking contradiction to the underlying fundamental principles of the StPO,

namely the investigation of the substantive truth. Hence, any arrangement between the court and (supposed) law breakers is to be rejected. The partners of such agreements face disciplinary and criminal responsibility.

In 2010<sup>63</sup> the OGH repeated this legal principle and stated the incompatibility of plea bargaining with the principle of the investigation of the substantive truth. Furthermore, if an arrangement cannot be found and the trial continues, judges are biased and therefore - besides disciplinary and criminal responsibility - excluded from further proceedings. The impartial judge is a basic element of the fair trial according to Art 6 ECHR.

As to the duration of criminal proceedings it is to say that Austria in the international comparison is highly efficient and the population trusts in the work of the judiciary.<sup>64</sup>

When asked if they wished for an explicit legal provision in Austria concerning plea bargaining, the vast majority of our interview partners found the actual legal situation satisfying. Judges as well as public prosecutors and defence counsels should be – according to our interview partners - professional and conscientious enough to know about the rule of law and its boundaries. Only a minority wished for a legal provision for plea bargaining reaching from an explicit ban to an explicit permission that determines the conditions.

## **IX. Safeguards**

In a system, where due to the above mentioned factors, among others, the clear and strict dividing line of the three professional actors and their specific roles in criminal proceedings is in danger of being blurred, how can judicial impartiality be protected and by that a fair trial guaranteed?

For the remedy of possible violations of the obligation to an unbiased trial, the installation of effective safeguards is indispensable. First of all, the selection process during the five-months internship ideally should bring especially those people into the court system who are able to distinguish personal feelings from professional decisions easier than average. This ability also needs to be strengthened during the training years.

Apart from that, there are legal measures to guarantee the court's impartiality. One of them is the parties' right to challenge judges on the grounds of (suspected) bias: if doubts concerning judges' subjective or objective impartiality are brought up during criminal trials, judges can decide on their own, whether or not the petition is well-founded. If they follow the parties' doubts, they pass the case on to another judge. If, however, they do not consider themselves to be biased, the trial is continued and a judgement passed, against which the defendants can appeal stating their doubts against the

judges. Public prosecutors, just like experts, lay judges and jury members, can also be challenged basically for the same reasons.

Besides, judges and public prosecutors are obliged to point out their own (suspected) bias to their respective authorities, whenever they think reasonable, objective observers could doubt their impartiality. The OGH has held that, if judges declare themselves partial, this should typically be considered severe enough to pass on the case.<sup>65</sup>

Frequent introspections are indispensable to make this measure a really effective safeguard, even in situations without obvious ties to one party. Only if judges and public prosecutors thoroughly and honestly question their own thoughts, feelings and real foundations of their decisions, true objective and subjective impartiality can be maintained. They also have to bear in mind, how their acting and interacting with the other parties would appear to an external observer.

Particularly two of our interview partners – one judge and one lawyer – pointed out that all the legal safeguards provided are of less consequence in reality. The most important safeguard against being biased is the responsibility of every single judge, public prosecutor or defence counsel. When this responsibility is also practised and shown in the every-day work in court, it may have a big influence on the other courtroom actors. Or, as the judge mentioned above put it: “My boundaries [of the rule of law] are quite narrow and I signalize this, so no-one would try to lead me into anything problematic.”

## **X. Conclusion**

Our investigation has brought us from the historical facts going via the basics of criminal procedure in Austria and different legal training systems in Europe, to the key aspect of our work: impartiality and bias. Within this field we not only gave insight in jurisdiction of Austrian as well as European Courts, but also tackled concrete problems, such as plea bargaining or different forms of closeness between judges, public prosecutors and/or defence counsels.

As for now, the following can be said: No matter how sophisticated and well-approved legal regulations and boundaries are, they can only be an effective remedy up to a certain point. Beyond this point it all comes down to the responsibility and integrity of every single actor in legal proceedings, in other words the judge, the public prosecutor and the defence counsel thoroughly and honestly have to question themselves. And this leads us to a simple, yet very important conclusion: The law can only be as effective as the people who apply it. Only personal efforts lead to a really unbiased and impartial court opinion, which – from our point of view – is actually the only valuable opinion.

- <sup>1</sup> *Ingenhaeff*, Ältere Rechtsgeschichte. Von den Anfängen bis zum Beginn der Neuzeit (2005) 239f.
- <sup>2</sup> *Kühne*, Historisch-psychologische Betrachtungen der Zeugenaussage, in *Greuel/Fabian/Stadler* (Hrsg), Psychologie der Zeugenaussage (1997) 5.
- <sup>3</sup> *Vormbaum*, Einführung in die moderne Strafrechtsgeschichte (2009) 90.
- <sup>4</sup> *Kühne* in *Greuel et al* 6.
- <sup>5</sup> *Vormbaum*, Strafrechtsgeschichte 89ff.
- <sup>6</sup> *Fabrizy*, Die Verlesung von Zeugenaussagen. Eine rechtshistorische Betrachtung, RZ 1989, 26ff.
- <sup>7</sup> *Vormbaum*, Strafrechtsgeschichte 92ff.
- <sup>8</sup> *Koenig/Pilnacek*, Das neue Strafverfahren – Überblick und Begriffe. StPO-Neu Teil I, ÖJZ 2008, 10.
- <sup>9</sup> *Birklbauer/Weber/Starzer/Soyer*, Die Rechtspraxis der Ermittlungsverfahrens nach der StPO neu, ÖJZ 2011, 856.
- <sup>10</sup> *Peters*, Fehlerquellen und Rechtsanwendung im Strafprozeß, in GedS für Hilde Kaufmann (1986) 915.
- <sup>11</sup> *Stuefer*, Überlegungen zur Reform der Hauptverhandlung, JSt 2009, 46.
- <sup>12</sup> *Koenig*, Wahrheit im Strafprozess, in *Soyer* (Hrsg), Strafverteidigung – Ethik und Erfolg (2010) 63ff.
- <sup>13</sup> *Pilgermair*, Zur Wahrheitsfindung in der Hauptverhandlung, in *Soyer* (Hrsg), Strafverteidigung – Ethik und Erfolg (2010) 100.
- <sup>14</sup> *Wiederin*, Der Staatsanwalt im Spannungsfeld zwischen Legalitätsprinzip und Kontrolle, RZ 2012, 28.
- <sup>15</sup> *Armstrong v. The United Kingdom*, no. 65282/09, ECHR, 09 December 2014, § 35.
- <sup>16</sup> *Wildhaber*, Judicial Impartiality Under the European Convention on Human Rights, <http://www.concourt.am>.
- <sup>17</sup> *Micallef v. Malta*, no. 17056/06, ECHR, 15 October 2009, §§ 93-105; *Armstrong v. The United Kingdom*, no. 65282/09, ECHR, 09 December 2014, §§ 35-38.
- <sup>18</sup> *Armstrong v. The United Kingdom*, no. 65282/09, ECHR, 09 December 2014, § 36.
- <sup>19</sup> *De Cubber v. Belgium*, no. 9186/80, ECHR, 26 October 1984, § 25.
- <sup>20</sup> *Wildhaber*, Impartiality; *Armstrong v. The United Kingdom*, no. 65282/09, ECHR, 09 December 2014, § 36.
- <sup>21</sup> *Miller and Others v. The United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, ECHR, 26 October 2004.
- <sup>22</sup> *Armstrong v. The United Kingdom*, no. 65282/09, ECHR, 09 December 2014.
- <sup>23</sup> *Hauschildt v. Denmark*, series A no. 154, ECHR, 24 May 1989, Series A no. 154, § 22.
- <sup>24</sup> *Fey v. Austria*, no. 14396/88, ECHR, 24 February 1993, § 30.
- <sup>25</sup> *Hit D.D. Nova Gorica v. Slovenia*, no. 50996/08, ECHR, 5 June 2014.
- <sup>26</sup> *Rechberger*, The Impact Of ECHR Jurisprudence On The Austrian Practice In The Field Of Judicial Independence, in *Shetreet/Forsyth* (eds.), The Culture Of Judicial Independence (2012), p. 231-242.
- <sup>27</sup> OGH vom 13.10.1994, 12 Os 97/94, RS 0096992.
- <sup>28</sup> OGH vom 17.11.1993, 1 N 556/93, RS0046052.
- <sup>29</sup> OGH vom 06.04.2010, 9 Nc 7/10v.
- <sup>30</sup> OGH vom 23.11.2006, 8 Nc 24/06f.
- <sup>31</sup> OGH vom 23.11.2006, 8 Nc 21/06i.
- <sup>32</sup> OGH vom 27.11.2001, 1 N 517/01.
- <sup>33</sup> OGH vom 27.03.2001, 1 N 506/01.

- <sup>34</sup> OGH vom 24.05.1989, 9 ObA 135/89, RS0045935.
- <sup>35</sup> OGH vom 30.09.1997, 10 ObS 275/97g, RS0108696.
- <sup>36</sup> § 9 Abs 4 Amtshaftungsgesetz; see *OGH* vom 31.03.2009, 1 Ob 35/09t.
- <sup>37</sup> OGH vom 17.12.2012, 9 Nc 40/12z.
- <sup>38</sup> *Setz/Pöschl/Bauer/Barth/Jelinek*, Als Richteramtswärter(in) beim Rechtsanwalt – Überlegungen zu einem gelungenen Arbeitsbündnis, *AnwBl* 2003, 198ff.
- <sup>39</sup> *Obereder*, Die Ausbildung in den Niederlanden (Teil II), *RZ* 2008, 249f.
- <sup>40</sup> *Lundmark*, Der Richter im europäischen Vergleich: Deutschland, England, Schweden, *ZfRV* 2010/12, 88.
- <sup>41</sup> *Mayr*, Die Anrechnung von Ausbildungen und Berufsprüfungen, 2010, 1f.
- <sup>42</sup> *Mayr*, Anrechnung, 2.
- <sup>43</sup> *Schünemann*, Der deutsche Strafprozeß im Spannungsfeld von Zeugenschutz und materieller Wahrheit, *StV* 1998.
- <sup>44</sup> *Schünemann*, Der Richter im Strafverfahren als manipulativer Dritter? *StV* 2000, 159ff.
- <sup>45</sup> *Soyer* in *Soyer* 80.
- <sup>46</sup> *Grasnick*, Wahres über die Wahrheit auch im Strafprozeß, in *Wolter* (Hrsg), 140 Jahre Goldammer's Archiv für Strafrecht: eine Würdigung zum 70. Geburtstag von Paul-Günther Pötz (1993) 63f.
- <sup>47</sup> *Danek*, Wahrheitsfindung und Prozessökonomie, *RZ* 2004, 122ff.
- <sup>48</sup> *Hassemer*, Grenzen des Wissens im Strafprozess, *ZStW* 121 (2009) Heft 4, 837f.
- <sup>49</sup> *Danek* in *WK-StPO*, 128. Lieferung (2010) § 232 Rz 5 mwN.
- <sup>50</sup> *Eder-Rieder*, Die amtswegige Wahrheitsforschung, *ÖJZ* 1984, 645.
- <sup>51</sup> *Soyer* in *Soyer* 79.
- <sup>52</sup> *Hollaender*, Die „Fairness des Strafverfahrens“ und das „richtige Verfahrensergebnis“, *AnwBl* 2005, 275ff.
- <sup>53</sup> *Ratz*, Verfahrensbeendende Prozessabsprachen in Österreich, *ÖJZ* 2009, 949.
- <sup>54</sup> *Schick*, Die neue Hauptverhandlung: Parteienprozess oder Inquisition? in *Soyer* (Hrsg), *Strafverteidigung – Ringen um Fairness* (2005) 39.
- <sup>55</sup> *Stuefer*, *JSt* 2009, 46f.
- <sup>56</sup> *Pilgermair* in *Soyer* 98.
- <sup>57</sup> *Essl*, Statement zur Wahrheit und „informellen Wahrheit“ im Strafprozess, *JSt* 2010, 11f; so auch *Soyer*, *Die Presse* vom 11.01.2013.
- <sup>58</sup> *Natsvlshvili and Togonidze v. Georgia*, no. 9043/05, ECHR, 29 April 2014, § 90.
- <sup>59</sup> *Scoppola v. Italy*, no. 10249/03, ECHR, 17 September 2009, § 135.
- <sup>60</sup> *Orlandi*, Plea bargaining in den kontinentaleuropäischen Ländern, *ÖJZ* 2009/46,404ff.
- <sup>61</sup> OGH vom 24.08.2004, 11 Os 77/04.
- <sup>62</sup> *Orlandi*, *ÖJZ* 2009/46,404ff.
- <sup>63</sup> OGH vom 4.3.2010, 13 Os 1/10m.
- <sup>64</sup> *Ratz*, Zur Reform der Hauptverhandlung und des Rechtsmittelverfahrens, *ÖJZ* 2010/47, 387.
- <sup>65</sup> OGH vom 17.11.1993, 1 N 556/93. RS0046053.