

# Presumption of Innocence: procedural rights in criminal proceedings

Social Fieldwork Research (FRANET)

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## **PART A. EXECUTIVE SUMMARY**

The fundamental rights of defendants included in Directive 2016/343/EU were implemented in:

### **The right to be presumed innocent in general:**

The right to be presumed innocent is the guiding principle of the work during the investigation procedure. It is practically implemented by the law enforcement authorities through objective investigations, which seek to collect both, incriminatory and exculpatory evidence. The judges similarly apply the principle through the objective evaluation of evidence, which is neutral towards incriminatory and exculpatory evidence. Still, a confession which is in line with the other evidence and a pre-trial detention challenges the practical implementation of the presumption of innocence. Moreover, the following group-based disadvantages were named by the interviewees: previous convictions are assessed as incriminating factor for the case at stake, members of certain nationalities and asylum seekers are disadvantaged by experience-based prejudices among the authorities, according to which they commit certain crimes more frequently. Popular or public persons are disadvantaged because of intense and biased media coverage of their cases.

### **Public references to guilt:**

The effect of the media coverage on the presumption of innocence depends on the quality of reporting. Intense and biased media coverage during the investigation proceeding in large cases, involving popular or public defendants, are likely to affect the presumption of innocence, the defendants' right to privacy and even the judgement in jury trials involving lay assessors only. Thus, media coverage during the investigative proceedings is perceived as problematic for the fairness of the proceedings, while media coverage during the main trial serves the public scrutiny and the public's interest to access trials. Almost all interviewees are hesitant in liaising with the media on criminal cases.

### **The presentation of suspects and accused persons:**

Defendants in pre-trial detention are presented in handcuffs and accompanied by law enforcement officers. Defendants are allowed to cover their faces and identifying photos must not be disclosed. Arrested defendants have a right to wear what they want during the trial. However, they depend on persons, who bring them clothes to prison. According to the interviewees, restraining measures do not imply guilt, but are necessary protection measures, meaning that they protect the other persons present in the courtroom as well as prevent the flight of the defendant. The fact of a pre-trial detention may influence lay assessors or even professional judges, as the reasons for pre-trial detention are perceived as incriminating factors.

### **Burden of proof:**

The burden of proof is placed on the prosecution, even if a defendant is caught in an incriminating situation. If the person concerned is able to provide a credible explanation for this situation, it will be investigated as exculpatory evidence. However, a credible confession which is in line with the existing evidence, is the most critical factor for the presumption of innocence. After a confession a conviction is only a matter of time. Moreover, a confession is a mitigating factor for the severity of a sentence. A confession is regarded as cooperation of the defendant during the proceedings.

**The right to remain silent and not to incriminate oneself:**

The process of informing defendants on the right to remain silent and not incriminate themselves is a formalised procedure at the police, which is also documented. The interrogation may only start after such a documentation. However, practice shows that the presence of a defence lawyer during the interrogation is the most important safeguard to ensure the application of the right to remain silent and not to incriminate oneself.

**The right to be present at the trial and to have a new trial:**

Findings indicate no practical challenges related to the implementation of the right to be present at the trial. There are hardly ever judgements in absentia. In case the defendant does not show up, the trial is adjourned. If defendants are repeatedly absent or difficult to locate, an arrest warrant is imposed. A practical challenge is related to the current presence of arrested defendants via video conference only. This entails practical barriers to hear and see what is going on in the courtroom. There are safeguards for vulnerable defendants in place; however, the needs assessment is challenging in practice.

Generally, the interviewed police officers perceive the implementation of the presumption of innocence in Austria more optimistic and report less challenges than defence lawyers. The perceptions by judges and prosecutors are positioned somewhere in between the positions of the police and lawyers. It is not clear whether these differences are due to their different roles and functions in terms of the presumption of innocence or due to the bias in the sample towards an overrepresentation of critical and sensitive voices (see section B.2).

## **PART B. INTRODUCTION**

In total, **12 eligible interviews** were carried out in the timeframe of 21 February to 12 May 2020. Seven interviews were held face-to-face; six of them in the interviewees' offices (at the criminal court, police station or in the lawyer's office), the seventh was conducted at the ETC. Due to social distancing measures to prevent the spread of COVID-19, five interviews were carried out via electronic means of communication. Depending on the interviewees' preferences, electronic means of communication were used. With the interviewees' consent, the face-to-face and video interviews were audio-taped. The recordings were subsequently used to complete the standardised interview reports.

### **B.1 PREPARATION OF FIELDWORK**

The preparation of fieldwork included reviewing the draft interview guidelines as well as the translation of the final questionnaire and data protection materials. All tasks were carried out by the ETC's project team (social fieldwork expert, legal expert, language editor). FRA's review of the translations was very helpful and the agency's suggestions were incorporated. No interviewer training was needed as the social fieldwork expert conducted all interviews.

### **B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS**

The ETC already disposed of good contacts with members of the criminal justice system thanks to previous social fieldwork projects on criminal procedure rights. These experts were contacted in writing using a pre-formulated letter containing information on the ETC, its work for the FRA, the current project as well as the framework for the interview. The experts were asked whether they would participate in the study or suggest other persons for participation. This strategy proved successful for establishing contacts with police officers and judges/prosecutors. However, it was less effective for connecting with defence lawyers. Thus, we searched for suitable defence lawyers on the internet applying the following criteria: at least four years of experience with the criminal justice system (precondition), experience with large cases or cases of media interest (ideally) and experience with the media. Lawyers meeting the requirements were contacted in writing and asked for participation. To recruit and achieve the requested four interviews with defence lawyers required however more time and effort by the ETC .

### **B.3 SAMPLE AND DESCRIPTION OF FIELDWORK**

Police officers:

Requested: 4, completed: 4

Judges/prosecutors:

Requested: 4, completed: 4

Defence lawyers:

Requested: 4, completed: 4

**Table 1: Sample professionals**

Code	Group	Operational expertise on criminal investigations and trials	Experience with media	Gender
AT/P/1	Police officer	Yes	No	F

AT/P/2	Police officer	Yes	No	M
AT/P/3	Police officer	Yes	No	F
AT/P/4	Police officer	Yes	Yes	M
AT/L/1	Lawyer	Yes	No	M
AT/L/2	Lawyer	Yes	No	M
AT/L/3	Lawyer	Yes	Yes	F
ÁT/L/4	Lawyer	Yes	No	M
AT/J/1	Prosecutor/Judge	Yes	Yes	F
AT/J/2	Prosecutor/Judge	Yes	Yes	M
AT/J/3	Prosecutor/Judge	Yes	Yes	F
AT/J/4	Prosecutor/Judge	Yes	Yes	F

In general, 11 out of 12 interviews exceeded the initially planned length of the interview. Only one stuck to the planned 60 minutes per interview. Most of the interviews took about 90 minutes.

The atmosphere during the interviews was pleasant and the level of trust was high. Most interviewed experts deemed the issue of the presumption of innocence relevant. This, in turn, had a positive effect on the atmosphere and level of trust.

The interviews with police officers were well structured and did not substantially exceed the predefined length. However, there were no narratives among the police officers during the interviews. Their answers were clearly structured and short, drawing a positive picture of the police. It appeared that they were familiar with interviewing techniques from their own interrogations. Therefore, it was sometimes challenging to interview the police officers.

#### **B.4 DATA ANALYSIS**

The legal framework, the case studies and the reports of the individual interviews were the basis of the data analysis. The interview guidelines as well as the guidelines for the final report allowed for a well-structured analysis. There was not much scope for individual analysis as is normal in a comparative study.

With regard to the interview data, the initial analysis was carried out for each question on a group-by-group basis. E.g. data of all police officers was used and compared in order to find out whether the answers are homogenous or differed. Emerging differences were analysed in more detail. In case of homogenous answers and in case of descriptive questions, the answers were simply counted and displayed in a table. In a second step, the similarities and differences between professional groups were analysed and discussed. Differences were analytically split in opinion-related differences and task-related differences. Moreover, differences between professional groups were explained by different levels of knowledge in the different stages of the procedure. I.e. naturally police officers had more knowledge of the investigative procedures than judges. By contrast, judges had more knowledge

on the main trial and on remedies than police officers et cetera. These differences were described in the report. The biased answers due to the over-representation of critical voices in the sample were explicitly acknowledged and considered in analysing the results. Finally, suitable and precise quotes were selected and added to the report.

Since this country report is part of a more extensive comparative report, the analysis also provides numbers. The report contains not only a narrative depiction of views, but also offers the overall number of those, who expressed it. I.e. throughout the report, statements like “Nine out of twelve interviews believe that the police orally inform defendants about their rights...” are made. This approach is applied because this report is used as evidence for the fundamental rights situation in one country. Thus, it is summarised data for a more extensive report on the fundamental rights situation in numerous EU countries. For this purpose, a quantitative analysis is appropriate.

## **B.5 LEGAL FRAMEWORK**

Generally, there were hardly any legal discussions on the implementation of Directive 2016/343 in Austria. The provisions of Directive 2016/343 were regarded as the Union’s codification of the European Court of Human Right’s case law on Article 6 ECHR. Since the ECHR has acquired constitutional status in Austria a long time ago, the ordinary law of criminal procedure had to be measured against this standard anyway. Therefore, hardly any need for implementation was identified.<sup>1</sup> In the following, the relevant legal provisions on the rights concerned are described in detail at the beginning of each subsection.

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<sup>1</sup> Kraml, B. and Zeder, F. ‘Die vierte Richtlinie über Beschuldigtenrechte: Unschuldsvermutung und Recht auf Anwesenheit in der Verhandlung (Richtlinie 2016/343)’, in: Journal für Strafrecht 2016/4, p. 357-361 (361).



## PART C. MAIN REPORT ANALYTICAL STRUCTURE

### C.1 The right to be presumed innocent in general

The presumption of innocence is explicitly mentioned in § 8 Criminal Procedures Act (*Strafprozessordnung 1975, StPO*).<sup>2</sup> It stipulates that every person is presumed innocent until proven guilty according to law. Moreover, Article 6 (2) European Convention of Human Rights, which is granted constitutional status in Austria, stipulates that “everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law”.

- a. How are the different professions implementing the presumption of innocence?

The interviewed **police officers** and **prosecutors** similarly state that they comply with the presumption of innocence by investigating in all directions, even if a suspect / defendant is identified. The police and the prosecution are obliged to objectively search for evidence regardless of a possible exculpatory or incriminating effect on the defendant. Assessing the credibility of the witness' / victim's statements is also part of the implementation of the presumption of innocence.

An interviewed prosecutor says:

*Q: How do you apply the concept of presumption of innocence in your daily work?*

*A: Prosecutors are obliged to investigate objectively. For example, if the accused offers an alibi, I can't say that I don't care, even if I am the prosecutor, but rather I have to check it or if they offer witnesses who confirm their version, then they are also questioned and not only on what incriminates them, but also on what exonerates them.*

*Q: Wie wenden Sie das Konzept der Unschuldsvermutung in Ihrer täglichen Arbeit an?*

*A: Staatsanwälte sind ja dazu verpflichtet, objektiv zu ermitteln. Wenn der Beschuldigte z. B. ein Alibi anbietet, dann kann ich nicht sagen, das ist mir wurscht, auch wenn ich der Staatsanwalt bin, sondern vielmehr muss ich das überprüfen oder wenn er Zeugen anbietet, die seine Version bestätigen, dann werden die auch vernommen und es wird nicht nur gesucht was ihn belastet, sondern auch was ihn entlastet.*

Thus, guilt is not something that is inherently presumed as soon as a defendant is identified, but rather something that has to be proven with evidence. It is the task of the police to provide this evidence during their investigation. It is not the duty of the defendants to prove their innocence.

There is a difference in respect to the implementation of the presumption of innocence between prosecutors and the police. Prosecutors are in charge of procedural decisions while the police are not. Police officers emphasise this difference with regard to the presumption of innocence. An interviewed police officer says:

*Q: What about cases that are not so clear?*

*A: There the police has the advantage that they don't have to decide about right or wrong, right? This right is not the responsibility of the police, it belongs to the public prosecutor's office or the court. The public prosecutor decides: do I charge this now and the judge decides: guilty or not guilty?*

*Q: How does your work end then? So, when the case goes to the prosecutor.*

*A: So, we write a final report and there we write that we have doubts for the reason that there is something wrong (with the statement), then it's much easier for the prosecutor. I mean, if you now have a clear proof, such as DNA or an injury that matches the victim's description of the crime, then it's relatively easy. Then I think: ok, there will be something to what the woman (the victim) said. So, we always treat victims as such, but still wonder if what they say is true.*

*Q: Wie ist es in Fällen, die nicht so eindeutig sind?*

*A: Da hat die Polizei dann wieder den Vorteil, dass sie nicht über Recht oder Unrecht entscheiden muss, gell? Dieses Recht obliegt nicht der Polizei, das gehört Richtung Staatsanwaltschaft oder Gericht. Der Staatsanwalt entscheidet: klage ich das jetzt an und der Richter entscheidet: schuldig oder nicht schuldig?*

*Q: Wie hört eure Arbeit dann auf? Also wenn der Fall zum Staatsanwalt geht.*

*A: Also wir schreiben einen Abschlussbericht und da schreiben wir hinein, dass wir aus dem und dem Grund Zweifel haben, dass da irgendetwas nicht passt (an der Aussage), dann tut sich der Staatsanwalt schon wesentlich leichter. Ich meine, wenn du jetzt einen eindeutigen Beweis hast, wie z. B. eine DNA oder eine Verletzung, die zusammenpasst mit der Tatschilderung des Opfers, dann ist das relativ einfach. Dann denke ich mir: ok, da wird schon etwas dran sein an dem was die Frau (das Opfer) gesagt hat. Also wir nehmen Opfer immer als solche an, aber machen uns trotzdem Gedanken ob das stimmen kann, was sie sagt.*

The police forward the file to the prosecution after the primary investigations. Thereby the presumption of innocence is respected in the wording of the file. The file is always written in the subjunctive mood, e.g. it states that "XY is under suspicion of..." or "XY is accused of...". This form is applied even if the defendant confesses and even if the police officers caught them in the act. Based on this file and the evidence gathered by the police, the prosecution decides whether the case is taken to court or not. Even though the prosecution's decision is based on the evidence gathered by the police, the police are not able to make crucial decisions in relation to the proceedings or the presumption of innocence. The police inform the defendants of their right to remain silent and not to incriminate themselves during the interrogation. An interviewed police officer elaborates:

*Q: Are there any measures to ensure that the accused understand their right to refuse to testify?*

*A: Well, there are the legal instructions anyway and then I say: have you understood it? You can say something, you don't have to say anything. You can tell me as much as you want. And most policemen even say: if you don't tell me anything, then we'll be finished faster (laughs).*

*Q: Gibt es irgendwelche Maßnahmen zur Sicherstellung, dass die Beschuldigten ihr Recht auf Aussageverweigerung verstehen?*

*A: Na ja, es gibt sowieso die Rechtsbelehrung und dann sage ich: hast Du es verstanden? Du kannst was sagen, du musst nichts sagen. Du kannst mir sagen so viel du willst. Und die meisten Polizisten sagen sogar noch dazu: wenn du mir nichts sagst, dann sind wir schneller fertig (lacht).*

The interviewed judges provide similar information on how they apply the presumption of innocence: they respect the principles of objectivity and neutrality during the evaluation of evidence. Thereby, they do not proactively apply the presumption of innocence by means of any describable methods, but they constantly keep it in mind.

An interviewed judge states:

*Q: How do you apply the principle of the presumption of innocence in your daily work?*

*A: This question is difficult to answer because the presumption of innocence is always there. In principle, the presumption of innocence is always there, as long as the accused is not found guilty and the verdict is final. In other words, I do not actually apply it at all, the presumption of innocence always exists. The presumption of innocence is always there, as I said.*

*Q: Wie wenden Sie das Prinzip der Unschuldsvermutung in Ihrer täglichen Arbeit an?*

*A: Diese Frage ist schwierig zu beantworten, denn die Unschuldsvermutung ist immer da. Grundsätzlich ist die Unschuldsvermutung immer da, so lange der Beschuldigte nicht schuldig gesprochen ist und zwar rechtskräftig. Das heißt, ich wende es in Wahrheit gar nicht an, die Unschuldsvermutung gibt es immer. Die Unschuldsvermutung ist, wie gesagt, immer da.*

This means that judges do not immediately believe the victim, but at the same time they do not immediately believe the defendant denying allegations. For the **judges**, the presumption of innocence is closely related to the principle in dubio pro reo. A judge says:

*Q: How do you apply the principle of the presumption of innocence in your everyday work?*

*A: [...] you don't say from the outset: it's like the victim says or it's like the perpetrator says - if they deny everything, that's not the case. But one knows: in case of doubt [judge in favour of] the accused and for this reason you approach every record with this basic principle [the presumption of innocence]. But it's not that I have it ready next to me every day, in every second.*

*Q: Wie wendest du das Prinzip der Unschuldsvermutung in deiner täglichen Arbeit an?*

*A: [...] Dass man nicht von vornherein sagt: es ist so wie es das Opfer sagt oder es ist so wie es der Täter sagt – wenn er alles leugnet, das ist es nicht. Sondern man weiß: im Zweifel für den Angeklagten und aus diesem Grund gehst du mit diesem Grundprinzip [der Unschuldsvermutung] an jeden Akt heran. Es ist aber nicht so, dass ich das jeden Tag, jede Sekunde neben mir parat habe.*

The interviewed **defence lawyers** provide heterogenous insights on how they apply the presumption of innocence in practice. To them, developing a strategy of disclosing only certain pieces of evidence is a means to protect the presumption of innocence. This disclosure strategy is based on existing evidence according to the record and the client's information. The principle in dubio pro reo is important for the interviewee's work with the presumption of innocence. The lawyers present the following challenges for the implementation of the presumption of innocence: the client's confession, an intense and biased media coverage, pre-trial detention and the individual judges in charge.

b. Potential factors that have an effect on guaranteeing the presumption of innocence

The interviewed **police officers** homogenously deny that there are any factors that have an effect on guaranteeing the presumption of innocence. The application of the presumption of innocence is a standard procedure that equally applies to all defendants until the final judgement. An interviewed police officer explains:

*Q: Do factors such as skin colour, gender or already existing convictions play a role?*

*A: That doesn't change the fact that I still have to collect as much evidence [as is needed] for the prosecution to file a charge, firstly, and secondly for the accused to be found guilty. It doesn't help me if I am the only one who is convinced that they are guilty because they already have so many previous convictions, because the court has to be convinced of this, so the objective evidence has to be there.*

*Q: Spielen vielleicht Faktoren, wie die Hautfarbe, das Geschlecht oder bereits bestehende Verurteilungen eine Rolle?*

*A: Das ändert ja nichts an der Tatsache, dass ich trotzdem so viele Beweise sammeln muss, dass erstens die Staatsanwaltschaft eine Anklage erheben kann und zweitens der Angeklagte schuldig gesprochen wird. Es hilft mir nichts, wenn nur ich davon überzeugt bin, dass der schuldig ist, weil der schon so viele Vorstrafen hat, denn es muss ja das Gericht auch davon überzeugt sein, also die objektiven Beweise müssen ja gegeben sein.*

One out of four police officers say that defendants, who do not cooperate, are perceived as hiding something. However, this does not apply to those, who make use of their right to remain silent. It rather applies to those, who are not showing up when they are summoned or behave disrespectfully towards the police.

The interviewed **prosecutors** believe or at least hope that the prosecution applies the presumption of innocence equally. The prosecution is engaged in the facts of the case, while gender, ethnicity and

social background (poor or famous / rich) of the persons involved have no influence at all. One prosecutor believes that only media coverage of criminal cases may lead to the assumption that the prosecution's work is biased, but this is not true. The interviewee uses the example of a recent case on Jihadism. According to him, some media outlets presented the case as proceedings against Islam and Muslims. The prosecution repeatedly informed the media that the proceedings are dealing with Jihadism and the prosecution does not intend to accuse anyone due to a religious affiliation. However, even if the media coverage is justified, stereotypes about certain groups still exist in society, which affects the reception of criminal procedures. Moreover, this prosecutor faces practical challenges in balancing the presumption of innocence and the pre-trial detention. S/He states:

*Q: What role does the presumption of innocence play in your daily work?*

*A: The second [scenario], besides the media, in which the presumption of innocence plays a major role, is of course pre-trial detention, because that is the strongest intervention we can make, namely to imprison someone who is innocent at that time; according to the law - who is considered innocent at that time. In other words, we imprison innocent people where we have a strong suspicion of a crime and also have grounds for imprisonment, but that does not change anything - at the end of the day, pre-trial detention is carried out on someone who is innocent according to the law. That is where the principle of reasonableness and the speeding up of detention is particularly important. So we have to be particularly quick.*

*Q: Welche Rolle spielt die Unschuldsvermutung in Ihrer täglichen Arbeit?*

*A: Das zweite, neben den Medien, wo die Unschuldsvermutung eine große Rolle spielt, ist natürlich die Untersuchungshaft, denn das ist der stärkste Eingriff, den wir machen können, nämlich jemanden, der zu diesem Zeitpunkt unschuldig ist, nach dem Gesetz – der zu diesem Zeitpunkt als unschuldig gilt, einzusperren. D.h. wir sperren Unschuldige ein, wo wir zwar einen dringenden Tatverdacht haben und auch Haftgründe haben, aber das ändert nichts daran – letztendlich wird die Untersuchungshaft vollzogen, an einem, der nach dem Gesetz unschuldig ist. Da ist das Prinzip der Angemessenheit und das Beschleunigungsgebot in Haftsachen besonders wichtig. Also, wir müssen da besonders schnell sein.*

The assessments of the two interviewed **judges** differ from one another. One of them is sure that the presumption of innocence is applied equally in all cases, as can be seen by the following quote of this judge:

*Q: In your experience, does the presumption of innocence apply equally to everyone in practice?*

*A: Of course. Contrary to many press reports and other reports, the presumption of innocence applies equally to everyone.*

*Q: Gilt die Unschuldsvermutung Ihrer Erfahrung nach in der Praxis für alle gleichermaßen?*

*A: Selbstverständlich. Entgegen vielen Presseberichten und anderen Berichten gilt die Unschuldsvermutung jedenfalls für alle gleichermaßen.*

The other interviewee admits that s/he would be lying if s/he said that s/he would treat all cases equally. S/He states that s/he is biased by his/her experiences with defendants' behaviour along nationalities. This judge elaborates:

*Q: We are talking about practice: does the principle of the presumption of innocence apply equally to everyone or can it happen in practice that it does not?*

*A: So, if you say that you approach everyone with the same kind of attitude, then that would simply be a lie. That's not true. [...] but sometimes you get in the way of saying: ok, obviously he's done something*

wrong. Perhaps this has less to do with the presumption of innocence, but simply with the tendency to say to certain groups of the population [nationalities]: ok, I think that's what happened. [...]

*Q: Wir reden ja über die Praxis: gilt das Prinzip der Unschuldsvermutung für alle gleichermaßen oder kann es sein, dass es in der Praxis nicht so ist?*

*A: Also, wenn man sagt, dass man zu jedem mit der gleichen Art heran geht, dann würde das einfach gelogen sein. Das stimmt nicht. [...] aber da kommt man manchmal schon in das Fahrwasser, dass man sagt: ok, offensichtlich hat der was angestellt. Das hat vielleicht weniger mit der Unschuldsvermutung zu tun, sondern einfach, dass man manchmal neigt, bei gewissen Bevölkerungsgruppen [Nationalitäten] zu sagen: ok, ich glaube das war so. [...]*

All interviewed **lawyers** point out that previous convictions exert a negative effect on the presumption of innocence in the case at stake. Defendants with previous convictions are disadvantaged because it is presumed that somebody who has already been sentenced, will engage in crime again. This particularly applies to previous convictions due to similar criminal acts. Judges tend to investigate the criminal record of the defendants first and only afterwards assess the evidence for the case at stake. The criminal past of the defendant is not only considered when it comes to assessing the severity of the sentence in case of a conviction. Judges rather derive the guilt from the criminal past of the defendant. This defence lawyer states:

*Q: In your experience, does the presumption of innocence apply equally to all in practice?*

*A: No. There is a significant difference between whether a client has a criminal record or not. Then the judges have an incredible problem when it comes to first looking at the current case and see if [they] can prove guilt. And only then, if [they] can prove guilt, do [they] look at how high the sentence should be and only then do [they] look at their past life. Many judges take the opposite approach, they first look at their past life and conclude from this past life that there is a possibility that they have actually committed the crime.*

*Q: Gilt Ihrer Erfahrung nach in der Praxis die Unschuldsvermutung für alle gleichermaßen?*

*A: Nein. Es ist ein wesentlicher Unterschied ob ein Mandant ein kriminelles Vorleben hat. Dann haben die Richter ein irrsinniges Problem, sich zunächst den aktuellen Fall anzusehen und schauen ob ich einen Schuldbeweis führen kann. Und erst dann, wenn ich einen Schuldbeweis führen kann, schau ich wie hoch die Strafe sein muss und erst dann schaue ich mir sein Vorleben an. Viele Richter machen den umgekehrten Weg, sie schauen zuerst wie sein Vorleben ist und schließen aus diesem Vorleben auf eine Möglichkeit, dass der die strafbare Handlung tatsächlich begangen hat.*

Interviewed lawyers give striking examples of their clients illustrating this assessment. One case is a male client who had previously been convicted of domestic violence. At a later point in time, he was attacked by his wife and defended himself against these attacks. However, he was convicted and given the highest sentence, but the fact that his wife attacked him too was not taken into consideration by the court. Furthermore, a lawyer observes that gender and nationality of the defendant influence the presumption of innocence. S/He notices a tendency that the presumption of innocence is granted more often to female than to male defendants as well as to Austrians than foreigners. S/He emphasises that s/he can only speak from his/her own experience and does not want to make sweeping statements as each judge decides individually – but the tendency is observable.

### c. The role of prejudices and stigma

Three out of four interviewed **police officers** say that prejudices and stigma are irrelevant. The police are obliged to collect as much evidence as needed for the prosecution in order to file charges. One interviewed police officer acknowledges that everyone has prejudices or stereotypes. Consequently, also police officers have them. However, these stereotypes do not affect the presumption of

innocence, because police investigations seek to find out the “objective truth”, which conflicts with group-specific experiences or prejudices. Moreover, there are safeguards, as each investigative step and all evidence (testimonies) are documented by the police and assessed by the prosecution. A police officer explains:

*Q: Does the presumption of innocence apply equally to all or is it possible that differences are already being made in practice?*

*A: Our task is only to find out: what can be right, what can be wrong? They can be innocent, they can be guilty, we have to investigate. But thank God it is not my job as a police officer, as a criminal investigator, to decide that. My job is just to add everything up, from all sides: there is the victim side, there is the accused side, and then there are perhaps a few witnesses, trace sides [and I add up]: what speaks for him or her now, what speaks against him or her. It doesn't matter how many convictions they already have, what their reputation is, what their past life was like, it doesn't matter.*

*Q: Trifft die Unschuldsvermutung für alle gleichermaßen zu oder kann es sein, dass da in der Praxis schon Unterschiede gemacht werden?*

*A: Unsere Aufgabe ist nur zu ermitteln: was kann stimmen, was kann nicht stimmen? Er kann unschuldig sein, er kann schuldig sein, wir müssen ermitteln. Aber Gott sei Dank ist es nicht meine Aufgabe als Polizistin, als Kriminalbeamtin, das zu entscheiden. Meine Aufgabe ist nur, alles zusammenzurechnen, von allen Seiten: da ist die Opferseite, da ist die Beschuldigtenseite und dann sind vielleicht noch ein paar Zeugen, Spurensseiten [und ich rechne zusammen]: was spricht jetzt für ihn oder sie, was spricht gegen ihn oder sie. Völlig egal wie viele Verurteilungen der schon hat, wie sein Ruf ist, wie sein Vorleben war, das ist ganz egal.*

Except for the police, all other interviewees acknowledge the role of prejudices and stigma. Prejudices and stigma are not influenced by gender or disability. Rather they are influenced by **nationality, certain severe criminal offences and previous convictions**.

One interviewed prosecutor is in charge of sexual offence cases and has experienced within the course of many years that (false) accusations of rape take place in divorce and alimony disputes. Thereby, women abuse the court and claim they were raped by their ex-husbands. The prosecutor says that these experiences made him/her sensitive and lead him/her to examine such stories more closely. These prejudices do not affect the defendants' presumption of innocence but protect them against false accusations. This prosecutor and a judge observe that the accusation of **child abuse** is a stigma, which already has consequences in the investigative stage of the proceedings. As soon as a child claims that s/he was sexually abused, the actors of the criminal justice system are shocked and tend to believe the child. Consequently, they neglect the presumption of innocence and all evidence that speaks against an accusation. The prosecutor says:

*Q: Does the presumption of innocence apply equally to everyone or is it possible that differences are already being made?*

*A: [...] which is already the case - I am now moving a bit on black ice - but I feel the need to say this because it often happens to me - I deal with sexual crimes. This accusation is also very much abused, especially in divorces and alimony disputes, partnership disputes, rapes are claimed, which you just have to look at more closely. And the worst thing for me is when a child says: I have been abused - as bad as it is when it's true – but then everyone runs together, it's a huge whirlwind and nobody wants to question whether that's true. Because when a child says that, then it is true. And that is a view of things that I don't like at all.*

*Q: Gilt die Unschuldsvermutung für alle gleichermaßen oder kann es sein, dass da schon Unterschiede gemacht werden?*

*A: [...] was aber schon ist – da bewege ich mich jetzt ein bisschen auf Glatteis – aber das ist mir direkt ein Bedürfnis das zu sagen, weil mir das oft passiert – ich mache ja Sexualdelikte. Es wird mit diesem Vorwurf sehr viel Schindluder auch getrieben, gerade in Scheidungen und Unterhaltsstreitigkeiten, Partnerschaftsstreitigkeiten, werden Vergewaltigungen behauptet, die man halt schon genauer anschauen muss. Und was für mich das Schlimmste ist, wenn ein Kind sagt: ich bin missbraucht worden – so schlimm es ist, wenn es stimmt – dann rennen alle zusammen, es ist ein Riesenwirbel und kein Mensch möchte das irgendwie hinterfragen ob das stimmt. Weil wenn ein Kind das erzählt dann stimmt das. Und das ist eine Sicht der Dinge, die mir überhaupt nicht gefällt.*

Moreover, applying the presumption of innocence is challenging when the defendant confesses and the confession is in line with the findings of the investigation. In these cases, the prosecution – but also the judges – may assume that the only step missing at this stage is the conviction seen as a rather formal act. The prosecutor states:

*Q: If someone confesses, how does this affect the presumption of innocence?*

*A: Well, if they confess, then you probably won't go for the presumption of innocence, so that would be very absurd. But there are certainly people - it's not only on television, it's real - who make a confession and you think to yourself: yes, I don't know whether that's really the true confession, because there are always confessors who want to cover up for someone else with their confession. So, if the confession is credible, we prosecutors are not the ones who check 10,000 times whether it is really true, we do not do that. Only if the evidence is such that one doubts the confession or there is another perpetrator in the room, maybe, then it will be checked. Because if this is a completely insane confession, then nobody will say: the presumption of innocence no longer applies. But I would say that in over 90% of the cases the confession is true.*

*Q: Wenn jemand gesteht, wie wirkt sich das auf die Unschuldsvermutung aus?*

*A: Na ja, wenn der das gesteht, dann wird man wahrscheinlich nicht auf der Unschuldsvermutung herumreiten, also das wäre schon sehr widersinnig. Aber es gibt sicher Leute – das gibt es nicht nur im Fernsehen, das gibt es wirklich – die ein Geständnis ablegen und du denkst dir: ja, ich weiß nicht ob das jetzt so wirklich ganz das wahre Geständnis ist, weil es ja immer wieder Geständige gibt, die durch ihr Geständnis jemand anders decken wollen. Also wenn das Geständnis glaubwürdig ist, sind wir Ankläger nicht die, die das 10.000-mal überprüfen ob das wirklich stimmt, das machen wir nicht. Nur wenn die Beweislage sich so darstellt, dass man an dem Geständnis zweifelt oder es steht ein anderer Täter im Raum, vielleicht, dann wird das schon überprüft. Weil wenn das ein komplett wahnsinniges Geständnis ist, dann wird keiner sagen: die Unschuldsvermutung gilt jetzt nicht mehr. Aber ich würde sagen bei über 90 % der Fälle stimmt das Geständnis schon.*

This assumption is further supported by the defence lawyers. One defence lawyer explains:

*Q: If a person confesses, how does this affect the procedure and especially the presumption of innocence?*

*A: There is no presumption of innocence anymore. Unless it would emerge in the proceedings that this is an absolute confession of protection. But even then, it can only be assessed in the context of the free assessment of evidence under guilt. Because if an accused confesses guilt, it is very difficult for the judge to say that they are not convinced of the guilt. [...] The presumption of innocence applies only to those who deny having committed a crime.*

*Q: Wenn eine Person gesteht, wie wirkt sich das dann auf das Verfahren aus und insbesondere auf die Unschuldsvermutung?*

*A: Unschuldsvermutung gibt es dann keine mehr. Es sei denn, es käme im Verfahren heraus, dass das ein absolutes Schutzgeständnis ist. Aber selbst dann kann man es nur im Rahmen der freien Beweiswürdigung unter Schuld würdigen. Weil wenn ein Beschuldigter die Schuld gesteht, tut sich der Richter prozessordnungskonform schon sehr schwer zu sagen, dass er von der Schuld nicht überzeugt ist. [...] Die Unschuldsvermutung gilt ja nur für diejenigen, die leugnen eine Straftat begangen zu haben.*

Another defence lawyer supports this assessment:

*Q: What is it like when someone confesses, how does this affect the proceedings in the context of the presumption of innocence?*

*A: [laughs] well, to apply for an acquittal, you would probably lose your reputation over years.*

*Q: Wie ist es, wenn jemand seine Schuld gesteht, wie wirkt sich das auf das Verfahren im Kontext der Unschuldsvermutung aus?*

*A: [lacht] na ja, einen Freispruch dann zu beantragen, da würde man wahrscheinlich über Jahre seine Reputation verlieren.*

A judge confesses prejudices due to experiences with defendants of certain nationalities, who are more likely to deny accusations. Based on these experiences, s/he is more doubtful when defendants of the respective nationalities deny accusations than in other cases. Moreover, due to experiences of inequality in the past, s/he is more critical when assessing the testimonies of **persons with a high-level social background** and a good reputation. S/He links this attitude to a former case of domestic violence, involving a defendant with a high reputation, which was crucial for him/her. The authorities did not believe the victim or downplayed what s/he said, because of the reputation and social background of the accused.

The interviewed lawyers confirm that prejudices related to nationalities affect the presumption of innocence. However, the lawyers also blame police officers of being influenced by prejudices. Lawyers explain that asylum seekers are more likely to commit drug or property offences due to their insecure and vulnerable status and their economic situation. Members of the police are indeed aware of this, which leads them to control asylum seekers more often on the street than locals. At the same time, such offences are usually easier to prove, as the evidence is rarely contradictory. Either there is a surveillance camera (shop lifting) or drug dealers are caught in the act or drugs are found with them. Thus, it is difficult to assess, whether there is resentment against this group or whether the clear evidence brings about the prejudices. Resentment is felt more in doubtful cases, where the body of



evidence is contradictory. Moreover, all interviewed lawyers point out that **previous convictions** are a major challenge for the presumption of innocence. According to a prosecutor, previous convictions in a similar field of crime are an incriminating factor. However, these do not influence the presumption of innocence – the prosecution needs to find evidence for each crime.

d. Discussion of findings

The members of the criminal justice system (judges, prosecutors, police officers) apply the presumption of innocence by means of an objective investigation and a neutral evaluation of the evidence. The prosecution and the police investigate in all directions and collect both, incriminating and exculpatory evidence. However, unlike the prosecution, the police do not perceive themselves as in charge of decisions relevant to the presumption of innocence. Similarly, the judges base their judgement on an objective evaluation of the evidence. The interviewed members of the criminal justice system point out that they do not apply the presumption of innocence consciously. It is rather viewed as an important principle guiding their work. The defence lawyers apply the presumption of innocence by developing a defence strategy for their clients based on the incriminatory evidence that is accessible. The interviewed lawyers identify several challenges related to the implementation of the presumption of innocence. Pre-trial detention, a defendant's confession, as well as (biased) media coverage on criminal cases are the most important obstacles for the presumption of innocence. Furthermore, the interviewed defence lawyers provide striking examples for violations of the presumption of innocence from their own clients.

The law enforcement officials tend to deny factors influencing the guarantee of the presumption of innocence. According to them, the presumption of innocence is applied equally. However, after further inquiries, prosecutors acknowledge that a confession of the defendant, which is in line with the material evidence, challenges the presumption of innocence. One prosecutor repeatedly experienced false accusations of rape by women in divorce situations, which then lead the prosecutor to prejudices that such persons would abuse the criminal justice system for their divorce proceedings. Interestingly, these experience-based prejudices lead the prosecution to assume the role of defence lawyers as well as to protect the defendant's presumption of innocence from false accusations. Judges report experience-based prejudices, which may affect the presumption of innocence of members of certain nationalities. However, both, the judges and the prosecutors, are trained to reflect on these prejudices and accept that they exist in their work.

Defence lawyers point out the role of prejudices related to previous convictions as impacting factor to the presumption of innocence by the judiciary. Moreover, they say that prejudices related to certain nationalities or the status as asylum seekers by the judiciary negatively affect the presumption of innocence. However, the lawyers also blame the police as having such prejudices.

Findings indicate that gender and disability do not influence the presumption of innocence. However, the interviewees acknowledge that they have no or little experience with female defendants or defendants with disabilities, as these groups are a minority among defendants.

Findings indicate that asylum seekers of Afghan nationality are more likely to be controlled by the police in the public sphere and suspected of drug offences than locals. In case defendants have already been convicted before, the court and the prosecution neglect the presumption of innocence. Previous convictions may even be treated as incriminatory evidence which leads to a more severe sentence. In case of child abuse, despite other evidence, the child victim is more likely to be believed. This might lead to a false accusation. However, such experiences may also provoke prejudice among prosecutors against victims which leads to situations where their testimonies are called into question.

Basically, all interviewees value the presumption of innocence as highly important. The fact that such factors are identified by interviewees can also be an indicator for their awareness on the existence of prejudices in anyone. Thus, the information provided by the interviewees shows their ability to reflect prejudices and their effects on the presumption of innocence.

Regarding the overall implementation of the presumption of innocence, media coverage is perceived as an even more problematic influential factor than group-based prejudices.

## C.2 Public references to guilt

### a. How do the different professions liaise with the media?

The majority of interviewees in all professional groups tend to avoid contact with the media. They perceive the media coverage on criminal proceedings as problematic, particularly during the investigative stage and in cases of high public interest. Cases of high public interest involve famous and public people or sensitive issues, such as sexual offences or child victims.

There are specific departments for public relations (PR) at the police and the criminal court. The interviewees appreciate that these departments prevent the media from directly contacting them. The officers/prosecutor/judge involved in the case write a report elaborating the facts of the case and submit it to the PR department. The PR department reviews the report – also in terms of the suspect’s / defendant’s right to privacy – and then forwards it to the media in the form of a press release.

One interviewed judge is a member of the PR department of the court. According to her, the court only liaises with the media after informing all other parties involved (defence lawyer, prosecution). This is an “inviolable rule” of the court to protect defendants and witnesses. The protection of their privacy is the most important principle guiding the PR work. In practice, the case files and the indictments are not accessible to the media, only the first name and the first letter of the surname is provided, except for defendants, who are public or famous or liaised with the media themselves. Whenever the media have more information about the defendants, it can be assumed that this information is provided by lawyers (litigation PR).

Two out of four police officers directly cooperate with the media in case of unknown offenders. In these instances, a cooperation with the media is important in order to help find the offender, get hints from the public, identify witnesses or even prevent the offender from committing offences in the future. Upon an order of the prosecution, the police provide the media with a photo of the unknown suspect or with descriptions of witnesses or victims to facilitate their identification. This kind of cooperation between the police and the media occurs in case of sexual offences involving unknown offenders and theft / robbery / burglary.

Three out of four defence lawyers, who are hesitant in liaising with the media, explain their reluctance as follows: First, it is one of the most important duties of a defence lawyer to work as discreetly as possible without attracting too much public attention. Their experience shows, that the defendant is more disadvantaged the more the media is involved in a case. The following quote of a defence lawyer illustrates this reluctance of lawyers to liaise with the media on criminal cases:

*Q: Do you work with the media when it comes to criminal cases?*

*A: No, I try to avoid that. The media are dangerous. So, I think a defence lawyer should have as little to do with media as possible.*

*Q: Arbeiten Sie mit Medien zusammen, wenn es um Kriminalfälle geht?*

*A: Nein, ich versuche das zu vermeiden. Die Medien sind gefährlich. Also ich finde, ein Verteidiger sollte mit Medien so wenig zu tun haben, wie es geht.*

Second, there are journalists with poor knowledge of the criminal justice system and who tend to write lurid articles. They do not quote defence lawyers accurately; they report the wrong facts of the cases and allegations; at times even prejudgements occur in such articles. The media protect themselves against accusations by including in their articles the note “the presumption of innocence applies”, which is perceived as a kind of rubber-stamp. Thirdly, interviewees have no experience with litigation PR, as they simply never had big cases, which attracted that much public attention. Only one interviewed lawyer says s/he liaises with the media and is also engaged in litigation PR. However, s/he also reports about negative experiences with media cooperation. When it comes to reporting on criminal cases, the media are more interested in gathering information from the prosecution than from the defence lawyers. Thus, the media are biased in relation to the presumption of innocence and, therefore, it is difficult for him/her to bring his/her clients' view in the media. The quote of the respective defence lawyer illustrates this. It is based on a striking case of his/her own work. S/He states:

*Q: What are your experiences with media reports on criminal proceedings?*

*A: I have a big media case in [federal state] right now, additionally it's an emotional story, a [characteristic] woman was murdered. The first best [suspect] is taken and then the police only investigate against him. That's one point. And: the media are fed by the prosecutor's office with - in part - even false details or they are reported incorrectly. So, what I've read in the newspaper. And if I, as a defense lawyer, do not oppose that [biased media coverage], which is difficult anyway, because the media prefer to write about the details from the prosecutor than the defense lawyer, because the defence lawyer is always suspicious, the one who is on the side of the bad guys. Because the evil people are those who are accused and the defence lawyer is the one who helps the evil people. But if I now have someone who is innocent (...) and the problem is that the jury then [at the trial] goes into consultation and has been informed by the media for three quarters of a year that this is the perpetrator.*

*Q: Was sind Ihre Erfahrungen mit medialen Berichten über Strafverfahren?*

*A: Ich habe jetzt aktuell einen großen Medienfall in [Bundesland], noch dazu eine emotionale Geschichte, eine schwangere Frau wurde ermordet. Es wird der Erstbeste [Verdächtige] genommen und dann ermittelt die Polizei nurmehr gegen diesen. Das ist einmal Punkt eins. Und: die Medien werden gefüttert von der Staatsanwaltschaft mit – zum Teil – sogar falschen Details oder sie werden falsch berichtet. Also was ich da gelesen habe. Und wenn ich da jetzt als Verteidiger nicht dagegenhalte, was sowieso schwer ist, weil die Medien viel lieber das vom Staatsanwalt schreiben, als das vom Verteidiger, denn der Verteidiger ist immer der Suspekter, der auf der Seite der Bösen steht. Weil die Bösen sind die, die beschuldigt werden und der Verteidiger ist der, der den Bösen hilft. Aber wenn ich jetzt einen Unschuldigen habe (...) und das Problem ist, dass die Geschworenen dann [bei der Hauptverhandlung] in die Beratung gehen und sind vorher schon ein Dreivierteljahr informiert worden von den Medien, dass es sich dabei um den Täter handelt.*

b. Mapping of laws and guidelines

§ 35b Public Prosecution Act (*Staatsanwaltschaftsgesetz*)<sup>3</sup> stipulates how the prosecution has to provide information to the media. According to § 35b (2) Public Prosecution Act providing information

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<sup>3</sup> Austria, Public Prosecution Act ([Bundesgesetz vom 5. März 1986 über die staatsanwaltschaftlichen Behörden, Staatsanwaltschaftsgesetz - StAG](#)), BGBl. Nr. 164/1986.

to the media shall only be permissible, if its timing and content do not violate the personal rights of the persons concerned, the principle of the presumption of innocence and the right to a fair trial. Moreover, § 35b (3) Public Prosecution Act states that information is not to be provided if, inter alia, secrecy interests worthy of protection, including the disclosure of identity, would be violated. No relevant case law or public discussion to be reported for § 35b Public Prosecution Act.

A Media Decree (*Medienerlass*),<sup>4</sup> adopted by the Federal Ministry of Justice entered into force on 1 June 2016 and prescribes to proper cooperation of the judiciary with the media. In the section on the provision of information, the decree also covers issues concerning the reference to guilt: When informing the media, choosing the content and timing of communication, account must be taken, on the one hand, of the personal rights of the persons concerned, the presumption of innocence and official secrecy and the guarantee of a fair trial and, in particular, the interests and rights of the victims of crime and their right to protection from further harm; on the other hand, account must be taken of the public interest in free and comprehensive information and the public duty of the media. The decree also prescribes that reference must be made to the presumption of innocence. No relevant case law or public discussion to be reported for the Media Decree.

The foundations for the public relations work of the Federal Ministry of the Interior are laid down in another decree, last revised in 2020.<sup>5</sup> According to this decree, the media's requests for information may conflict with principles, rights and legally protected interests, such as in particular the presumption of innocence, the personal rights of parties and other persons part of proceedings, the obligation to conduct proceedings fairly and without interference, the obligation to maintain official secrecy and the general interest in ensuring an independent and impartial management and administration of justice. The decree stipulates that these legitimate interests must be safeguarded by the public relations work. Therefore, the public's need for information shall only be met to the extent that the interests of those affected do not take precedence over the need for information. When providing information to the media, inter alia, the presumption of innocence must be considered. Information should only contain information that does not jeopardise further investigation work and does not violate the rights of data subjects and third parties, e.g. by naming the gender, age or nationality or origin of victims, witnesses, suspects or perpetrators, due to which clear conclusions can be drawn about specific persons.

§ 7b (1) Media Act (*Mediengesetz*)<sup>6</sup> stipulates that if a person who is suspected of a criminal offence but has not been convicted by a final court decision is presented in the media as convicted or guilty or is described as the perpetrator of a criminal offence and not merely as a suspect, the person concerned shall be entitled to compensation from the media owner for the offence suffered. The amount of compensation shall not exceed 20,000 Euro. According to the Supreme Court<sup>7</sup>, the publication of statements of similar content in several media of the same media owner establishes several claims for compensation according to § 7b Media Act. There is an article<sup>8</sup> presenting the Supreme Court

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<sup>4</sup> Austria, Media Decree ([Erlass des Bundesministeriums für Justiz vom 23. Mai 2016 über die Zusammenarbeit mit den Medien](#)), BMJ-Pr50000/0021-Kom/2016.

<sup>5</sup> Austria, Federal Ministry of the Interior, [Informations- und Dokumentationsangelegenheiten; Öffentlichkeitsarbeit Erlass für die Öffentlichkeitsarbeit im Wirkungsbereich des Bundesministeriums für Inneres](#), BMI-ID1400/0117-I/5/2019BMI-ID1400/0117-I/5/2019.

<sup>6</sup> Austria, Media Act ([Bundesgesetz vom 12. Juni 1981 über die Presse und andere publizistische Medien, Mediengesetz – MedienG](#)), BGBl. Nr. 314/1981.

<sup>7</sup> Austrian Supreme Court, [15Os66/19y](#) (15Os67/19w), 11 September 2019.

<sup>8</sup> Rohrer, R. and Burtscher, B., 'Kein Schutz der Unschuldsvormutung über den Tod hinaus', *Evidenzblätter* 2018/92, Volume 14-15 / 2018, p. 651.

judgment 6 Ob 226/16b<sup>9</sup>, which clarified that the claim for compensation according to § 7b (1) Media Act is highly personal and therefore inheritable, unless the person affected had already filed the claim in court before his/her death. According to the article, it is undisputed that § 7b Media Act does not serve to protect the presumption of innocence in relation to deceased persons.

The “Principles for journalistic work - Code of Honour for the Austrian Press”<sup>10</sup> contains the rules for the daily work of journalists of the print media in Austria. Compliance is monitored by the Austrian Press Council, which also established this code. The Austrian Press Council is a self-regulating institution in the press sector, which serves the purpose of editorial quality assurance as well as guaranteeing freedom of the press. An essential task of the Press Council is to point out grievances in the press and to counteract them. For this purpose, so-called "Complaints Senates" have been established in line with the Statutes of the Austrian Press Council.<sup>11</sup> The Press Council has at least two of such Complaint Senates, consisting of 11 members each. The Complaints Senates are called upon to decide on complaints and notifications concerning editorial publications or journalistic behaviour. However, they also have the possibility to act on their own initiative. The Code of Honour for the Austrian Press forms the basis for the decisions of the senates of the Press Council. The aim of these rules is to ensure that journalistic professional ethics are upheld. References to guilt are not explicitly mentioned in this code, however, the code generally prescribes that everyone has the right to respect for dignity of the person and to protection of personal rights.

There are huge differences in the interviewees' awareness and knowledge about such guidelines. There are interviewees in each professional group, who have excellent knowledge, but there are others who do not. The ones with a high knowledge provide information in line with the findings of the desk research. Those with poor knowledge say, that they do not know and do not need to know, as they do not liaise with the media anyways.

Findings of interviews show that only the **defendant's first name and the first letter of the surname** may be disclosed. Well-known and prominent defendants or defendants, who disclosed their names to the media themselves, are the exception. According to an interviewed prosecutor, the disclosure of the defendant's name in the media is practically not relevant. If the defendant is a public or famous person, the media know it already. If the defendant is not a famous or public person, only the case as a whole and not the name is of interest to the media. Further, the media representatives, who approach the prosecution for information on criminal cases, are not deeply interested in the personal details of the defendant, but rather in catchy details about the case.

*Q: Will personal information or names of the accused be disclosed to the media?*

*A: All these personal details about the accused, they do not play a role in press inquiries. Because, as I said, in cases with well-known people, the press knows who it is anyway and in cases with Mr. [X] from the 20th district, nobody cares what his name is anyway.*

*Q: Werden persönliche Informationen oder Namen der Beschuldigten an die Medien weitergegeben?*

*A: Diese ganzen persönlichen Details über die Beschuldigten, die spielen keine Rolle bei Presseanfragen. Weil wie gesagt, bei bekannten Personen, weiß die Presse ohnehin wer es ist und beim Herrn [X] vom 20. Bezirk interessiert es eh keinen Menschen wie er heißt.*

Interviewed lawyers mention examples of **rule violations by the media**. A lawyer emphasises that the control of the lawyers/prosecutors/police on information in the media is limited. The media conduct

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<sup>9</sup> Austrian Supreme Court, [6 Ob 226/16b](#), 22 December 2016.

<sup>10</sup> Austria, Press Council, Principles for journalistic work - Code of Honour for the Austrian Press ([Grundsätze für die publizistische Arbeit - Ehrenkodex für die österreichische Presse](#)), 7 March 2019.

<sup>11</sup> Austria, Press Council, [Statutes of the Austrian Press Council](#).

their own research in any case and use other sources than the “official ones”. One of his/her cases recently attracted high media interest and identifying details of the suspect were indeed disclosed in the media reports, e.g. the defendant is an arbitrator and his father is a lawyer. For the interviewee, this is sufficient to identify the suspect. Moreover, the media used photos of the defendant – presumably from Facebook or other social media outlets – and only a small part of the eyes/forehead was pixelated. Based on this photo, a witness came forward and testified that they saw the defendant close to the crime scene. The police then refrained from an identity parade to verify this testimony. They simply used the testimony and the witness as one of the key witnesses in the proceedings. Furthermore, the interviewee read in the media, that his/her client was arrested, but that the prosecution said that he had not yet confessed.” According to her, this wording violates the presumption of innocence as the case is still open and there is even another suspect. The interviewee will use this problematic media reporting (the disclosure of the identifying details, as well as the violation of the presumption of innocence) to bring the case to another regional court. This defence lawyer explains:

*Q: Can you think of any safeguards to ensure that the accused are not presented as guilty?*

*A: [...] The indictment says that they have committed a crime. Not in the subjunctive, but as a statement, in the indicative mood: they have committed, they have killed. So that's the end of the presumption of innocence in the indictment.*

*Q: Können Sie sich irgendwelche Sicherheitsvorkehrungen vorstellen, die sicherstellen, dass die Beschuldigten nicht als schuldig dargestellt werden?*

*A: [...] In der Anklageschrift steht, er hat begangen. Nicht im Konjunktiv, sondern in der Aussageform, im Indikativ: er hat begangen, er hat getötet. Also das ist schon das Ende der Unschuldsvermutung in der Anklageschrift.*

Another lawyer also observes many cases of infringements of official secrecy, particularly when the police are involved. Police officers indeed provide the media with the content of records during the investigation stage of criminal cases. The interviewee remembers a case in which s/he was called by a client, who received information from a media outlet that there is an expert opinion in his/her file. The interviewee then looked at the file and in fact, there was such an opinion. No one without access to the file could have had access to this information. Thus, the interviewee is convinced that a police officer disclosed it. The interviewee complained to the prosecution and the prosecution responded indifferently, explaining that they were not able to do anything about it. Complaints against police officers have practically no consequences.

Another interviewed lawyer refers to a case in which a former cross-country skiing star was caught in the act of doping and was arrested. A video of the arrest was made public (see case study 1) and since then everybody knows him. His lawyer can no longer do anything to secure his anonymity.

### c. Effects media has on presumption of innocence

Interviewees rather homogeneously link the effects of media coverage on the presumption of innocence to the quality of the media in question and to the specifics of the case. Thus, public scrutiny to the criminal justice system is perceived as important for the rule of law. This public scrutiny is neither beneficial nor problematic for the overall fairness of the proceedings, because the quality of the journalists' work differs.

#### aa. Positive effects

Media coverage may help **identifying unknown suspects** and prevent offenders from committing future crimes in case of offences involving unknown offenders. The interviewed police officer says:

*Q: Do you cooperate with the media when it comes to information about suspects or defendants?*

A: Yes. [...] These investigative measures in cooperation with the media [publication of descriptions of perpetrators and photos of suspects by the media] are of course very important for us, because in most cases you don't know who the person on the videos is. And if the picture is published, then this can already lead to a perpetrator. We had one case that was a series of robberies in [city], where one person attacked several elderly, old ladies on the street and robbed [their] jewellery. In the course of the investigation it was found that the perpetrator had apparently always been travelling together with the victims on public transport before. So, in three cases we had him on video and we did not know who he was. So, the circumstantial evidence indicated that he is the perpetrator, because he appeared on all videos, but we had no identity of him. Now we have decided together with the public prosecutor's office that we will publish the photos. And in the end, it was the case that because of the publication of the photos, colleagues in Romania - because that was a Romanian perpetrator - noticed that this person was under investigation and they were able to identify him.

Q: Arbeiten Sie mit den Medien zusammen, wenn es um Informationen über Verdächtige oder Beschuldigte geht?

A: Ja. [...] Diese Ermittlungsmaßnahmen in Zusammenarbeit mit den Medien [Veröffentlichungen von Täterbeschreibungen und Fotos von Verdächtigten durch die Medien] sind natürlich sehr wichtig für uns, weil in den meisten Fällen kennt man den ja nicht, der in den Videos drauf ist. Und wenn das Bild veröffentlicht wird, dann kann das schon zu einem Täter führen. Wir hatten einen Fall, das war in [Stadt] eine Raubüberfallsserie, wo eine Person einige betagte, alte Damen auf der Straße niedergeschlagen hat und [ihren] Schmuck geraubt hat. Im Zuge der Ermittlungen hat man feststellen können, dass der Täter offenbar immer mit den Opfern in öffentlichen Verkehrsmitteln unterwegs war vorher. Also bei drei Taten haben wir ihn auf Videos draufgehabt und wir haben noch nicht gewusst wer das ist. Also die Indizien haben darauf hingewiesen, dass er der Täter ist, weil der auf allen Videos aufgetreten ist, aber wir haben keine Identität von ihm gehabt. Jetzt haben wir mit der Staatsanwaltschaft zusammen entschieden, dass wir die Fotos veröffentlichen. Und schlussendlich war es dann so, dass aufgrund der Veröffentlichung der Fotos Kollegen in Rumänien – weil das war ein rumänischer Täter – das wahrgenommen haben, dass da ermittelt wird gegen diese Person und die haben ihn dann identifizieren können.

High quality media reporting helps clarifying the facts surrounding the case and, thereby, **preventing pre-judgements** against certain groups, e.g. based on nationality in the general population. Interviewed police officers perceive the disclosure of the suspect's nationality (also if it is Austrian) important to prevent these stereotypes. Moreover, high quality media coverage **serves the rule of law and the reputation of the criminal justice system**. Public access to trials is very important. Although trials usually take place publicly, people not related to the case rarely show up. Thus, the population would receive almost no information about trials without media coverage. Media coverage is an important means of public scrutiny of the criminal justice system. Two interviewed lawyers are in favour of live-tickers from trials, such as those provided by the media outlet Der Standard. It secures the public scrutiny of the criminal justice system and the live ticker offered serves the overall fairness of the proceedings.

#### bb. Negative effects

Negative effects are related to biased and low-quality media coverage, but not to media coverage in general. Low quality media coverage is related to false information due to poor knowledge about the criminal law and criminal, as well as to incriminating articles, whereby the authors protect themselves by mentioning the sentence "the presumption of innocence applies to all persons mentioned" at the end of the text. The effect of this sentence on the presumption of innocence is doubted by the interviewees.

Moreover, negative effects are generally related to media coverage during the investigative stage of the proceedings and not to media coverage during the main trial.

Cases involving famous persons / persons of public interest or large cases are particularly affected by the negative effects of media coverage. The reputation of the defendants involved is destroyed by such media coverage, even in case of acquittal.

Finally, negative effects of media reporting are particularly identified in courts of lay assessors (jury proceedings), whereby professional judges lead the trial and lay assessors find the judgement (*Geschworenenverfahren*). Professional judges are generally not influenced by the media coverage on criminal cases.

The findings are now explained in more detail. There are negative effects on the...

#### **...presumption of innocence:**

The presumption of innocence is particularly vulnerable in case of media coverage during the investigative proceedings, less in case of media coverage of trials. A prosecutor argues that the general population indeed has a legitimate right to follow the main trial and to being informed about the judgement, while the interest in information on the investigation procedure is not legitimate according to the interviewee and, thus, should remain with the involved parties (victim, defendant, witnesses). During the investigation proceedings, the suspicion is often not very concrete, as the investigation takes place with the purpose of clarifying the suspicion in a way that the prosecution is able to decide whether to charge the person or not. The public has no interest in accessing information about these early stages of the proceedings, as this information is not secure anyway.

The media coverage always includes the sentence: "The presumption of innocence applies." However, in practice, the media mainly report about incriminating evidence and refer to the prosecution, as well as neglect exonerative evidence, the defence lawyers' views or aspects that are still open. The media consumer is usually convinced that the prosecution is objective and has enough reason to arrest the defendant, who is in pre-trial detention. Consequently, the defendant can never fully get rid of the accusation, at least not until another offender comes up and will be convicted.

An intense media coverage during the investigation proceedings mostly takes place in large cases involving defendants, who are known by the public, or sensitive offences, such as murder or sexual offences. According to all interviewees, media coverage has the power to influence the public in such large proceedings. The way of reporting strongly depends on the individual journalists. Interviewed defence lawyers refer to the tendency that evil aspects and convictions are more interesting to the public than reading that there was nothing to it [the accusation]. Good news is simply not as interesting. An interviewed lawyer explains:

*Q: What influence does media coverage have on the presumption of innocence?*

*A: [...] And when a proceeding is dragged out like the proceeding against [ex-politician], then it manifests itself in the public perception in such a way that it is not the politician who has perhaps done nothing, but that the police and the prosecutor's office are simply too bad, too slow, too incapable of finding anything, because it has to be like that. So: the bigger, the more glamorous the case, the more worthless the presumption of innocence becomes.*

*Q: Welchen Einfluss hat die mediale Berichterstattung auf die Unschuldsvermutung?*

*A: [...] Und wenn ein Verfahren dann so in die Länge gezogen wird, wie das Verfahren gegen [Ex-Politiker], dann manifestiert sich das ja auch in der öffentlichen Wahrnehmung dann so, dass nicht der Politiker vielleicht nichts getan hat, sondern dass einfach die Polizei und die Staatsanwaltschaft zu schlecht, zu langsam, zu unfähig sind, da etwas zu finden, weil es muss ja so sein. Also: je größer, je glamouröser die Causa, desto wertloser wird die Unschuldsvermutung. [...]*



Moreover, there is still a commonly held assumption in Austria that the police do not touch someone who did nothing. Consequently, the public is more likely to presume a person guilty than innocent as soon as the media report about a case. The long duration of proceedings and the respective media coverage intensify the negative effect on the presumption of innocence: particularly in case of well-known persons (such as former politicians), the presumption of guilt is manifested in the public eye even in case of acquittal. The public then tends to doubt that the respective defendant is innocent, but rather believes that the police and the prosecution did not work well enough to prove the guilt.

#### **...reputation of the criminal justice system:**

Particularly the interviewed prosecutors point out that biased and low-quality media coverage in large cases with a long duration or involving famous persons endanger the reputation of the criminal justice system. Intense and low-quality media coverage causes intense and expressive media reception also on social media, whereby laymen discuss issues as if they were experts of the criminal justice system. People express opinions on criminal investigations or judgements in social media or online media platforms, but these opinions and claims are in conflict with the criminal law and the criminal procedure. Particularly in large cases or cases involving prominent persons or public figures, biased media reporting, which violates the presumption of innocence, leads to the expectation of a conviction within the general population. As a result, the prosecution is forced to discuss the value of pieces of evidence with the media and to undertake the evaluation of evidence publicly to protect themselves from the accusation of being biased, as made by the general population or by defence lawyers in the course of litigation PR.

Both prosecutors emphasise the negative effects of such media coverage on their work and on the reputation of the criminal justice system. An interviewed prosecutor was involved into several large cases. S/He sometimes reads online media users' comments on these cases in forums and says,

*if 10 persons comment that the defendant must be sentenced with the maximum penalty, although professionals know that the legal preconditions for the maximum penalty are not there, it causes problems in the public reception of the judgement and the criminal justice system in general.*

The interviewee does not so much blame the articles of the journalists, but the comments of laymen on social media and online media platforms. These public discourses of laymen on criminal procedures, triggered by biased media coverage, are not good for the overall procedures and the reputation of the criminal justice system.

#### **...criminal investigations:**

Media reports during the investigative stage of proceedings may impede the investigations, if too much information on the investigations and the existing evidence is disclosed. The police are already at odds with the defendants' right to access the file, as this may impede the police investigations. Public access to information on criminal investigations and evidence may even more disturb the investigation proceedings. Two interviewed judges additionally elaborate that some victims are more willing to talk with the media than to testify at the police. They observe that this tendency increased during the recent years. A case, which happened in February 2020, may serve as an example: A petrol station employee was approached by a woman and was asked for help to escape her violent companion, who was waiting outside the petrol station. The shop employee secretly called the police and managed to keep both of them present at the petrol station until the police arrived. The shop employee was interviewed and portrayed in the media as the saviour of the woman. However, the case is still in the investigation phase and the accusation of the woman against her companion has not yet been verified. Such media coverage is not only problematic for the presumption of innocence, but

also for the criminal investigations, especially if the media do not present a balanced picture of the case by talking to the law enforcement officers or other actors involved too.

### **...neutrality of lay assessors in jury trials:**

The interviewees homogeneously emphasise that the media coverage has no effects on the presumption of innocence in single judge procedures (*Einzelrichterverfahren*) and lay assessor procedures (*Schöffengerichtverfahren*). For professional judges, media reports on criminal cases do not influence them. In lay assessor procedures, there is a consultation between professional judges and lay judges to find a judgement. Professional judges may at least discuss the media coverage during these consultations and request the lay judges to ignore what they read in the media. However, when it comes to jury trials (*Geschworenengerichtverfahren*), lay assessors find their judgement without the help of professional judges. Thus, interviewees of all professional groups (except for police) are afraid that the media coverage has a negative effect. Moreover, particularly in jury trials, the media tend to report with a bias of some kind. An interviewed lawyer says that Austria has one of the most antique systems of jury trials (which is a court, consisting of lay assessors only) compared to all other EU countries and almost all other Council of Europe countries. Jury members, who are lay assessors, decide on the case but have been influenced by the public and the media for the course of months to believe that the defendant is the offender. For this interviewed lawyer, it is extremely difficult to work on cases involving courts of lay assessors, which have a high media coverage.

An interviewed defence lawyer states an example where public pressure through the media was the reason for an appeal against a first instance decision. It is a case involving a brother of a local politician. He was accused of violence and abuse against his children and acquitted in the first instance. The acquittal led to an intense media coverage and the children told their stories of violence and abuse in the media. The judgement was appealed by the Higher Court. The lawyer says:

*Q: Can you think of cases where people other than those belonging to the criminal justice system organise press conferences and provide information about ongoing investigations?*

*A: Yes, I am thinking of the doctor who was driven by his children through the media. And of course, the victims' representatives were always leading the way in informing the media about the latest developments and thus of course also exerting pressure on the court. [...] The problem in such cases is, and this is not pleasant for any criminal defence lawyer, that already in the investigation proceedings, which are not public, the media are supplied with details from the files by victims' lawyers. I must also say, however, that there are media that very actively try to approach victim lawyers in spectacular cases in order to obtain parts of the files.*

*Q: Fallen Ihnen Fälle ein wo andere als dem Strafjustizsystem zugehörige Personen Pressekonferenzen organisieren und über laufende Ermittlungen informieren?*

*A: Ja, ich denke da an den Arzt, der von seinen Kindern damals massiv durch die Medien getrieben worden ist. Und da waren natürlich die Opfervertreter immer führend damit, die Medien immer über neueste Entwicklungen zu informieren und damit natürlich auch Druck auf das Gericht auszuüben. [...] Das Problem in solchen Fällen ist, und das ist für keinen Strafverteidiger angenehm, dass bereits im Ermittlungsverfahren, welches nicht öffentlich ist, die Medien mit Details aus den Akten versorgt werden von Opferanwälten. Ich muss aber auch sagen, es gibt Medien, die ganz aktiv versuchen, an Opferanwälte in spektakulären Fällen heranzutreten um Aktenbestandteile zu bekommen.*

#### d. Differences in media coverage concerning certain groups

Some interviewees notice differences in media coverage concerning certain groups, while others do not. However, almost all interviewees believe that these differences in media reporting along categories like gender, nationality or disability have no influence on the presumption of innocence among the members of the criminal justice system. Police officers, prosecutors and judges act professionally. Moreover, the professionals are informed about the group-based characteristics of defendants (nationality, asylum seeker, disability, gender) in the file anyhow.

##### aa. Men and women

All interviewees point out that criminal cases – particularly the severer ones – are male dominated. Thus, media coverage on these cases is mainly on male defendants. Women rarely are defendants in severe cases, such as serious crimes. Media, however, rarely report on small cases. Consequently, female defendants are rarely mentioned in the media and thus, it is difficult for interviewees to identify any gender differences. An interviewed police officer states:

*Q: In your opinion, are there differences in the way male or female accused persons are reported in the media?*

*A: [Thinking] I couldn't say that now. I don't know. Women among the accused are very rare anyway, at least in larger cases where the media report on them.*

*Q: Gibt's, Ihrer Meinung nach, Unterschiede in der Art und Weise wie über männliche oder weibliche Beschuldigte berichtet wird in den Medien?*

*A: [denkt nach] könnte ich jetzt so nicht sagen. Weiß ich nicht. Frauen unter den Beschuldigten sind sowieso sehr selten, zumindest in größeren Fällen, wo die Medien darüber berichten.*

However, some interviewees identify gender differences. According to them, female defendants are presented less harmful than men in comparable offences. Media tend to find excuses for female defendants.

##### bb. Children and adults

Cases involving children as victims of adults trigger very lurid media coverage according to an interviewed prosecutor, a judge and an interviewed police officer. This is explained with the great agitation provoked by cases of child victims addressing deep-rooted feelings in the population, i.e. how can a mother / father do this to their baby?

##### cc. Nationals and non-nationals (including ethnic minorities, e.g. Roma)

The way how the nationality of a defendant is disclosed, is shaped by the political situation. In Austria, there was a change in the federal government in 2020 and now there is a new Minister of the Interior. This Minister issued a media decree, which emphasised that the nationality of the defendant must only be published if relevant for the case and in no way if it allows for conclusions about the defendant. The previous media decree requested the disclosure of the nationality in all cases of defendants. Moreover, the role that nationality, including ethnicity, plays in media coverage depends on the media outlets. Whereas some media outlets are slightly more right-wing oriented and, therefore, may report differently if the defendant is a member of a minority or an asylum seeker or a native Austrian, other media outlets with higher quality standards report more neutrally about the nationality of the defendant.

Interviewees of different professional groups observe tendencies in media coverage on crimes to emphasise the defendant's foreign nationality, while neglecting the defendant's Austrian nationality. An interviewed police officer observes this tendency in media coverage on drug offences. Whereas media reports on drug dealings become generalising when the suspect is of black skin colour, they

tend to present the Austrian native suspect as an individual who went off the legal norm just once. The interviewee believes that xenophobia, racism and stereotypes are created in this manner. An interviewed judge mentions that several knife attacks against women took place and observes the tendency in the media coverage to emphasise the ethnicity and migratory background of the defendants. A prosecutor confirms this assessment by saying that particularly asylum seekers or the ethnic origin of defendants have an effect on how some media outlets cover a case. However, the prosecution has no influence on media reporting: whenever the prosecution liaises with the media, they only report facts of the case, nonetheless the media discloses the defendant's nationality. According to this prosecutor, the media get this information mainly from victims' representatives (lawyers). Individual police officers, who are involved in the investigations on the case, may also disclose information on the defendant's nationality to the media. The prosecutor excuses these police officers by saying that they are seduced to disclose this information by journalists, who pose tricky questions.

An interviewed lawyer contradicts these assessments on the role of defendants' nationalities in media coverage. S/He observes that meanwhile, there is emphasis on the Austrian nationality of defendants and accused persons. The interviewee believes that this is a strategy of the media to downplay the offences involving asylum seeking suspects. The interviewee believes that the motive of this is to keep the average population and the general public calm and to prevent resentment against asylum seekers. The interviewed lawyer elaborates:

*Q: Are there other characteristics, apart from gender, that play a role in the media coverage of the presumption of innocence?*

*A: Yes, there are. The subject of asylum. If you read the media reports very carefully, then you can already see - this was a knife attack - where one writes: "yes, it was an Austrian who is supposed to have done this." "Austrian knives down woman" or "Austrian jurist shot woman". So, this emphasis on the fact that it was not a foreigner is indeed apparent to the attentive reader in comparison to other media reports. So there one tries consciously, in the media, so to speak, to deal with the whole subject of criminal offences committed by asylum seekers and the like, there are many of them, there is no need to beat about the bush, that's true, but there is a very conscious way of defusing this and trying to point out straight away: well, it wasn't a foreigner, so as not to enrage the public.*

*Q: Gibt es andere Merkmale, außer dem Geschlecht, die in der Medienberichterstattung zum Thema der Unschuldsvermutung eine Rolle spielen?*

*A: Ja, schon. Das Thema Asyl. Wenn man sehr aufmerksam die Medienberichte liest, dann sieht man schon – das war jetzt eine Messerattacke oder ein Messerattentat – wo man schreibt: ja, das war jetzt ein Österreicher, der das gemacht haben soll. „Österreicher hat Frau niedergestochen“ oder „Österreichischer Jurist hat Frau erschossen“ Also dieses Hervorheben, dass es kein Ausländer war, ist für den aufmerksamen Leser im Vergleich zur sonstigen Berichterstattung schon ersichtlich. Also da versucht man schon bewusst, medial sozusagen, diese ganze Thematik rund um Straftatbestände, die von Asylwerbenden und ähnlichem begangen werden, derer gibt es ja viele, da braucht man nicht herumzureden, das ist so, aber da gibt es eine ganz bewusste Richtung, das zu entschärfen und zu versuchen, gleich darauf hinzuweisen: na ja, es war kein Ausländer um die Volksseele nicht erzürnen zu lassen.*

The interviewees acknowledge that the general public is indeed influenced by such group-based differences in media reports, particularly in case of severe crimes. Thereby, judges or prosecutors could be influenced indirectly by public pressure, e.g. in case of a sexual offence accusing an asylum seeker or a group of asylum seekers. Interviewees can imagine that due to group-based media

coverage and the entailing resentment in the general public, judges may impose a more severe sentence for preventive reasons.

dd. Persons with disabilities

The interviewees have no experiences with cases involving defendants with disabilities. Thus, they cannot report on how the media coverage deals with this issue and which effects media coverage entails.

ee. Popular persons

Being a nobody for the public or being a defendant, whom everybody knows, is the most important factor influencing the quantity and intensity of media coverage according to the interviewees. The media coverage on cases involving popular defendants is more detailed, more personal, more devaluating and there is a longer period of media coverage than in cases involving “nobodies”. Thus, popular defendants are disadvantaged by the media coverage compared to persons unknown by the wider public.

In line with other group-based differences in media coverage, professional judges are not influenced by this. It is rather the opposite. The intense or biased media coverage of cases involving popular persons motivates them to conduct an even more careful evaluation of all evidence as not to become themselves subject to any accusation or media attacks. They are aware that the actors of the criminal justice system are under special observation and the media representatives only wait for an insensitive statement by them. Thus, they suffer from more pressure, but the presumption of innocence and the defendants’ rights do not.

e. Discussion of findings

The findings indicate large quality differences in the media coverage of criminal cases. Low quality media coverage is related to biased information on the case, excluding the views of the defendant or disclosing personal details on them. Moreover, it causes an intense public debate on the case and triggers laymen to comment (professional) media coverage in social media or online forums. The means restrains on social media comments or online-fora are low compared to professional media coverage. Still, the public debate involving laymen comments on investigations or criminal proceedings during the investigative proceedings make the work of the members of the criminal justice system more difficult and may even have an impact on the presumption of innocence in case of jury trials.

Generally, an intense media coverage during the investigation proceedings leads the public to expect a conviction. Low quality media coverage has a negative impact on the defendant’s presumption of innocence, on the investigative proceedings and the reputation of the criminal justice system.

Thus, public scrutiny prior to the trial can have negative effects on the overall fairness of the proceedings and the presumption of innocence. Public scrutiny during the trial is indeed beneficial to the overall fairness of the proceedings and to the presumption of innocence. The interviewees are strongly in favour that a trial is subject to public scrutiny by the media, meaning that journalists are present during the trial in order to report about it afterwards or have live-tickers about it. Media coverage during the trials secures public access to the them. Thus, it serves the rule of law and the reputation of the criminal justice system. During the investigative stage of the proceedings, media coverage is only useful for the identification of unknown offenders.

The findings also reveal group-based differences in media coverage on criminal cases, which negatively affect persons because of their nationality. Apart from this, there are no group-based differences in the media coverage. However, there are differences in the intensity of media coverage

related to the following factors: publicity of the defendant, size of the case and severity or sensitivity of the crime.

According to the media law, defendants may sue the media because of defamation or a violation of their right to privacy. However, these remedies are hardly ever pursued and generally perceived as ineffective by the interviewed lawyers. Firstly, journalists are very well briefed; therefore, they know exactly how to report as to avoid convictions according to media law. Secondly, even if the defendant wins the proceedings, media outlets are obliged to publish a correction or a counterstatement resulting in the defendant's and the case's repeated presence in the media. Moreover, compensation payments are low. The following quote of a defence lawyer shows the lack of effectiveness of these proceedings:

*Q: What remedies do defendants have if they are publicly labelled guilty by the media?*

*A: This is what I always talk my clients out of. Of course, they can use the whole repertoire of media law, which is sometimes not as tame as you might think. The compensation payments could well be higher to make it pay off, but the issue is, if you take such steps and involve the medium in a lawsuit and demand a counterstatement, then it always has the consequence that, in addition to the article that was in the newspaper, there is a reinforcement: and a lawsuit has been initiated. And then everyone knows that this is being countered. But I put the whole thing back in the newspaper and I may even have persuaded the medium to report more intensively and perhaps with greater legal protection, but I have not gained a new ally as a result.*

*Q: Welche Rechtsbehelfe haben Beschuldigte falls sie durch Medien öffentlich als schuldig bezeichnet werden?*

*A: Das ist das was ich meinen Klienten immer ausrede. Natürlich können sie das ganze medienrechtliche Repertoire verwenden, das manchmal gar nicht so zahm ist wie man glaubt. Die Entschädigungszahlungen könnten ruhig höher sein, damit es sich auszahlt, aber das Thema ist, wenn man solche Schritte ergreift und das Medium in ein Verfahren verwickelt und eine Gegendarstellung fordert, dann hat das immer zur Folge, dass neben dem Artikel, der in der Zeitung war, dann zur Verstärkung kommt: und ein Verfahren ist eingeleitet worden. Und dann wissen alle zwar, dass man dem entgegentritt. Aber ich habe das ganze wieder in der Zeitung und ich habe vielleicht sogar das Medium dazu gebracht, dass es intensiver berichtet und vielleicht mit größerer rechtlicher Absicherung aber ich habe dadurch keinen neuen Verbündeten gewonnen.*

### **C.3 The presentation of suspects and accused persons**

§ 239 Criminal Procedures Act (*Strafprozessordnung 1975, StPO*)<sup>12</sup> stipulates that, at the main hearing, the defendant is not restrained by handcuffs. However, defendants must be guarded during the main hearing. According to the legal commentary<sup>13</sup> on this provision, orders by the head of the prison not to remove the handcuffs from the (particularly dangerous) defendant are irrelevant; rather, it is up to the judge to decide on this. In the case of particularly dangerous defendants, it will in any case be necessary to ensure that the law enforcement officers presenting the accused are positioned in the courtroom in such a way that assaults or escape attempts can be prevented.

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<sup>12</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

<sup>13</sup> Danek, M., and Mann I., §239, in: Fuchs., H., and Ratz, E., *Wiener Kommentar zur Strafprozessordnung*, § 239.

The detention of people who are arrested by the police is regulated in the Detention Order (*Anhalteordnung, AnhO*).<sup>14</sup> § 26 Detention Order stipulates, inter alia, that the handcuffing of defendants is allowed for transfers, unless there are special reasons making an escape attempt unlikely.

§ 186 (1) (*Strafprozessordnung 1975, StPO*)<sup>15</sup>, inter alia, stipulates that defendants in detention pending trials are entitled to wear their own clothes. If a detained defendant does not have suitable clothing, such clothing shall be made available to him/her for hearings in court, for statements and for transfers by public transport.

Defendants in detention pending trials may be brought to the court hearing according to § 184 Criminal Procedures Act (*Strafprozessordnung 1975, StPO*).<sup>16</sup> In such cases, § 98 (3) Penitentiary Act (*Strafvollzugsgesetz, StVG*)<sup>17</sup> is applicable, which stipulates that the use of the prisoner's own clothing shall be permitted if there is no danger of escaping.

There are neither relevant cases nor legal discussions on the above provisions to be reported.

a. Measures used to present the accused and its impact on their presumption of innocence

The information provided by the interviewees on restraining measures used to present the accused is homogenous – with a varying degree of details. Defendants, who are in liberty, are never restrained; they are summoned to the trial by a registered letter of the court. Only defendants, whose place of residence is unknown or who did not show up at previous appointments with the court, are brought to the trial by uniformed police officers. However, no physical restraining measures are used to present them.

The interviewees homogeneously confirm the findings of the desk research. Accused persons, who are in pre-trial detention, are escorted from the prison to the courtroom in handcuffs by uniformed law enforcement officials. The criminal court in charge for the cases of most interviewees and the pre-trial detention facility are in the same building. Therefore, the defendants can walk directly from the prison to the court room. The criminal court is a public building. Consequently, anybody who is inside the building can see them being brought to the trial in handcuffs. Once the defendant is in the courtroom, the handcuffs are removed, as foreseen by the law. The law enforcement officers take a seat close to the defendant but not next to them. Only defendants who are considered very dangerous remain in handcuffs. Only in criminal proceedings regarding cases of high treason and anti-state connections, the imposed restraining measures are extreme. In addition to the regular accompaniment of defendants by law enforcement officers, there are also officers of the special police unit Cobra,<sup>18</sup> who are heavily armed, present during the trial in the courtroom as well as at all entrances of the court building. In these cases, the restraining measures may indeed imply guilt. Furthermore, these proceedings are usually judged by lay assessors.

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<sup>14</sup> Austria, Detention order ([Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes, Anhalteordnung - AnhO](#)), Federal Law Gazette No. 128/1999.

<sup>15</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

<sup>16</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

<sup>17</sup> Austria, Penitentiary Act ([Bundesgesetz vom 26. März 1969 über den Vollzug der Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen, Strafvollzugsgesetz - StVG](#)), Federal Law Gazette No. 144/1969.

<sup>18</sup> It is part of the Directorate for Special Units, which is directly subordinate to the General Directorate for Public Security at the Federal Ministry of the Interior.

The general assessment of danger and the restraining measures is carried out by the prison administration and is based on the behaviour of the defendants in prison and not on the committed crime. The prison administration asks the judge for these measures during the trial and the judge usually gives the respective order and documents it. With regard to this procedure, the findings of desk research are in line with the interviews.

The defendants are protected against a disclosure of their faces by media law and the right to their own picture. Still, all defendants may (or are at least not prevented to) cover their faces with whatever they want when they are brought into the courtroom. They usually use folders or their hands; a blanket is not used. Only when they testify in front of the judge, they must not cover their faces. However, in this specific situation they are positioned with their back to the audience; furthermore, no pictures are allowed as soon as the trial commences.

The prosecution is very cautious when formulating reasons for the prosecution (*Anklagebegründung*) or reasons for restraining measures, because even when phrasing them like this "this person is suspected of having...", there are language pitfalls and a suspicion might be understood as an allegation. However, despite all caution, the use of problematic expressions in the prosecutor's formulations still occur from time to time due to stress and heavy workloads. The confrontation of a defendant with a witness testimony and the request to comment is also likely to be perceived as a verbal presentation of the defendant as guilty. The interviewed prosecutor says that you can never avoid such verbal and non-verbal implications. You can only be aware of them.

There are substantial differences among the interviewees in assessing whether these restraining measures affect the presumption of innocence or not. The police officers and the prosecutors homogeneously deny any effect on the presumption of innocence. According to them, these measures do not imply guilt because they are not a punishment. Handcuffs are seen as necessary for the protection of other persons present during the trial. An interviewed prosecutor brings examples of aggressive defendants during the trial and argues that these measures are indeed required. Moreover, handcuffs prevent the flight of the defendant during the trial. The presumption of innocence still applies and the judge reaches a verdict.

Interviewed judges and defence lawyers believe that the restraining measures do not present someone as guilty but rather the deprivation of liberty. A defendant deprived of his/her liberty is more likely assumed as guilty. Moreover, the actors of the criminal justice system are aware of the preconditions for pre-trial detention. They are imposed for a reason. In cases of pre-trial detention, the suspicion is pressing, and the assumption clearly goes into the direction of conviction. The accused, who is presented from pre-trial detention, may also be acquitted (in doubt). Still the interviewees believe that being presented at the courtroom from pre-trial detention may lead to a certain prejudgement.

Interviewed prosecutors, defence lawyers and judges acknowledge that presenting an accused in handcuffs, accompanied by officers, may influence the public or people who are not used to criminal procedures like visitors or lay assessors in jury trials. Laymen are likely to think that the accused must have done something wrong, otherwise there would not be two or four accompanying law enforcement officers. Interviewees trace the presentation of guilt back to the presence of officers, not to the clothing or the handcuffs. The presence of officers, who guard the accused, is a means to present an accused as guilty. This presentation of guilt has an impact in jury proceedings, in which lay assessors reach the judgement. Thus, the presumption of the defendant's innocence may be negatively affected with regard to lay judges and jurors, but not with professional judges because they are used to seeing handcuffs. The problems of jury proceedings which challenge the presumption of innocence are discussed by interviewed prosecutors, judges and defence lawyers. A lawyer says:



*Q: Are there safeguards in place to ensure that defendants are not presented as guilty by such measures?*

*A: Handcuffs in the courtroom do not imply guilt. It is clear to everyone: this is a defendant. And handcuffs are really only put on people who are dangerous or particularly fit. That's independent of the charge or if it's a felony. I don't think that has any influence. It happens in other countries too. You can argue about whether it has an influence on lay judges but for professional judges it doesn't matter.*

*Q: Gibt es Sicherheitsvorkehrungen, die sicherstellen, dass Angeklagte durch solche Maßnahmen nicht als schuldig dargestellt werden?*

*A: Handschellen im Gerichtssaal implizieren keine Schuld. Es ist jedem klar: das ist ein Angeklagter. Und Handschellen werden ja wirklich nur bei Leuten angelegt, die gefährlich sind oder besonders fit. Das ist unabhängig von der Anklage oder wenn es sich um ein Kapitalverbrechen handelt. Ich glaube nicht, dass das einen Einfluss hat. Es kommt ja auch in anderen Ländern vor. Man kann darüber durchaus streiten, ob es einen Einfluss auf Laienrichter hat, aber für Berufsrichter ist das völlig egal.*

## b. Clothing

Interviewees homogenously say that defendants (arrested or at liberty) have a right to wear clothes of their choice during all hearings. During the pre-detention hearing, they usually wear the clothes, they wore upon apprehension. If these clothes are not in a presentable condition, they may borrow clothes from a social service which is accessible also in police custody.

To make use of **the right to wear what they want**, arrested persons depend on others providing them with clothes in prison. Persons who are resident in another country are at a slight disadvantage, because they cannot easily organise clothes and their relatives cannot bring them clothes. Further, persons with a low socio-economic background or homeless persons are disadvantaged in accessing suitable clothing. However, clothing provided by the social services is available upon request. Even if these clothes usually do not fit appropriately, they are neutral, consisting of grey trousers, a light blue shirt and a dark blue sweater. According to a prosecutor working at the (city) Criminal Court, there is no social services' clothing available at this location. Defendants, who do not have presentable clothes, need to resort to prison clothing which looks like workmen's clothes. Still, interviewees homogenously say that defendants have access to clean and tidy clothes.

According to the interviewees, defendants wear a broad variety of clothes during the main trial. No specific tendencies can be found regarding this issue. Casual clothes are worn by defendants who are not socially integrated, either because they have no relatives in the country or because they are not visited anymore. Casual clothes are also worn by defendants who want to provoke the court, e.g. a person, who was accused of murder in three cases and of attempted murder in 108 cases showed up at the trial in a white suit or a person, who was accused of property crime, wore a big golden Rolex watch during the trial. In general, however, defendants are dressed appropriately before the court; (privately paid) defence lawyers also care for a good or an authentic appearance of their clients, as this helps the lawyers to implement their defence strategy.

The **assessment on the effects of clothes** on the presumption of innocence varies between and within professional groups. No tendencies can be found, except for one: lawyers believe, that clothing is an effective way to appear more credible at court or to influence the judge. A defence lawyer elaborates:

*Q: What influence does clothing have on the presumption of innocence?*

*A: A great one. I know of a case with an elderly judge of fraudulent bankruptcy, where it was an advantage that the defendant came wearing high heels and - which one should rather avoid - lipstick and the acquittal was based on her appearance and not on the case. So, one can quite subtly underline certain topics with different things.*

*Q: Welchen Einfluss hat die Kleidung auf die Unschuldsvermutung?*

*A: Einen großen. Ich kenne da einen Fall mit einem älteren Richter von betrügerischen Krida, bei dem war von Vorteil, dass die Angeklagte durchaus mit Stöckelschuhen und – was man sonst eher vermeiden soll – Lippenstift gekommen ist und der Freispruch ist aufgrund ihres Äußeren zustande gekommen und nicht aufgrund der Sache. Also man kann durchaus subtil mit verschiedenen Sachen bestimmte Themen unterstreichen.*

The lawyers' views can be interpreted in a way that the clothing of defendants does not have too much impact on their presumption of innocence, but rather helps defence lawyers to achieve a milder sentence. Good clothing and the overall appearance of their clients is a tool used by defence lawyers to present their clients as "victims of bad circumstances" in order to achieve a minor sentence. However, the general conviction seems to be clear at that stage.

Some judges and police officers say that they expect defendants to appear well dressed at the main trial, as it is a way of paying respect to the judiciary. A judge points out that s/he is not influenced by the defendant's clothing in the matter of the case, but at least s/he gets the impression that the defendant does not entirely respect the authority of the court. However, media representatives might be influenced by unsuitable clothing and report about it. Another interviewed judge does not share this view. The interviewee does not believe that the defendant's clothing has an influence, not even if the trial is covered by the media. The interviewee states a specific example: s/he was judge in a trial on drugs. The accused appeared in a T-shirt, showing a large hemp leaf and the words "fuck police" on it. Not even this provocative outfit influenced him/her in his/her judgement, as it is the right of the accused to provoke and to wear what they want. The view that **clothing of the defendant has no influence** at all during the main trial is supported by other interviewees – police officers and prosecutors. The judge says:

*Q: What influence does the clothing worn by an accused person at trial have on the presumption of innocence?*

*A: None. I always say this to legal trainees who are in training that they should be aware of their personal prejudices. A classic example: the adidas sandals with the white socks inside. You can like them, but you don't have to like them. But if you don't like them, you have to know that yourself. We learn this during training. You have to know your own prejudices, which each of us has. Once you know them, you can also hide them accordingly. [...] Evil has no face, therefore it does not matter what the accused looks like. It's about the crime.*

*Q: Welchen Einfluss hat die Kleidung, die ein Beschuldigter bei der Verhandlung trägt, auf die Unschuldsvermutung?*

*A: Gar keinen. Ich sage das auch immer zu den Rechtspraktikanten, die in der Ausbildung sind, dass sie sich ihre persönlichen Vorurteile bewusst machen sollen. Ein klassisches Beispiel: die Adiletten mit den weißen Socken drinnen. Die kann man mögen, muss man aber nicht mögen. Aber wenn man das nicht mag, dann muss man das selbst wissen. Wir lernen das bei der Ausbildung. Man muss seine eigenen Vorurteile, die jeder von uns hat, die muss man kennen. Sobald man sie kennt, kann man sie auch*

*entsprechend ausblenden. [...] Das Böse hat kein Gesicht, deshalb ist es auch egal wie der Beschuldigte aussieht. Es geht um die Tat.*

Others believe that clothing has an indirect influence in combination with the behaviour of the defendant. If defendants wear clothes they would normally never wear, they do not appear authentic and they do not appear credible during the trial. Thus, an interviewed lawyer is not in favour of dressing all defendants in a suit and a tie; s/he recommends his/her clients to wear clothes in which they feel comfortable. Another lawyer has a different opinion. S/He would not recommend his/her client, who is a construction worker, to wear their work attire. S/He could not represent such a client and achieve a milder sentence for them. According to an interviewed prosecutor, the respectful behaviour of the defendant plays a bigger role for their credibility than their clothing.

Generally, the interviewees are convinced that the members of the criminal justice system (lay assessors included), who judge or are in charge of procedural decisions, are not influenced *in their judgement* by the defendant's clothing.

#### c. Presentation of vulnerable groups

The majority of interviewees are **not aware of any special safeguards** available for vulnerable groups. The interviewed police officers and prosecutors in particular do not see any need for such safeguards – not even for invulnerable groups. To them, a defendant does not appear guilty when brought in in handcuffs.

Interviewed lawyers and judges mention such safeguards for vulnerable groups upon request. Young defendants have the possibility to be supported by an additional actor, usually the probation officer. This probation officer is already available during the investigation stage of the proceedings and accompanies the defendant to the proceedings. There is a different criminal law and a different criminal procedure law applicable to adult defendants under the age of 21.

There is the possibility to **exclude the public** from the trial in case of young defendants or in case of being accused of sexual offences. This measure is not applicable for defendants with disabilities or defendants who are migrants. However, according to a prosecutor, exclusion from the public must be cautiously balanced, particularly in the case of jury courts. Jury courts involving lay assessors in combination with the exclusion of the public are perceived as problematic for the rule of law. The lay assessors in jury courts do not have to provide the reasons for their judgement.

Defendants with mental disabilities are **assessed by a court expert**, whether they can stand the trial. If this is the case, they are accompanied by their adult representative, who is usually a lawyer too. Thus, they have two lawyers.

**Interpreters** are available to migrants. Generally, the actors of the criminal justice system are eager to have interpreters for migrants to not endanger the proceedings, because if a defendant did not understand what was going on during the proceedings, they have to start again. In case of persons with mild intellectual disabilities, the defendant will be interrogated in a "child-friendly" manner, i.e. using easy language.

#### d. Reactions to presenting accused as being guilty

According to the Penitentiary Act (*Strafvollzugsgesetz*), there are remedies or complaint mechanisms in case the defendants, who are deprived of liberty, are presented as being guilty. The Criminal Procedures Act occasionally refers to provision of the Penitentiary Act and clarifies that these provisions apply analogously for defendants in pre-trial detention. E.g., §184 Criminal Procedures Act

stipulates that the provisions of §§ 97 and 98 Penitentiary Act apply analogously in respect to hearings or transfers of defendants in pre-trial detention. The trial court decides whether the imposed restraining measures were justified or not. In case the defendant's fundamental rights were violated, they are entitled to compensation. According to an interviewed judge, defendants can always raise complaints in all stages of the proceedings. Further, an interviewed prosecutor confirms that this remedy is available independently of the stage of the proceedings. Defendants may raise the issue of remedy (or complain about these measures) directly to the court in the court room. Consequently, the court will have to decide in the framework of the session police (*Sitzungspolizei*) if these measures are justified (and kept) or not (and removed). The interviewed lawyer contradicts this and states that these remedies cannot be used during the trial. These are issues of administrative law and the provincial administrative courts (*Landesverwaltungsgerichte*) are in charge of them. According to the experience of two defence lawyers, these mechanisms are never used because usually the measures (handcuffs) are justified. Moreover, according to the interviewee's experience, in the case of media presence the judges take care that photos are taken appropriately.

In case of vulnerable defendants (young defendants, defendants with disabilities, defendants, who are accused of a sexual offence), the public can be excluded according to paragraph 166 Criminal Procedure Code. If the needs of vulnerable defendants are neglected by the court, the trial is nullified.

#### e. Discussion of findings

The prison administration decides on restraining measures for defendants who are in pre-trial detention. The decision is made based on a danger assessment relating to the behaviour of the defendant and not to the offence they are accused of. The exception are severe offences or offences related to high treason or denial of state (i.e. jihadism) in which the security measures during the trial are high.

Usually, the defendants in pre-trial detention are presented by law enforcement officers and in handcuffs. As soon as the trial starts, the handcuffs are removed. The defendants may cover their faces and media law protects them from journalists, who take photos from them. Identifying photos must not be disclosed.

The defendants have a right to wear what they want during the trials in all stages of the proceedings; however, the arrested defendants depend on persons who bring them clothing to prison. Foreign nationals and persons with a low social background are disadvantaged, as they are less likely to have relatives who can bring them clothes. However, even these persons may resort to clothing from social services, which are available for defendants in pre-trial detention and for those in police custody. In addition, defence lawyers take care that the defendants are dressed in suitable clothing during the main trial.

The views of the interviewees vary with regard to the assessment of the effects of restraining measures and clothes on the presumption of innocence.

The police officers and prosecutors homogeneously deny that handcuffs and law enforcement officers imply guilt. For them, these are necessary protection measures, which secure that the defendant will not flee and serve the security of other persons present during the trial, especially the prosecutors and the witnesses. The police officers and the prosecutors emphasise that these measures are not in place to expose or punish the defendant, but to secure a smooth course of action during the trial. At the same time, the police officers point out that the defendant's appropriate clothing is sign of respect for the court and not of securing the presumption of innocence. Further, the judges are also not influenced by these measures. They point out that they are professionals and used to seeing restrained defendants. Furthermore, they state that they are used to all kinds of defendant's clothing; thus, they are also not influenced by this. However, according to judges, lay assessors in jury proceedings may become influenced by this.

The interviewed lawyers also tend to deny that handcuffs themselves imply guilt. It is rather the fact of the pre-trial detention or the presence of accompanying law enforcement officers, that implies guilt – at least for lay assessors. Also, the defence lawyers highlight the role of the defendant's clothing to support their defence strategy. They state that according to their experience judges are indeed influenced by the defendant's clothing.

The interviewees' awareness on safeguards is low in relation to both, vulnerable and invulnerable defendants. The exclusion of the public in cases of young defendants, defendants with disabilities or sexual offences is mentioned as well as. Moreover, the defendant's protection according to media law. Other than that, not a lot of significant information is provided on safeguards to prevent the presentation of accused persons as guilty during the trial. Consequently, there is only few information on remedies for defendants in case they are presented as guilty. Even the interviewed defence lawyers lack knowledge in this regard. Further, they do not perceive the "normal restraining measures" (handcuffs, law enforcement officers) as implying guilt.

#### **C.4 Burden of proof**

There is no rule on the burden of proof formally anchored in the Criminal Procedure Act. The criminal police, the prosecution and the court are obliged by § 3 Criminal Procedure Act to investigate the truth objectively.<sup>19</sup> There are no relevant cases, nor relevant legal discussions on § 3 Criminal Procedure Act to be reported. In that respect, the burden of proof is closely linked to the obligation to conduct investigations in a spirit of objectivity.

One prosecutor and one police officer have a rather formal-legal understanding of the prosecution's burden of proof. Correspondingly, they say that the burden of proof is not placed on the prosecution. It is true that the defendants do not need to prove their innocence. However, the prosecution is also not assigned with the burden of proving a person's guilt. The court decides and justifies a person's guilt or innocence by evaluating the evidence. The principle in dubio pro reo (in doubt for the accused) does not mean that the court always has to decide in favour of the defendant if there are more options to evaluate the evidence / proof. There is a free rule of proof and, thus, the principle in doubt for the accused is not related to the evidence. The principle in doubt for the accused is only related to the judges' decisions and it only applies if the court is not sure in its decision.

All other interviewees show a more practical understanding of the subject matter. They say that the burden of proof is on the prosecution and there is no exception to that. In a case where there is not enough evidence to prove the defendant's guilt, the principle in doubt for the accused applies and the judge must acquit the defendant. However, the judge is free in the evaluation of evidence.

With regard to concrete examples of defendants caught with illegal or stolen products also the police officers say that defendants need a credible explanation on how they came to these products, otherwise they are presumed guilty. This is decided on a case by case basis; there are no standards. If the defendant can provide a credible explanation, it will be taken seriously and indeed investigated.

Even if defendants are caught in a problematic situation (with drugs, illegal goods, stolen products) and insist on not knowing how these products came into their possession or make use of their right to remain silent, it is placed on the prosecution to prove the guilt. Finding the defendant with the goods will not be enough for a conviction, as the criminal act itself (smuggling) needs to be proven by the prosecution. A police officer states that s/he always takes different options into consideration:

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<sup>19</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

*Q: If someone is found with smuggled goods, is it possible that they have to prove that they are not smuggling goods?*

*A: I always think to myself, even if all the incriminating evidence is there, I always have to question it. For example, if it is in a car, I always have to ask: did they know that they now have it in their car, is it a rental car? Was it built in somewhere? Did they have a passenger who had it in their pocket and didn't tell the driver? There is always something - even if you say: the fact of the matter is like this, there is always something that is completely different. Just because it looks black doesn't mean it's black.*

*Q: Wenn jemand mit geschmuggelter Ware angetroffen wird, kann es sein, dass der beweisen muss, dass er nicht schmuggelt?*

*A: Ich denke mir immer, selbst wenn alles dafürspricht, ich muss immer hinterfragen. Wenn das z. B. in einem Auto ist, ich muss immer hinterfragen: hat der das gewusst, dass er das jetzt im Auto hat, ist es ein Mietauto? Ist das irgendwo verbaut gewesen? Hatte er einen Beifahrer, der das in seiner Tasche hatte und dem Fahrer nichts gesagt hat? Es gibt immer etwas – auch wenn man sagt: die Sache ist so, es gibt immer irgendwas, das ganz anders ist. Nur weil es schwarz aussieht, heißt es nicht, dass es schwarz ist.*

It is a quite different situation if already the possession of goods constitutes a criminal act as it is the case with drugs. Nevertheless, if only the import of smuggled goods constitutes a criminal act and not the possession, the presumption of innocence applies, because the defendant could have for example received the goods from someone else. In this case, the prosecution has to prove that the defendant was responsible for the import of the goods. The judges confirm this assessment.

#### A. Exceptions to the burden of proof

When it comes to exceptions to the burden of proof there are large differences in the assessments between the lawyers on the one hand and the judges, prosecutors and police officers on the other hand. The lawyers say that in practice, every case is an exception to the prosecution's burden of proof, while all other professionals say, there is no exception to this rule.

The lawyers observe that the prosecution's investigations are directed towards identifying criminal offences and conviction. Thus, they tend to be biased towards incriminating evidence, while it is up to the defence lawyer to collect evidence for the defendant's innocence, which is practically towards proving the defendant's innocence. A lawyer explains the tendency as follows:

*Q: The project assumes that the burden of proof lies with the public prosecutor's office. Do you know of any exceptions to this?*

*A: [...] On the whole, however, it is rather prosecution-heavy. In other words, "I [as a prosecutor] am primarily looking for criminal offences and incriminating as opposed to exonerating", which is, unfortunately, the practice I have been living. And only in court, sometimes even before that, is it possible for the defence lawyer to try to obtain exculpatory evidence by means of applications for evidence. But of themselves they [prosecution] are not particularly enthusiastic about collecting exculpatory material.*

*Q: Das Projekt geht davon aus, dass die Beweislast bei der Staatsanwaltschaft liegt. Kennen Sie irgendwelche Ausnahmen davon?*

*A: [...] Im Großen und Ganzen ist es aber eher verfolgungslastig. Das heißt, ich suche primär Straftatbestände und belastendes als entlastendes, das ist leider Gottes die gelebte Praxis. Und erst bei Gericht, teilweise schon davor, besteht die Möglichkeit durch Beweisanträge seitens des Verteidigers, zu versuchen, entlastende Beweise beizuschaffen. Aber von selber sind sie nicht besonders begeistert dafür, Entlastungsmaterial zu sammeln.*

Lawyers acknowledge that there are indeed exceptions among police officers and prosecutors. Some officers investigate in an objective manner and consider or even investigate along exculpatory evidence too. Still, they observe a general tendency of the prosecution towards incriminating evidence when they study the record or read the indictment. Moreover, defence lawyers' requests for exculpatory evidence are not likely to be granted. An interviewed lawyer views this approach from a procedural perspective. The prosecutor must not file charges in case s/he does not presume the defendant's guilt. The prosecutor must drop the charges in case an acquittal is more likely than a conviction. According to this lawyer, it is not only in the interest but also the duty of the defendant to provide evidence against the presumed guilt – simply because the prosecutor cannot always access all the evidence. For the interviewee, it is a regular and acceptable procedure: two lawyers (one represents the state, the other one represents the defendant) are in a contest with each other and it is for the judge to decide on the winner.

Only one lawyer has a different opinion. In his/her view, the burden of proving a person's guilt is always placed on the prosecution. Even if a defendant is caught in the act, the prosecution needs to prove the guilt before the court. S/He rather traces the problem back to the fact that there is no prohibition of the use of evidence against the defendant. Even if the police find incriminating evidence in the course of an unlawful act and even if the unlawfulness of this act is confirmed by the higher court, the incriminating evidence may still be used against the defendant. Thus, even if the burden of proof is on the prosecution, they may gather and use incriminating evidence by means of unlawful acts.

#### a. Confession

The interviewed police officers downplay the relevance of a confession for their further proceedings with the case. A confession is indeed an incriminating part of the evidence, but it still needs to be supported with material evidence. The police try to support all testimonies of persons (witnesses, victims) with material evidence (e.g. traces) and even more so the testimony of defendants, who are allowed by the law to lie. A confession does not lead to the immediate presumption of guilt; the police may also assume that the defendant does not tell the truth. They know from experience, that defendants confess to protect others or because they are put under pressure. A police officer explains:

*Q: If a person confesses their guilt, which impact does it have on the proceedings and on your work?*

*A: When someone says: I don't care, I did it. I always ask: Why? Because maybe they were intimidated by someone else or they had a principal and they believe something worse will happen if they don't confess to the crime or they are afraid of a principal. So, we try to intervene very gently and scrutinize: why do they confess now?*

*Q: Wenn jemand seine Schuld gesteht, welchen Einfluss hat das auf das Verfahren und auf Ihre Arbeit?*

*A: Wenn jemand sagt: mir ist alles wurscht, ich war es. Dann frage ich immer nach: Warum? Weil vielleicht wurde der eingeschüchtert von jemand anders oder er hatte einen Auftraggeber und er denkt sich, dass etwas schlimmeres passiert, wenn er die Tat nicht gesteht oder er hat Angst vor einem*

*Auftraggeber. Da versuchen wir dann schon sehr sanft, da einzuwirken und zu hinterfragen: warum gesteht der jetzt?*

For the police, the confession is a part of the evidence and documented in the police record which is being forwarded to the prosecution. The confession has no effect on the way the police write their reports. The person is still only suspected of having committed the offence and the presumption of innocence still applies.

The interviewed prosecutors have a different point of view. According to them, a confession is a huge challenge for keeping up the presumption of innocence. Particularly if the confession is in line with the other evidence and the general outcome of the investigation, a person who confesses might be presumed as guilty. In such cases, the prosecution will not insist on the presumption of innocence. Only if the confession is doubtful or not credible or if another possible perpetrator is identified, the prosecution will call the confession into question. However, the prosecutors say, that only rarely persons protect someone else. An interviewed prosecutor states:

*Q: If someone confesses, how does this affect the presumption of innocence?*

*A: Well, if they confess, then you probably won't insist on the presumption of innocence, that would be very absurd. But there are certainly people - it's not only on television, it's real - who make a confession and you think to yourself: well, I don't know whether that's really the true confession, because there are always confessors who want to use their confession to cover for someone else. [...] Because if this is a completely insane confession, then nobody will say: the presumption of innocence no longer applies. But I would say that in over 90% of the cases the confession is true.*

*Q: Wenn jemand gesteht, wie wirkt sich das auf die Unschuldsvermutung aus?*

*A: Na ja, wenn der das gesteht, dann wird man wahrscheinlich nicht auf der Unschuldsvermutung herumreiten, also das wäre schon sehr widersinnig. Aber es gibt sicher Leute – das gibt es nicht nur im Fernsehen, das gibt es wirklich – die ein Geständnis ablegen und du denkst dir: ja, ich weiß nicht ob das jetzt so wirklich ganz das wahre Geständnis ist, weil es ja immer wieder Geständige gibt, die durch ihr Geständnis jemand anders decken wollen. [...] Weil wenn das ein komplett wahnsinniges Geständnis ist, dann wird keiner sagen: die Unschuldsvermutung gilt jetzt nicht mehr. Aber ich würde sagen bei über 90 % der Fälle stimmt das Geständnis schon.*

Two interviewed lawyers feel that the presumption of innocence is in conflict with a confession. These two defence lawyers have an obviously pessimistic view on the right to be presumed innocent in case of the defendant's confession. They believe that the presumption of innocence only applies to those who deny having committed a crime, while those who confess have no right to the presumption of innocence anymore. One of these defence lawyers says:

*Q: If a person confesses, how does this affect the procedure and especially the presumption of innocence?*

*A: There is no presumption of innocence anymore. Unless it would emerge in the proceedings that this is an absolute confession of protection. But even then, it can only be assessed in the context of the free assessment of evidence under guilt. Because if an accused confesses guilt, it is very difficult for the judge to say that they are not convinced of the guilt. [...] The presumption of innocence applies only to those who deny having committed a crime.*



*Q: Wenn eine Person gesteht, wie wirkt sich das dann auf das Verfahren aus und insbesondere auf die Unschuldsvermutung?*

*A: Unschuldsvermutung gibt es dann keine mehr. Es sei denn, es käme im Verfahren heraus, dass das ein absolutes Schutzgeständnis ist. Aber selbst dann kann man es nur im Rahmen der freien Beweiswürdigung unter Schuld würdigen. Weil wenn ein Beschuldigter die Schuld gesteht, tut sich der Richter prozessordnungskonform schon sehr schwer zu sagen, dass er von der Schuld nicht überzeugt ist. [...] Die Unschuldsvermutung gilt ja nur für diejenigen, die leugnen eine Straftat begangen zu haben.*

The other one explains that his/her reputation would suffer for years in the future if s/he applied for acquittal in case of a confession. Further, according to the criminal procedure code, it is difficult for the judge to doubt the guilt in case of a confession. Even a confession to protect somebody else is evaluated in the framework of presumed guilt.

The two other lawyers perceive this issue differently. To them, a confession is not necessarily in conflict with the presumption of innocence. Similarly, police officers state that a confession has to be assessed and scrutinised as any other evidence. Moreover, a confession can be withdrawn by the defendant in every subsequent interrogation. One defence lawyer says:

*Q: How does a confession affect the presumption of innocence?*

*A: Well, basically every confession has to be examined. That is, just because someone confesses doesn't automatically mean prosecution, conviction, thanks, good bye. But it should at least be checked if the information is correct. There are already cases in which people confess to something and then revoke. It's up to the investigating officers to check. If they don't do it and the accused revokes their confession, then this can lead to a breakdown in the investigation and lead to an acquittal, because the revocation of a confession is permissible. So, you have to explain in court why you confessed, but if there is no other evidence in court, the accused will be acquitted.*

*Q: Wie wirkt sich ein Geständnis auf die Unschuldsvermutung aus?*

*A: Na grundsätzlich ist jedes Geständnis zu prüfen. Das heißt, nur weil einer gesteht, heißt das nicht automatisch: Anklage, Verurteilung, Danke, Wiederschauen. Sondern es sollte zumindest nachgeprüft werden, ob die Angaben richtig sind. Also es gibt schon Fälle, wo Leute etwas gestehen, die das dann widerrufen. Da hängt es natürlich von den Ermittlungsbeamten ab, das zu überprüfen. Wenn sie es nicht tun und der Beschuldigte widerruft sein Geständnis, dann kann das dazu führen, dass das als Ermittlungspanne zu einem Freispruch führt, denn der Widerruf eines Geständnisses ist zulässig. Da muss man halt erklären vor Gericht warum man das gestanden hat, aber wenn es sonst vor Gericht keinen Beweis gibt, wird der Beschuldigte freizusprechen sein.*

The other interviewed lawyer acknowledges that it is very difficult for a defendant to withdraw a confession at a later stage of the procedure. Nevertheless, s/he also thinks that a confession is not necessarily an exception to the prosecution's burden of proof.

The interviewed judges homogenously agree that a confession shows that the defendant cooperates in clarifying the facts and, thus, it makes their work easier. Therefore, the confession is a mitigating

factor for the sentence in case of a conviction. Thus, also judges perceive the confession as being in conflict with the presumption of innocence, except very untrustworthy confessions.

### **Attitude towards confession**

The police officers have either an indifferent attitude towards a confession – they inform the defendant that they do not care whether the defendant confesses or remains silent or they inform the defendant that a confession is a mitigating factor for the severity of the sentence and, thus, the defendants may benefit from it.

A confession makes the prosecutor's work easier. They also acknowledge this during the interviews. One of the prosecutors considers it as a defence strategy if the defendant remains silent until the prosecutor's indictment and waits for what the prosecution finds out. They confess at a very late stage of the proceedings and only when the evidence is severe and speaks against the defendant. According to her, the prosecution dislikes this strategy as it entails a lot of investigative work for them. Nonetheless, they must deal with it. Moreover, a statement provides defendants with a possibility to express their views on the accusation.

The judges and two defence lawyers explain that a confession is one of the most important mitigating factors in Austrian criminal proceedings. A confession reduces the duration of the proceedings and the intensity of investigations. In case the defendant has no criminal record and the crime is not too severe, a diversion instead of a conviction is possible. In other cases, a confession reduces the sentence. Further, two defence lawyers acknowledge that a confession makes their work easier, meaning that it affects the conduct of the proceedings in a positive way. Lawyers may use the confession to reach a less severe sentence. They can argue that the defendant actively cooperated in the clarification of the facts and the case. Moreover, they can present a defendant as a victim of the circumstances and further encourage a milder sentence. The two other defence lawyers approach the confession differently. They are more critical. According to them, a confession should only be based on access to the body of incriminating evidence. They apply the principle that the defendant's silence leads to acquittal if not enough incriminating evidence is available.

#### **b. Discussion of findings**

The findings indicate that a confession is indeed a practical exception from the prosecution's burden of proof. Particularly in case the confession is credible and in line with the other evidence. Furthermore, a confession is also a mitigating factor for the severity of a sentence in case of a conviction. The confession facilitates the proceedings as well as reduces the investigative work for the prosecution and the evaluating work for the judges. Even two out of four defence lawyers acknowledge that a confession reduces their work and offers them the possibility to adopt a defence strategy of presenting their clients well at court during the trial. They can present a cooperative and repentant defendant (thereby arguing with the confession), who was a victim of the circumstances (thereby arguing in the context of the crime and the motives of the defendant), and achieve a mild sentence for their clients. An interviewed lawyer illustrates this using the example of one of his/her clients – a young defendant, who confessed:

*For me, as a defence lawyer, it is also about being able to represent my client. In criminal proceedings all the more, I am the salesman of my client. Because even if they have confessed to the offence, it is still possible for me to convince the judge to such an extent that lower penalties are imposed. The personal impression of the judge also plays a role here. [...] I was able to represent a client as a young gentleman who had just become a victim of the adverse circumstances, that was a jury trial and there were youth jurors, the defendant was just 18 years old. The judge consulted with these jurors and then*

*said, ok, I would have given him two years unconditionally, but you pulled the jurors onto your side and that is why it is 1.5 years and only one of them is unconditional.*

*Für mich als Verfahrenshilfeverteidiger geht es auch darum, dass ich meinen Mandanten repräsentieren kann. Im Strafverfahren umso mehr bin ich auch Verkäufer meines Mandanten. Weil selbst wenn der das Delikt zugegeben hat, ist es mir auf Plädoyer Ebene immer noch möglich, selbst bei der Schuld noch so weit zu überzeugen, dass hier geringere Strafen verhängt werden. Da spielt auch der persönliche Eindruck des Richters eine Rolle. [...] Man konnte ich einen Klienten repräsentieren als jungen Herren, der halt gerade Opfer der widrigen Umstände geworden ist, das war ein Schöffverfahren und da waren Jugendschöffen, der war gerade 18 Jahre alt. Da hat sich die Richterin beraten mit diesen Jugendschöffen und hat dann gesagt, ok ich hätte ihm zwei Jahre unbedingt gegeben, aber Sie haben die Schöffen auf Ihre Seite gezogen und deswegen ist es 1,5 Jahre und davon nur eines unbedingt.*

Even if the repentant confession (and accepting the responsibility for the wrong done) itself would already be a mitigating factor for the severity of the sentencing, the fact that a defendant is not inherently evil but a victim of bad childhood etc. might additionally reduce the sentence.

The remaining two defence lawyers relate the confession to the body of incriminating evidence. They do not recommend their clients to confess if there is not too much incriminating evidence available. They appear to work more towards an acquittal. These two lawyers also say that a confession is difficult to withdraw.

The following safeguards to secure a conscious and informed confession can be summarised from the findings of the interviews:

- Informing the defendant about their right to remain silent in a clearly understandable manner
- Probing and assessing the confession in light with the other evidence available
- Legal advice prior to the police interrogation
- The presence of a defence lawyer during the police interrogation

The following safeguards are in place for vulnerable defendants:

- Interpretation services for migrants
- The presence of an adult representative for defendants with mental disabilities

The following challenges were reported in relation to vulnerable defendants. A practical challenge is related to the recognition of the need for such safeguards in time, as usually defendants do not express their need for safeguards. At times, persons with mental disabilities may broadly understand what is going on, but they cannot really assess what it means for them. E.g. a defendant has poor hearing but does not tell anyone. The same is true for other sensorial impairments or drunken persons at the police. Moreover, there are mental illnesses which are difficult to detect, such as borderline personality disorder. If authorities are under the impression that somebody suffers from disabilities or mental troubles, a psychiatric expert is consulted.

There are no special measures for persons with learning disabilities, who do not have an adult representative at the police. The right to the presence of parents in case of young defendants during the interrogation is a safeguard. However, they rarely make use of it.

### **C.5 The right to remain silent and not to incriminate oneself**

The right to remain silent and not to incriminate oneself is enshrined in § 7 (2) Criminal Procedures Act (Strafprozessordnung 1975, StPO), which stipulates that defendants may not be forced to incriminate themselves. They shall at all times be free to testify or to refuse to testify. They may not be coerced or induced to make statements by coercive means, threats, promises or pretences according to this provision. § 49 Criminal Procedures Act further enumerates the rights of defendants

and stipulates, inter alia, that defendants have the right to make a statement or not to testify. According to § 164 (1) Criminal Procedures Act, the defendant has to be informed about this right before the hearing. There are no relevant cases, nor recent legal discussions on § 7 (2) or § 49 Criminal Procedure Act to be reported.

a. The right to remain silent in practice

The interviewed police officers homogenously say that prior to the police interrogation, the defendants are informed in detail about their rights, including the right to remain silent. They are informed orally and there is a standardised computer-assisted procedure available for this. The rights are read out aloud in easy language and explained to the defendants. With regard to this, the police officers say:

*Q: How do you inform the accused about their right to remain silent?*

*A: And I then say: Mr. XY, you don't have to talk to me at all. You do not have to talk to the court either. I mean, it would be reasonable to talk to your defence counsel about it, but he cannot tell anyone what you have discussed with him anyway. But he does me no harm personally when he says: I am not talking to you [but] I take note: I am accused of this, but I have nothing to say about it. That is his right.*

*Q: Wie informieren Sie den Beschuldigten über sein Recht zu schweigen?*

*A: Und ich sage dann: Herr XY, Sie müssen mit mir gar nichts reden. Sie müssen auch mit dem Gericht nicht reden. Ich meine, vernünftig wäre es, mit Ihrem Verteidiger darüber zu reden, aber der darf es eh keinem sagen, was Sie mit ihm besprochen haben. Aber mir tut er jetzt persönlich keinen Schaden, wenn er sagt: ich rede mit Euch nicht, ich nehme zur Kenntnis: das wird mir zur Last gelegt, aber ich sage nichts dazu. Das ist sein Recht.*

During this process of informing about the rights, the defendants may pose questions or request an explanation at any time. According to an interviewed police officer, the right to remain silent is the most important safeguard for the defendant to ensure that a confession is only made by his/her own informed choice. This police officer state:

*Q: How do you implement the right to refuse to testify in your work?*

*A: They [the accused] are informed about all their rights and this is recorded in the protocol. Exactly, they could say anything at all, the accused could also say something, because they have no duty to tell the truth, like for example a witness or a victim have. The accused can actually say everything [they like] and that is actually the greatest protection for them. And also, the greatest evidentiary value as far as a confession is concerned, because they wouldn't have to make a confession [in the first place]. It's up to the accused. But nevertheless, one tries to substantiate this [with factual evidence], because as I said, a confession doesn't always have to be right. It does happen. We have also had cases in which someone confesses because they want to protect their best friend.*

*Q: Wie setzen Sie in Ihrer Arbeit das Recht auf Aussageverweigerung um?*

*A: Er wird über alle seine Rechte belehrt und das wird im Protokoll aufgenommen. [das schließt das Recht auf Aussageverweigerung mit ein] Genau, er kann überhaupt nichts sagen, der Beschuldigte kann auch irgendwas sagen, der hat ja nicht die Wahrheitspflicht, wie z. B. ein Zeuge oder ein Opfer. Der Beschuldigte kann eigentlich alles sagen und das ist eigentlich für den der größte Schutz. Und auch die größte Beweiskraft, was ein Geständnis angeht, weil das müsste er ja nicht ablegen. Das ist ja wie der oder die Beschuldigte will. Aber trotzdem versucht man halt das noch zu untermauern [mit*

*Sachbeweisen], weil wie gesagt, ein Geständnis nicht immer richtig sein muss. Das kommt schon vor. Wir haben auch Fälle gehabt, wo jemand gesteht, weil er seinen besten Freund decken will.*

According to police officers drawing from experience, some defendants have their lawyers present during the police interrogation, others do not. There is no observable tendency when it comes to the recommendations of defence lawyers (if they are present): some defence lawyers immediately say that they will not say anything without access to the file, while others recommend their clients to explain what has happened. All interviewed lawyers contradict this assessment and state that they are almost never present during police interrogations. They only enter the case at a later procedural stage. One of these lawyers says that the presence of the defence lawyers is in fact not part of the defendant's rights; it is rather a matter of the individual police officer:

*Q: How are defendants informed about their right to refuse to testify?*

*A: Theoretically [they are informed] by the police and it is also written in the file. In practice, there is significant evidence that this does not take place. Because it is not understandable that when certain officers of a certain police department, conduct interrogations, a lawyer has never sat with the defendants and for others it is very well. Thus, certain police officers control defendants and indirectly influence and discourage them to make use of their right to a defence lawyer. Because it is explained to them: firstly, the lawyer costs money and if you call the lawyer, that takes time and you have nothing to gain from it, because they are not allowed to say anything anyway. So, it is smarter if you talk to us because we will tell the judge that you have been very cooperative.*

*Q: Wie werden Beschuldigte über ihr Recht die Aussage zu verweigern informiert?*

*A: Theoretisch durch die Polizei und das steht auch so im Akt. In der Praxis erweist es sich als belegbar, weil es nicht einsichtig ist, dass bei bestimmten Beamten einer bestimmten Kriminalabteilung noch nie ein Anwalt dabeigesessen ist und bei anderen sehr wohl. Da wird durch indirekte Einflussnahme gesteuert, dass die Beschuldigten entmutigt werden einen Verteidiger beizuziehen oder ein Beschuldigtenrecht in Anspruch zu nehmen, weil ihnen dargelegt wird: erstens kostet der Anwalt Geld, wenn du den Anwalt anrufst, das dauert und du hast nichts davon, weil der eh nichts sagen darf. Daher ist es gescheiter, wenn du mit uns redest, denn wir werden dann dem Richter sagen, dass du sehr kooperativ warst.*

The interviewed prosecutors similarly to the police officers say that they inform the defendant about their right to remain silent and do not further probe in case defendants want to make use of this right. One of these two prosecutors states:

*Q: As a prosecutor, how do you implement the right to refuse to testify?*

*A: I ask them whether they want to say something or not - that's it. At the beginning of every interrogation I say: You know, you don't have to talk to me, you don't have to answer my questions if you don't want to and the second thing is, you can also demand to talk to a defence lawyer first and if you can't pay him, then you can make a request for procedural assistance. That is the procedure and it is also written in all the minutes.*

*Q: Wie setzen Sie als Staatsanwältin das Recht die Aussage zu verweigern um?*

*A: Ich frage ihn ob er was sagen möchte oder nicht – das ist es. Zu Beginn jeder Vernehmung sage ich: Sie wissen, Sie müssen nicht mit mir reden, Sie müssen meine Fragen nicht beantworten, wenn Sie nicht wollen und das zweite ist, Sie können auch verlangen, vorher mit einem Verteidiger zu sprechen und wenn Sie den nicht zahlen können, dann können Sie einen Verfahrenshilfeantrag stellen. Das ist der Vorsatz und das steht auch in allen Protokollen drinnen.*

The judges emphasise that informing the defendants about their right to remain silent is the police's task prior to the police interrogation.

The interviewed lawyers deal differently with the right to remain silent. Two lawyers inform the defendant about this right prior to the police interrogation and recommend them to make use of it as long as there is no incriminating evidence according to the police file. Furthermore, these lawyers aim to be present during the police interrogation of their clients to ensure the correct application of the right to remain silent. They observe that the police discourage defendants to make use of their right to remain silent and to call a lawyer. An interviewed lawyer elaborates:

*Q: How are defendants informed about their right to refuse to testify?*

*A: Theoretically by the police and it is also written in the act. In practice it proves to be provable, because it is not understandable that for certain officials of a certain criminal department a lawyer has never sat with them and for others it is very well. It is controlled by indirect influence that the accused are discouraged to call in a defence lawyer or to make use of an accused's right, because it is explained to them: firstly, the lawyer costs money if you call the lawyer, that takes time and you have nothing to gain from it, because they are not allowed to say anything anyway. So, it is smarter if you talk to us because we will tell the judge that you have been very cooperative.*

*Q: Wie werden Beschuldigte über ihr Recht die Aussage zu verweigern informiert?*

*A: Theoretisch durch die Polizei und das steht auch so im Akt. In der Praxis erweist es sich als belegbar, weil es nicht einsichtig ist, dass bei bestimmten Beamten einer bestimmten Kriminalabteilung noch nie ein Anwalt dabeigesessen ist und bei anderen sehr wohl. Da wird durch indirekte Einflussnahme gesteuert, dass die Beschuldigten entmutigt werden einen Verteidiger beizuziehen oder ein Beschuldigtenrecht in Anspruch zu nehmen, weil ihnen dargelegt wird: erstens kostet der Anwalt Geld, wenn du den Anwalt anrufst, das dauert und du hast nichts davon, weil der eh nichts sagen darf. Daher ist es gescheiter, wenn du mit uns redest, weil wir werden dann dem Richter sagen, dass du sehr kooperativ warst.*

The following challenges are identified in the practical implementation of the right to remain silent. Firstly, defendants do not efficiently understand their rights and the effectivity of the process of informing defendants depends on the individual officer. Moreover, many defendants waive their right to a lawyer during the police interrogation because they are "advised" to do so by the police. However, without the presence of a defence lawyer, the implementation of the right to remain silent cannot be secured. Regarding the protection of the defendant's right to remain silent, lawyers argue in favour of video-documenting police interrogations if no defence lawyers are present.

A public defence lawyer supports this experiences and states that defendants, who cannot afford a lawyer, usually waive their right to a defence lawyer during the first interrogation at the police. When the interviewee joins the case, the defendants have usually already confessed and the right to remain silent is not relevant anymore from a procedural perspective. Therefore, the interviewee used the

defendant's confession in the proceedings as active contribution to clarifying the case and to achieve a milder sentence.

b. How is information on the right to remain silent and not to incriminate oneself shared with the accused?

The police have reformed the recording system PAD (Protokollieren, Anzeigen, Daten, Recording, Display, Data). The change to the new system PAD NG (PAD Next Generation) in mid-January 2018 was the largest data migration in modern police work. The application Administrative Procedure (VStV) and the recording system PAD were merged into one application with four modules.<sup>20</sup>

The interviewees homogeneously confirm that defendants are informed orally by the authorities about the accusation, the right to remain silent and the right to consult a defence lawyer prior to each interrogation. It is only afterwards that the defendants decide whether to remain silent or not. Interviewed police officers report that the recording system PAD NG provides easy and understandable information on defendants' rights. Defendants under arrest are informed orally and in writing again by the judge, who decides on pre-trial detention. Generally, interviewees doubt that defendants do not receive the information about this right. Moreover, defendants have to prove with signature that they understand this right and only then the interrogation may start. Judges mention that each record of a police interrogation contains a documentation that the defendant was informed about this right. An interviewed judge acknowledges that in ad-hoc questioning situations by the police, defendants might not be informed about this right. But as soon as there are notes and minutes of an official act, the defendant is informed about the right to remain silent. Judges have never heard of defendants complaining about not being informed of this right.

If the defendants feel that their subjective right has been violated, they may raise an objection at the public prosecutor's office according to § 106 Criminal Procedures Act. In case the law enforcement officers failed to correctly inform the defendant about the right to remain silent, the defendant's statement must not be used in the proceedings. In case the statement (confession) was already read out loud in the trial and the judgement was already made, it can lead to the nullity of the judgement (desk research). The interviewed defence lawyers confirm this information, but report about practical difficulties and challenges in using this remedy. The defendants will need to prove that they have not been informed about the right to remain silent and they need a specialised defence lawyer to enforce this. Video documentation of police interrogations could protect the police officers against accusations of not correctly informing defendants, but this is not foreseen in Austria.

c. Self-incrimination

The interviewed police officers say that there is no obligation to provide information or evidence that could incriminate the defendants (including computer password, phone pin number, email password). The defendant can only voluntarily provide evidence that may affect their presumption of innocence. The interviewed defence lawyers homogeneously state that the accused cannot be obliged to provide incriminating evidence. The principle of the right to not incriminate themselves applies. However, an interviewed lawyer observes that particularly innocent defendants still provide their passwords during the first police interrogation, as they say that they have nothing to hide. Particularly innocent defendants or those without experience with police interrogations are under pressure when they are interrogated and confronted with an accusation. They are informed by the police about their right to not incriminate themselves and to remain silent. S/he says:

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<sup>20</sup> Austria, Federal Ministry of the Interior, [Neues Protokollierungssystem PAD NG](#), 9 Februar 2018

*Q: Is it possible that the police put pressure on the accused to confess?*

*A: There is talk about clients: well, if you testify, then I call the prosecutor and it's nothing [bad] anyway and then I will stand up for you and not much will happen. Or they say: only the confession is the only true thing and leads to a mild sentence and possibly to avoiding imprisonment. And there it can happen, especially with innocent people, that statements are made that are very, very negative for them in the proceedings. [...] The police can make the confession so palatable to the accused, they are trained to say: you don't stand a chance anyway and the only thing that helps is if I stand up for you. Part of it is true, part of it is not true at all.*

*Q: Kann es sein, dass von der Polizei Druck auf den Beschuldigten ausgeübt wird, dass er gesteht?*

*A: Da wird ja von Klienten erzählt: na ja, wenn du aussagst, dann rufe ich den Staatsanwalt an und es ist ja eh nichts [Schlimmes] und dann setze ich mich für Dich ein und da wird schon nicht viel passieren. Oder man sagt: nur das Geständnis ist das einzig Wahre und führt zu einer milden Strafe und unter Umständen zur Vermeidung der Haft. Und da kann es gerade bei Unschuldigen zu Aussagen kommen, die sehr, sehr negativ im Verfahren für sie sind. [...] Die Polizei kann das Geständnis dem Beschuldigten so schmackhaft machen, darin ist sie geschult, dass sie sagt: du hast ja eh keine Chance und das einzige was dir hilft, ist wenn ich mich für dich einsetze. Zum Teil stimmt das, zum Teil stimmt das gar nicht.*

However, a lawyer reported that when a police officer reads out all the rights (to remedies, to access files, etc.), even a defendant without any form of intellectual disability is not able to fully comprehend this amount of information especially in this short amount of time, e.g. that there is no obligation to provide their computer password. The interviewed lawyer observes:

*Q: Can a defendant be required to give a computer password or telephone password?*

*A: No, actually not, but the accused always do it well at the first interrogation. You don't have to give away anything that could incriminate you. I have never judged it through. Most of the time, if a client is innocent, at the first interrogation they say: you can have it anyway. [But if it were against them] you can't be forced to do it because that principle applies.*

*Q: Kann ein Angeklagter verpflichtet werden, dass er Computerpasswort oder Telefonpasswort hergibt?*

*A: Nein, eigentlich nicht, aber die Beschuldigten tun es immer brav bei der ersten Einvernahme. Man muss nichts hergeben, was einen belasten könnte. Ich habe es nie durchjudiziert. Meistens ist es so, dass ein Klient, wenn er unschuldig ist, bei der ersten Einvernahme sagt: können Sie eh haben. [Aber wenn es gegen sie sprechen würde] kann man nicht dazu gezwungen werden, weil dieses Prinzip gilt.*

According to one police officer, confiscations are a means to oblige the defendant to provide incriminating evidence. The preconditions for confiscations are legally defined by the criminal procedure code. The police may confiscate material on their own or must ask the prosecution for an order to do so. For the confiscation of data / computers / mobile phones with a value of more than €200 an order from the prosecution is required. This is confirmed by an interviewed prosecutor. The phone may be confiscated by the authorities, but the defendant is not obliged to provide the password. However, the authorities have access to the data on the phone anyway. The interviewed judges confirm that the defendant cannot be obliged to provide this information or evidence, but the court has possibilities to access these data (e.g. bank account, email password, etc) via official channels.



#### d. Right to remain silent

The police officers state that it makes no difference to them if the defendants make use of the right to remain silent or not. If they do, the police document it accordingly and try to find other evidence (material evidence or witnesses) in case the suspicion is persistent. According to two police officers, a confession has a mitigating effect on the sentences. However, in practice, this mitigating effect also applies if the confession comes at a later stage of the proceedings. Upon further inquiry, a police officer says that the usage of the right to remain silent might lead to pre-trial detention because of the danger of collusion. However, the police do not decide on this. All interviewed police officers point out that the usage of the right to remain silent has no effect on the presumption of innocence – all defendants are presumed innocent until the final judgement is made and the police is not in charge of the judgement.

The usage of the right to remain silent makes the prosecutions' work more difficult because they are obliged to find other evidence if they still consider the defendant a suspect. In such instances the investigations consume more time and the workload is intensified – the duration of the proceedings increases. Therefore, one prosecutor informs defendants wanting to make use of their right to remain silent about their advantages resulting from testifying / confessing. The defendants are not warned that their silence will be considered during proceedings, but are informed that it can also be an advantage if they testify. They are informed that when they remain silent, they also waive their opportunity to clarify issues connected to the case / accusation and to express their own views on it. A police officer, who is in charge of investigating drug crimes and street crimes, says:

*Q: How do you apply the right to refuse to give evidence in your daily work?*

*A: I inform the accused about the right. I also tell them that they have the chance to contribute something to the clarification of the facts with their testimony. After all, it can also contribute to their exoneration. But if they don't say anything, then I take it like this. But then I think to myself: mah, why don't you say something. For example, a drug deal that we observe and then they say: they won't say anything and perhaps the background to that is really that they have been appointed by someone else [to do the deal] - how are we supposed to find out?*

*Q: Wie wenden Sie das Recht auf Aussageverweigerung in Ihrer täglichen Arbeit an?*

*A: Ich informiere die Beschuldigten über das Recht. Ich sage ihnen auch, dass sie die Chance haben, mit ihrer Aussage etwas zur Aufklärung der Sachlage beizutragen. Es kann ja auch zu ihrer Entlastung beitragen. Aber wenn er nichts sagt, dann nehme ich das so auf. Aber ich denke mir dann schon: mah, wieso sagst du nichts. Zum Beispiel so einen Suchtmitteldeal, den wir beobachten und der sagt dann: er sagt nichts und vielleicht wäre der Hintergrund der, dass er von einem anderen dazu bestimmt worden ist – wie sollen wir das erfahren?*

The prosecution advises them to reconsider their decision to remain silent or to talk to their defence lawyers before making use of this right. However, all interviewed law enforcement authorities say that if the defendants insist on remaining silent, it will be accepted as their right and the silence is not perceived as an indirect confession or concession to the accusation.

Furthermore, judges acknowledge that a confession makes their work easier, e.g. preparing the record is easier, the information provided by the defendant can be compared to other evidence and thereby the truth may be revealed. The fact that a confession reduces the workload is precisely why a confession is a mitigating factor on the severity of the sentence in case of a conviction. When it comes to the confession as mitigating factor for the severity of the sentence, the assessments differ among

the interviewees. Some always consider a confession as a mitigating factor for the sentence, regardless of the procedural stage in which it is made. Others do not share this opinion. According to them, the earlier the confession is made in the course of the proceedings, the stronger it is considered a mitigating factor, because only an early made confession is a repentant confession. If a defendant decides to remain silent at the beginning and only at a later stage in the course of the proceedings confesses or confirms something the authorities found out, it may affect the defendant's credibility. A late confession is still a confession and valued as such. However, the aspect of penitence as a factor in order to obtain a milder sentence is not given because the confession was made only at a late stage of the proceedings as well as under pressure of occurring evidence.

The lawyers homogenously agree that defendants have the right to remain silent, but this has no effect on the proceedings. An interviewed lawyer says that the usage of the right to remain silent may lead to an acquittal if there is no other evidence against the defendant.

Another lawyer supports this view of the judges by saying that the judges and prosecutors are professionals in this regard, meaning that the defendant does not need to say anything or to cooperate in the proceedings – the evidence collected and shown in the file speaks for itself either in favour or against the defendant. According to the interviewee, the authorities are able to deal with defendants using their right to remain silent professionally. Defendants, who remain silent, are not automatically presumed guilty.

The other lawyers contradict this assessment. An interviewed lawyer knows from the experiences mentioned by his/her clients, that law enforcement authorities indeed put pressure on the defendants to confess, especially during the 48 hours of police detention. However, the police do not warn the defendant; they rather point out the advantages of a confession, e.g. by explaining that by confessing the pre-trial detention can be gone around, the sentence can be lowered, the police officer will support the defendant at the prosecution in case of a confession, etc. The police also downplay the accusation to motivate the defendants to give a confession. The lawyer explains:

*Q: Is it possible that the police put pressure on the accused to confess?*

*A: There is talk about clients: well, if you testify, then I call the prosecutor and it's nothing [bad] anyway and then I will stand up for you and not much will happen. Or they say: only the confession is the only true thing and leads to a mild sentence and possibly to avoiding imprisonment. And there it can happen, especially with innocent people, that statements are made that are very, very negative for them in the proceedings. [...] The police can make the confession so palatable to the accused, they are trained to say: you don't stand a chance anyway and the only thing that helps is if I stand up for you. Part of it is true, part of it is not true at all.*

*Q: Kann es sein, dass von der Polizei Druck auf den Beschuldigten ausgeübt wird, dass er gesteht?*

*A: Da wird ja von Klienten erzählt: na ja, wenn du aussagst, dann rufe ich den Staatsanwalt an und es ist ja eh nichts [Schlimmes] und dann setze ich mich für Dich ein und da wird schon nicht viel passieren. Oder man sagt: nur das Geständnis ist das einzig Wahre und führt zu einer milden Strafe und unter Umständen zur Vermeidung der Haft. Und da kann es gerade bei Unschuldigen zu Aussagen kommen, die sehr, sehr negativ im Verfahren für sie sind. [...] Die Polizei kann das Geständnis dem Beschuldigten so schmackhaft machen, darin ist sie geschult, dass sie sagt: du hast ja eh keine Chance und das einzige was dir hilft, ist wenn ich mich für dich einsetze. Zum Teil stimmt das, zum Teil stimmt das gar nicht.*

In case of a forced confession or a confession obtained by means of pressure, the defence lawyer may complain against the police officers involved at the prosecution. However, a positive outcome for the defendant is not likely, as there are always two officers present during the interrogation and they have each other's back. Moreover, the prosecution tends to believe the police rather than the defendants and their lawyers. Therefore, the interviewees make the case for video-recording of police interrogations. If the defendants are alone (unrepresented by a lawyer), pressure to confess might be imposed by police officers, even unconsciously. This form of pressure may bring the defendants to confess, even if they did not do it. The interviewee knows that the interrogations are different when a lawyer is present. At times and especially young police officers record inaccurately, meaning that they write down something the defendant did not actually say. If a lawyer is present at this interrogation, s/he would interrupt it immediately.

*Q: How are defendants informed about their right to refuse to testify?*

*A: Theoretically by the police and it is also written in the act. In practice it proves to be provable, because it is not understandable that for certain officials of a certain criminal department a lawyer has never sat with them and for others it is very well. It is controlled by indirect influence that the accused are discouraged to call in a defence lawyer or to make use of an accused's right, because it is explained to them: firstly, the lawyer costs money if you call the lawyer, that takes time and you have nothing to gain from it, because they are not allowed to say anything anyway. So, it is smarter if you talk to us because we will tell the judge that you have been very cooperative.*

*Q: Wie werden Beschuldigte über ihr Recht die Aussage zu verweigern informiert?*

*A: Theoretisch durch die Polizei und das steht auch so im Akt. In der Praxis erweist es sich als belegbar, weil es nicht einsichtig ist, dass bei bestimmten Beamten einer bestimmten Kriminalabteilung noch nie ein Anwalt dabeigesessen ist und bei anderen sehr wohl. Da wird durch indirekte Einflussnahme gesteuert, dass die Beschuldigten entmutigt werden einen Verteidiger beizuziehen oder ein Beschuldigtenrecht in Anspruch zu nehmen, weil ihnen dargelegt wird: erstens kostet der Anwalt Geld, wenn du den Anwalt anrufst, das dauert und du hast nichts davon, weil der eh nichts sagen darf. Daher ist es gescheiter, wenn du mit uns redest, weil wir werden dann dem Richter sagen, dass du sehr kooperativ warst.*

Thus, the interviewed lawyers argue for having a defence lawyer present during the police interrogation or, if not possible, for video-taping the interrogation.

#### e. Discussion of findings

Informing the defendants about their right to remain silent is a formalised procedure. It is done orally and a computer program assists the documentation of the informing process and the decision whether defendants make use of their right or not. The defendants are first informed about the accusation and afterwards about their rights. Only then the interrogation may commence. The interviewees' views on the practical implementation of the right to remain silent differ in relation to their professions. The police officers report no challenges at all when it comes to the implementation of the right to remain silent. The prosecutors and judges acknowledge that a confession makes their work easier and, therefore, is seen as a mitigating factor for the severity of the sentence in case of a conviction. The interviewed lawyers mention one practical challenge in relation to the right to remain silent:

A defence lawyer is not necessarily present during the police interrogation and no legal advice is received before the interrogation. This makes the defendants vulnerable to police officers, who motivate defendants to confess by saying that a confession is a mitigating factor for the sentence.

Furthermore, police officers promise defendants that they would support them during the proceedings if they confess.

Most interviewees say that a confession is a major challenge for the presumption of innocence, especially if the confession is credible and in line with other evidence.

### **C.6 The right to be present at the trial and to have a new trial**

§ 6 (1) Criminal Procedures Act (*Strafprozessordnung 1975, StPO*)<sup>21</sup> stipulates that defendants have the right to participate in the entire proceedings and the duty to be present during the main hearing.

§ 427 (1) Criminal Procedures Act (*Strafprozessordnung 1975, StPO*)<sup>22</sup> lays down the rules for trials in absence of defendants: If the defendant does not appear at the main hearing, the main hearing may only be held and the judgement may be pronounced in his/her absence, if the offence is punishable with a maximum prison sentence of up to three years, the defendant has been heard on the charge (§§ 164 or 165 Criminal Procedures Act) and the summon to the main hearing has been given to them personally. Otherwise a judgement shall be null and void. If the main hearing cannot be held in the absence of the accused, for instance because any of the requirements pursuant to § 427 (1) Criminal Procedures Act are not met, the main hearing shall be deferred and the presentation of the defendant may be ordered according to § 427 (2) Criminal Procedures Act. If, however, the defendant is a fugitive or his/her whereabouts are unknown, the proceedings shall be conducted in accordance with § 197 (1) Criminal Procedures Act, which means that a wanted notice may be issued in order to arrest the defendant. The public prosecutor's office must then terminate the proceedings and may continue the proceedings after the defendant has been found. Investigative acts and the taking of evidence, in which the defendant has the right to participate, may in this case still be carried out in the absence of the defendant. In cases where the defendant cannot be found and, therefore, cannot be summoned properly to the hearing, no hearing may be held in his/her absence.

Judgments violating § 6 Criminal Procedures Act may be challenged by the defendant by means of an appeal for annulment according to § 281 (1) Z 4 and § 345 (1) Z 5 Criminal Procedures Act because the defendant's right to be heard is a principle of the criminal procedure required by Article 6 ECHR and the principle of a fair trial.

There are neither relevant cases, nor recent legal discussions on the above-mentioned provisions of the Criminal Procedure Act to be reported.

#### **a. Consequences of non-appearance**

The interviewees provide homogenous information on this issue with varying detail. Under certain circumstances the **trial may take place** and a judgement may be found **without the defendant present**. The following circumstances are required: the defendant was previously interrogated on the case (s/he may even have remained silent) and verifiably summoned (by registered letter) and the threatened sentence does not exceed three years of imprisonment. In this case, the judges are allowed to carry out the trial without the presence of the defendant. However, they are not obliged to do so. The court is only required to facilitate the participation of the defendant, but not to ensure the participation. Otherwise, the defendant could prolong the proceedings indefinitely.

In order to facilitate the presence of the defendant, the authorities verifiably issue a summons to the defendant's address. If the defendant does not follow the summons, the authorities perceive it as waiving his/her right to be present. Consequently, the defendant receives the judgement in absentia

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<sup>21</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

<sup>22</sup> Austria, Criminal Procedures Code ([Strafprozessordnung 1975](#)), Federal Law Gazette No. 631/1975.

including information on legal remedies. The defendant may appeal against the judgement by saying s/he had no chance to be present during the trial. However, in these cases they need to prove that they were located somewhere else or abroad when the letter was issued and during the period of deposit or they have to explain why their registered address is not their place of residence. In this case, the trial starts anew.

An interviewed judge says that if there are many contradictions in the case and the case cannot be decided in absence, the trial is adjourned until the defendant is present. According to her, this is an easy procedure for the defendant. This view is supported by the other interviewed judge and two defence lawyers. They say that judgements in absentia only rarely take place. In practice, the trial is adjourned if the defendant does not show up and even if a judgement in absentia would be possible. Still, the trial is adjourned and the accused is threatened with police presence at the trial. If a defendant does not appear at the trial, it does not mean s/he is guilty; it is perceived as a sign of not caring. These defendants simply do not show up and they must be brought to the trial by the police.

In cases, where the above-mentioned circumstances do not apply, the **presence of the defendant during the trial is obligatory**. Only defendants, who are perceived dangerous and of unsound mind by a medical expert, or defendants, who are sent to an institution for mentally disturbed offenders, may still be absent. Otherwise, a judgement in absentia is impossible. If the defendant does not appear in trial, the trial is adjourned, and the summons is issued to the defendant by the police. If the defendant cannot be located, a search warrant is issued. Defendants, who repeatedly do not show up during the trial, although the summons were issued by the police, may be arrested for pre-trial detention until the main trial takes place. An interviewed judge elaborates:

*Q: How do the authorities inform a defendant about the trial if they cannot be found?*

*A: Yes, how should I inform them if they cannot be found? Not at all. I try to find out where they live, where they are. I do this by means of a query via the central register of residents. If they do not appear there, then I try to communicate with the police station where they were last located. They then try to find out where they are - sometimes that works too. And otherwise there is a so-called judicial alert to find out where they is, which means that the next time they are checked by the police, they will be informed that the court is looking for them and then their current details of where they live will be recorded and sent to the court. And then they are summoned again.*

*Q: Wie informieren die Behörden einen Beschuldigten über die Verhandlung, wenn er nicht auffindbar ist?*

*A: Ja wie soll ich ihn informieren, wenn er nicht auffindbar ist? Gar nicht. Ich versuche herauszufinden, wo er wohnt, wo er ist. Das mache ich über eine Abfrage über das zentrale Melderegister. Wenn er dort nicht aufscheint, dann wird versucht mit der Polizeidienststelle zu kommunizieren, wo er zuletzt aufhältig war. Die versuchen dann herauszufinden wo er ist – manchmal funktioniert das auch. Und sonst erfolgt eine so genannte gerichtliche Ausschreibung zur Aufenthaltsermittlung, das heißt, wenn er das nächste Mal von der Polizei kontrolliert wird, wird er darauf hingewiesen, dass ihn das Gericht sucht und dann werden seine aktuellen Daten, wo er wohnt, aufgenommen und dem Gericht übermittelt. Und dann wird er noch einmal geladen.*

Most interviewees say that defendants are informed about the consequences of non-appearance during the trial via the summons, which contain this information. The Federal Ministry of Justice

provides templates for the summons and these templates contain information about the consequences of not showing up for trial. Other interviewees do not think that defendants are aware on this. An interviewed prosecutor and a lawyer state that the defendants are not informed, as there are no consequences for the proceedings if the presence is not obligatory. And if the presence is obligatory, the trial must not take place without them present anyway.

b. What has been understood as “effective participation”?

Being physically present during the trial, being asked by the prosecutor and the judge and having the possibility to speak up is understood as “effective participation” by the majority of interviewed authorities. A prosecutor additionally mentions that the defendant’s physical or mental constitution must not prevent him/her from understanding what is happening, otherwise s/he does not participate. Thus, the court is obliged to meet special needs of defendants to facilitate the effective participation. However, the quality of the defence lawyer is not relevant for effective participation because the court must not evaluate the ability / quality of the defence lawyers. Another interviewed judge indeed perceives the defence lawyer as relevant for active participation. According to her, the defence lawyer needs to be able to follow each step, assess the body of evidence and its meaning for the client and needs to be able to speak for the client. Moreover, the lawyer must be able to understand all offers made by the judge (e.g. diversion for confession) and communicate them to his/her client, who then decides. According to his/her experience, some defence lawyers just remain very passive during the trial. The interviewee considers this problematic. This judge reports:

*Q: What is your understanding of the concept of effective participation in the proceedings?*

*A: For me, effective participation in the proceedings is when someone is present in the proceedings, when they speak up and actively participate in the proceedings. There is both the prosecutor who asks questions or at least puts out an accusation, to which the accused responds. I always try to ask as many questions as possible, so there should not be too many open questions. The same is the case with the defence lawyers: that they ask questions, that they stand up for their client. If you now effectively see in a narrower sense that they recognize the evidence - that is, if I say that the evidence is like that and if they bear responsibility, a diversion would be possible. Often the defendant does not understand this, then the defence lawyer, who perhaps would not have come up with this idea of their own accord or would not have dared to do so, are told this in the proceedings. Then they will go and talk to the client. And there are often defence lawyers who just sit there and do nothing.*

*Was ist dein Verständnis des Begriffes einer effektiven Teilnahme an der Verhandlung?*

*Für mich eine effektive Teilnahme an der Verhandlung ist, wenn jemand in der Verhandlung präsent ist, wenn er sich zu Wort meldet und aktiv an der Verhandlung mitarbeitet. Da ist sowohl der Staatsanwalt, der Fragen an ihn stellt oder zumindest einen Vorwurf in den Raum stellt, wo sich der Beschuldigte dazu äußert. Ich versuche immer möglichst umfassend zu fragen, also es sollten nicht zu viele Fragen offen sein. Beim Verteidiger detto, dass er Fragen stellt, dass er sich für seinen Mandanten einsetzt. Wenn man jetzt effektiv im engeren Sinn sieht, dass er die Beweislage erkennt – also, wenn ich sage, die Beweislage ist so und wenn er die Verantwortung trägt, wäre eine Diversion möglich. Das versteht der Angeklagte ja oft nicht, dann sagt man das dem Verteidiger, der ja von sich aus vielleicht nicht auf diese Idee gekommen wäre oder sich nicht getraut hätte, in dem Verfahren. Dann wird der gehen und mit dem Mandanten reden. Und es gibt halt oft Verteidiger, die sitzen einfach nur dort und tun nichts.*

The other judge assesses the effective participation in the framework of the law. According to the law, the defendant only needs to be physically present during the trial. They can decide on how to behave and on what to say. Due to COVID-19, participation via video conference is currently also possible.

The interviewed lawyers mention similar criteria for an effective participation: to be present in person, to understand what is going on and having a right to ask questions on all parts of the evidence. The right of the defendant to ask a question is exercised in practice by the defence lawyer. Moreover, defendants are requested to comment on the testimonies of the witnesses. Other interviewed lawyers also relate the effective participation to earlier stages of the proceedings. According to them, the right that investigations also search for exculpatory evidence and that this evidence is considered in the main trial is important for an effective participation. Finally, the presence of a lawyer during the very first stages of the proceedings ensures the defendant's effective participation.

### c. Vulnerable groups

There are differences in knowledge on specific safeguards for vulnerable defendants among the interviewees. One interviewed prosecutor says that apart from issuing the summons via registered mail, there are no safeguards to secure the presence of the defendants for vulnerable defendants. Other interviewees do name such special measures applied for vulnerable defendants.

**Young persons** need to be present during the trial, meaning the trial must not take place without their presence. Further, their parents are informed about the trial. In case of young defendants with previous convictions or who are separated from their parents the court approaches the social workers or the youth authority and liaises with them. There are specially trained juvenile court judges available for young adults. In instances of defendants with previous convictions, the court liaises with the probationary officers and these officers try to prepare the defendant for the trial.

In case of **persons with mental disabilities**, the adult representative (*Erwachsenenvertreter*) is summoned to the trial in addition to the defendants. If the defendants have no adult representative, the members of the criminal justice system will call in the defendant's facility and inform the staff about the trial and that the defendant's presence is required. Persons suffering from severe mental disabilities are accompanied by their defence lawyers and a psychiatrist during the trial. The ability of defendants with mental disabilities to participate in a trial has to be confirmed with a psychological report of a court psychiatrist. Moreover, psychiatrists are present during the trial and constantly assess if the defendants are still able to follow what is going on. A challenge is related to defendants with mild / invisible mental impairments or illiteracy. There are no rules in place for dealing with these defendants. The court can only consider special needs in case they are documented in the record, claimed for or visible in the behaviour of the defendant.

In practice, instances of defendants with an **impairment of the senses** are rare. However, in these cases the summons can be translated into braille language before being issued. The presence of an interpreter during the trial is secured in case of sensory disabilities and the court building is accessible barrier free for wheelchair users, as well as for blind persons.

An interviewed judge says that **migrants** are not perceived as a vulnerable group of defendants. Still, the template for the summons and the relevant information is available in many languages. An interviewed prosecutor and a lawyer contradict this information and say that the summons is not translated for migrants – only the prosecution and criminal charges are translated.

**Presence during the trial via video conference** or glass box is not possible according to the judges and prosecutors – either the defendants are absent or physically present. Only victims or witnesses with special protection needs may be interrogated via video conference. Two defence lawyers contradict this information. According to them, their clients indeed left the room while victims testified. Further, if a defendant is arrested in a different detention facility, s/he may be present via video in hearings during the investigation stage. Moreover, defendants who misbehave in the courtroom during trial may be excluded from the trial. However, their defence lawyer is always present. In general, defence lawyers were present, posed questions to the victims and explained their clients what was going on during their absence.

c. The implications of COVID-19 on the right to be present at the trial

The measures to prevent the spread of the COVID-19 disease took place in Austria since 15 March. These various measures as well as their fundamental rights implications are intensely discussed in the FRANET COVID-19 Bulletins.<sup>23</sup> The 8<sup>th</sup> COVID Law entered into force on 6 May<sup>24</sup> and amended the first judiciary law accompanying the COVID-19 Law.<sup>25</sup> Oral hearings and hearings without the personal physical presence of the parties or their representatives may now in principle be held until the end of 31 December 2020 using appropriate technical means of communication for the transmission of words and images. The parties to the proceedings must agree and have the necessary equipment. The parties to the proceedings will not be held responsible for technical faults. Any party to the proceedings who is at risk or in contact with persons at risk may apply to take part in the proceedings via technological means.<sup>26</sup>

Consequently, arrested defendants participate in the trial via video conference. They can meet with the defence lawyer beforehand, just like in any other trial. In case the defendant wants to counsel with the defence lawyer during the main trial, the trial is interrupted upon request. This is possible independently whether the defendant is physically present or via video conference.

For interviewed judges, the presence of the defendant via video conference is in line with the defendants' rights in single judge procedures and in jury procedures (*Schöffengerichtverfahren*). But it is problematic in jury courts involving lay assessors only (*Geschworenengerichtverfahren*). The video system at the court works well in general, but it is not comparable with film equipment, e.g- the defendant cannot see all people in the courtroom. Thus, the judge has to inform him/her about who is currently speaking. The camera to the courtroom cannot be moved to enlarge the defendant's field of vision. The defendant can only see the judge, but not the witnesses and all the other persons in the room. However, these rules only apply until the end of May 2020. After this date, the defendants are physically present in the courtroom again. A judge comments on this:

*Q: Now since [the outbreak of the] coronavirus, detained defendants are allowed to join a video conference from prison?*

*A: Exactly, it wasn't like that before. Now they are transmitted into the courtroom via video. They can meet with the defence attorney beforehand, just like at any other trial.*

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<sup>23</sup> FRANET SR32: Information request on Coronavirus pandemic in the EU - Fundamental Rights implications

<sup>24</sup> Austria, Eighth COVID-19 Law ([8. COVID-19 Gesetz](#)), Federal Law Gazette I No. 30/2020.

<sup>25</sup> Austria, first judiciary law accompanying the COVID-19 Law ([1. COVID-19-Justiz-Begleitgesetz](#)), Federal Law Gazette I No. 16/2020.

<sup>26</sup> Austria, Eighth COVID-19 Law ([8. COVID-19 Gesetz](#)), Federal Law Gazette I No. 30/2020.



*Q: But during the main trial this is not possible, is it?*

*A: During the main hearing it is not possible, of course. But at a normal trial, if they would be physically present in the courtroom, it would be very difficult, wouldn't it? They are not sitting next to the defence lawyer, they are sitting in the middle. This means that a conversation between the defendant and the defence lawyer during the main trial is inadmissible anyway. We won't do that. You can make a small interruption, then the defence lawyer and the defendant can talk again. You can always apply for that and it happens in practice. This is also possible with the new Corona regulations.*

*Q: Jetzt seit Corona dürfen inhaftierte Angeklagte via Video Konferenz aus dem Gefängnis zugeschaltet werden?*

*A: Genau, früher war es nicht so. Jetzt werden sie via Video in den Verhandlungssaal übertragen. Sie können sich vorher mit dem Verteidiger treffen, so wie bei jeder anderen Hauptverhandlung vorher auch.*

*Q: Aber während der Hauptverhandlung ist das dann nicht möglich, oder?*

*A: Während der Hauptverhandlung ist das nicht möglich, klar. Aber das geht bei einer normalen Hauptverhandlung, wenn er physisch im Saal anwesend wäre, auch sehr schwer, nicht? Er sitzt ja nicht neben dem Verteidiger, der sitzt in der Mitte. D.h. eine Unterhaltung des Angeklagten mit dem Verteidiger während der Hauptverhandlung ist sowieso unzulässig. Das machen wir nicht. Man kann eine kleine Unterbrechung machen, dann können sich der Verteidiger und der Angeklagte noch einmal austauschen. Das kann man mit Antrag immer machen. Das geht auch jetzt selbstverständlich mit den neuen Corona-Regelungen.*

The interviewed defence lawyers perceive this presence via video conference as not in line with the defendants' rights to be present during the trial, the fundamental rights to the immediacy of the trial and the public right to access trials. However, upon request of the defence lawyer, defendants may be brought from prison to the courtroom indeed, despite the restrictions due to Covid-19.

Thus, these social distancing measures entail challenges for the effective participation of the arrested defendants during the trial. The presence during the trial only via video conference limits the defendants' possibility to fully hear and see what is going on in the courtroom. The judge must explain this to the defendant. The defence lawyers criticise these measures and state that they will apply for having their clients physically in the courtroom or appeal in case it is not granted.

On 25 May the Ministry of Justice (*Bundesministerium für Justiz*) issued an information sheet on conduct in court buildings and during proceedings.<sup>27</sup> It outlines basic hygiene measures (security distance, covering nose and mouth, washing hands) and clarifies how parties should act when entering the court room. The presence of defendants during the trials via video-conference applies until the end of June. The physical presence of the defendant may only take place in the trial upon an order of the judge.<sup>28</sup>

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<sup>27</sup> Austria, Federal Ministry of Justice (2020), [SARS-CoV-2 \(Corona\) – Verhalten in Gebäuden der Gerichte und Staatsanwaltschaften sowie in Verhandlungen](#), 25 May 2020.

<sup>28</sup> Austria, Federal Ministry of Justice (2020), [Maßnahmen zu COVID-19 im Straf- und Maßnahmenvollzug](#) (Stand: 1. Juni 2020) – komprimierte Fassung.

#### d. Discussion of findings

The findings indicate that the right to be present at the trial and to have a new trial is implemented well in practice, and no significant challenges derive from it. In most cases, the trial will be adjourned if the defendant does not show up, as no judgements in absentia are allowed with only few exceptions. If the defendant is arrested, they will be presented by the prison administration. Thus, the defendants' right to be present during the trial is implemented in practice.

Effective participation is homogeneously understood by the interviewees as consisting of the possibility to be physically present in the courtroom, to have the right to pose questions, to comment witness statements and to follow and understand what is going on. Interviewed defence lawyers mention the right to a defence lawyer at an early stage of the proceedings and the right to have exculpatory evidence investigated and considered.

Special safeguards for vulnerable groups are assessed on an individual basis, sometimes by medical experts. The court building is accessible barrier-free. A challenge is related to not visible, not communicated or even denied special needs.

### C.7 Challenges and improvements

#### a. Challenges

The most important challenges named by the interviewees are related to:

- **Biased and sensational media coverage** during the investigative proceedings in cases involving public persons. Biased media coverage violates the presumption of innocence and manifests itself in the public opinion. Even if defendants are acquitted, their reputation is destroyed. Furthermore, the remedies against such media coverage are ineffective, because compensation payments are low and a counterstatement in the media will only keep the case and the defendant at the attention of the public.
- A **confession** is a large challenge for keeping up the presumption of innocence, especially if it is credible and in line with the other evidence. Police officers tend to “motivate” defendants to confess by telling them about the procedural advantages of a confession (i.e. milder sentence).
- The **presence of defense lawyers** prior or at latest during the police interrogation is the most important safeguard for the implementation of the right to remain silent. In practice however, police officers discourage defendants from using their right to a lawyer; thus, defense lawyers enter the case only at a later stage.
- **Jury proceedings involving only lay assessors** constitute a major challenge for the presumption of innocence and a fair trial. Lay assessors are more likely to be influenced by biased media coverage, restraining measures for arrested defendants or other public references to guilt.

#### b. Improvements

The following improvements were named by the interviewees:

- Improved information for defendants about their rights prior to the police interrogation.
- Defendant's right to cost-free legal advice prior to the police interrogation and to ask for the presence of a defense lawyer during police interrogation.
- Improved access to translations for migrants: access to cost-free interpreters, access to translation of the record, the indictment and the judgement.
- Differentiation between suspect, defendant and accused, whereby already the suspect has all defendants' rights.

#### c. Suggestions

The following suggestions were proposed by the interviewees:

- Video documentation of police interrogation to secure the defendants' rights and to protect the police officers from accusations.
- Easier access to a defence lawyer prior or during the police interrogation.
- Reforming the system of jury courts involving lay assessors only.
- Reforming the system of public aid and increasing the remuneration for public defence lawyers.

## PART D. GENERAL ASSESSMENT

All interviewees consider the presumption of innocence of high value, but at the same time state that it is difficult to apply. Only the police officers take on a little different view: they do not feel in charge of the presumption of innocence, as they do not take procedural decisions. They simply investigate in all directions – search for incriminating and exculpatory evidence. All other interviewees name several challenges.

While particularly the interviewed police officers state that the **presumption of innocence applies equally**, the lawyers and some judges and prosecutors identify inequalities. The following factors make a defendant vulnerable to disadvantages in the presumption of innocence:

- previous convictions are used as incriminating evidence in the proceedings at stake – not only for the determination of the sentence in case of a conviction, but also before the conviction is found.
- whenever law enforcement authorities experience statistical connections between certain nationalities and crimes the respective nationalities are disadvantaged. Examples: drug and property crimes and asylum seekers
- female defendants and defendants with disabilities are a minority among defendants in Austria
- persons, who are suspected of child abuse or other severe or sensitive crimes, are disadvantaged with regard to the presumption of innocence

The difficulty of implementing the presumption of innocence, particularly in long-term proceedings involving the media and “famous” defendants, is a key point, which came up in almost all interviews. Such cases entail an intense **media coverage**, whereby the presumption of innocence is violated through biased reporting during the investigative proceedings, bringing up private details of defendants and entailing an intense discourse of readers in social and online media. Particularly public defendants are affected by this, as they are known in society. Their reputation suffers even in case of an acquittal. Furthermore, the prosecution’s work suffers from public interference and at times this leads to the prosecution’s need of having to explain their work in the media. Judgements may be influenced by such media coverage in cases of jury proceedings involving only lay assessors. The judgment of professional judges is not influenced by media coverage. **The privacy of defendants is well protected:** only the first name and the first letter of the surname may be disclosed. Further, defendants may cover their faces and no identifying photos must be disclosed. However, in practice this does not apply to public defendants.

When it comes to the **defendant’s procedural rights**, the right to remain silent and the right to a defence lawyer play an important role for the implementation of the presumption of innocence. Findings indicate that a confession, which is credible and in line with the other evidence, entails a large challenge for the presumption of innocence. Almost all interviewees except for the police officers acknowledge that the defendant’s confession makes their work easier. Thus, they have no interest in facilitating the defendant’s usage of the right to remain silent in practice. The **presence of a defence lawyer** is the most important safeguard in this regard. However, although defendants have the right to a defence lawyer or legal counselling prior to the police interrogation, findings show that it is almost never used. Interviewed lawyers say that most confessions are made at the police. Police officers discourage the defendants to consult a defence lawyer by saying that they have to pay for them themselves; that they will have no benefit as the defence lawyers need to remain silent during the interrogation; and that it takes time until they arrive. At the same time, police officers motivate defendants to confess, particularly by promising them some procedural advantages (support of officers, milder sentence, their cooperation will be considered). Police interrogations are only documented in writing; there is no video documentation. Furthermore, there are always two officers

present during the interrogation, who protect each other against accusations. All these factors encourage a confession of the defendant, which can hardly be withdrawn. Even interviewed defence lawyers believe that a defendant who confesses has no right to the presumption of innocence anymore.

However, if a defendant is caught in a precarious situation, e.g. in a drug deal or in the possession of smuggled goods, the **burden of proof** still is on the prosecution. If the defendant is able to provide a credible explanation for his/her situation, it will be further investigated as exculpatory evidence.

Interviews indicate that **restraining measures** for arrested defendants have only little influence on the presumption of innocence. Handcuffs and the presence of law enforcement officers are protection measures and no punishments. Moreover, the authorities present in the courtroom and even the media are by now used to seeing handcuffs. Thus, such measures do not imply guilt. Interviewees acknowledge that the fact that pre-trial detention was imposed may play a role indeed. There are several reasons for pre-trial detention, as soon as these reasons apply, the innocence cannot fully be assumed anymore. The most important reasons are: danger of flight and danger of collusion. Thus, several interviewees explain that pre-trial detention and not restraining measures for arrested defendants may imply guilt.

## PART E. CONCLUSIONS

Several challenges to the presumption of innocence were identified in the interviews and came up as recurring themes during the interviews. They are briefly summarised in this section and added by policy conclusions, which address what to do about the shortcomings identified.

Firstly, the **low-quality media coverage during the investigative proceedings** in large cases involving public defendants violates the presumption of innocence and the defendant's privacy. Moreover, as such media coverage triggers comments and discourse of laymen in social media, the investigations are disrupted, and the reputation of the criminal justice system may suffer due to the public debate. If the case ends with an acquittal, prosecutors may be in a position where they must justify themselves. Furthermore, biased media coverage in long and large proceedings may influence lay assessors in jury trials. However, media coverage during the main trial, particularly in the framework of live-tickers, is presumed as important for the public's access to trials. The following policy conclusions can be derived from the research findings:

- The interests of the prosecution during the investigation proceedings should be balanced against the right to information of the public (careful and restricted disclosure of information about criminal investigations to the media)
- An amendment of the Media Law (*Mediengesetz*) to impose more effective control and sanction mechanisms, while still respecting media freedom and the right of the public to access information on criminal proceedings
- A reform of the system of jury trials with lay assessors only to ensure the quality of judgements and to reduce the influence of the media coverage and public debate during the investigative proceedings

Secondly, the **defendants' confession** is in practical conflict with the presumption of innocence, especially if the confession is credible and in line with the existing evidence. A confession makes the work for all professionals involved in the criminal proceedings easier: the investigative workload is lowered for the members of the judiciary and the lawyers' defence strategy is reduced to defining the amount of sentencing, because a conviction as such is definite. Findings clearly indicate that the presence of a defence lawyer during the police interrogation is the most important safeguard to ensure that every confession is the informed and conscious decision of the defendant. Thus, the following recommendations can be named to secure the presence of the defence lawyer during the police interrogation:

- More effective access to a defence lawyer prior to as well as during the police interrogation to secure the right to remain silent
- Video documentation of all police interrogations to secure the defendant's rights to a defence lawyer and to remain silent as well as to protect the police officers involved against false accusations for violations of defendant's rights
- Cost-free access to a defence lawyer during the police interrogation, because at the moment legal aid is available only at a later stage of the proceedings
- A reform of the system of legal aid and better remuneration for legal aid lawyers to ensure the quality of the criminal defence for people who cannot afford a defence lawyer themselves

Findings indicate that the presumption of innocence is not equally applied in practice. The factors previous convictions, ethnicity and in need of international protection lead to disadvantages. Previous convictions are perceived as incriminating factor and asylum seekers and members of certain nationalities are presumed to be more likely to commit drug and property related crimes. Moreover, persons of dark skin colour are more frequently controlled by the police in the public sphere than others.

- Awareness raising measures and trainings for the members of the criminal justice system are recommended to overcome stereotypes relating from such factors

Furthermore, the findings reveal that the implementation of the right to be present at the trial and to having a new trial generally works well in Austria. Safeguards for vulnerable groups are in place. However, their need assessment turns out to be difficult. This difficulty particularly affects defendants with invisible mental disabilities or those, who do not dare to claim their special needs. The social distancing measures to prevent the spread of the COVID-19 disease entail challenges for the arrested defendants' presence during the trial. The currently foreseen video presence of arrested defendants during the trial provides limited access for them. The technical equipment limits the defendant's ability to hear and see all that is going on in the courtroom. The judge needs to translate and explain it to the defendant. The two defence lawyers, who were interviewed since these measures have been applied, do indeed regard this as a challenge for the effective participation in the trial and the defendant's need to be physically present during the trial.

Generally, the findings indicate a reinforcement of the defendants' rights in the course of the last years. The standardised and simplified information of the defendants about their rights at the police and the cost-free access to interpreting and translation services for migrants were named most prominently in this regard. The findings indicate that the defendant's rights have never been as effective as they are now.

## Annex 1 –Presumption of innocence - Case study

Austrian case study/ media coverage #1		
1	<b>Reference details/Name/Title</b> (please indicate here how the case has been publicly referred to)	Former cross-country skiing athlete caught in the act of doping and sentenced by the Innsbruck Regional Court for severe sports fraud.
2	<b>Brief description of the case</b>	<p>On 28.02.2019, the media outlets “kleinezeitung.at“, “vol.at“, “heute.at“, “krone.at“ und “oe24.at“ published a video shot in the context of a corresponding police operation at the Nordic World Ski Championships in Seefeld.</p> <p>The video shows a cross-country skier in a hotel room doping his own blood. The police shot the video in the course of this operation and arrested the athlete. The media publication of the video took place shortly after the athlete was arrested. In the media publication, the face of the athlete was neither pixelated nor in any other way made unrecognisable. The video was disclosed by a police officer who was involved in the police operation.</p> <p>In the meantime, most media outlets have removed the video from their websites.</p>
3	<b>Timeline of events</b> (briefly outline major events in order to capture the nature of the case)	<p>February 2019: the police operation “operation bloodletting” (“<i>Operation Aderlass</i>”) took place. The athlete was caught in the act of doping in a hotel room and arrested. The police operation was filmed by the police.</p> <p>28 February 2019: various local media outlets published a video of the police operation, showing the athlete in the act of doping his own blood.</p> <p>3 April 2019: the police officer who disclosed the video of the police operation, was sentenced to a fine of 4,760 Euros by the Innsbruck Regional Court. Half of that was given to him on parole. In addition, the officer must pay the athlete 500 Euros partial pain compensation. The sentence is not final.</p> <p>11 April 2019: the Austrian Press Council issued a decision (42/2019) that the publication of the video is not in line with press ethics. It violates the personal rights of the athlete and it leads to a prejudgement of the person concerned during the criminal investigations against him. The Austrian Press Council requested the publication of the decision in the reprimanded media outlets.</p> <p>30 October 2019: The public trial took place at the Provincial Court Innsbruck.</p> <p>The former cross-country skier was sentenced to five months of conditional imprisonment for serious sports fraud. The athlete from the Province of Styria is alleged to have engaged in blood doping from</p>



		April 2016 until his arrest during the Nordic World Ski Championships in Seefeld in February 2019, thereby illegally obtaining prize money and sponsorship. The judgement was not final for the time being.
4	<b>Media coverage</b> (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)	<p>The media referred to the suspect as: ski-star, doping sinner (“<i>Dopingsünder</i>”) and “Sp( r)itzensportler”, which is a play of words between “top athlete” and “injection athlete”, ski-star. The full name of the athlete was mentioned.</p> <p>A video of the police raid was published by the media. In the video, the suspect was presented in the act of doping, surrounded by police officers who arrested him. No measures to protect the suspect’s privacy (such as pixilation) were applied.</p> <p>A police officer who was involved in the police operation forwarded the video to other police officers in a private WhatsApp group. From there, the video was forwarded to the media. The police officer who shared the video with other officers was sentenced for abuse of authority. Media outlets reported about this proceeding, but secured the police officer’s anonymity.</p> <p>The suspected athlete was also presented during the public trial. Here, no measures to secure his anonymity were applied.</p> <p>References:  Der Standard, Video von Dopin(city)zia: Polizist zu Geldstrafe verurteilt, 3 April 2019.  Focus, Ski-Star [full name] in flagranti beim Dopen erwischt, 1. March 2019  Salzburger Nachrichten, Beamter soll Video von Doping-Razzia und [full name] samt Nadel im Arm veröffentlicht haben, 1 March 2019  Österreichischer Presserat, Entscheidung 2019/042, 11. April 2019</p>
5	<b>Key issues</b> (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)	<p>The published video of the police raid, in the course of which the athlete was caught in the act of doping and was arrested, led to major allegations of guilt in the media and a violation of the athlete’s personality rights.</p> <p>An involved police officer disclosed the video and was sentenced for the abuse of authority.</p> <p>The athlete was arrested. He confessed to the act of doping during the public trial. The judge found three aspects to be mitigating for the sentence: his remorseful confession, the fact he had no criminal record, and the fact he had partially repaid the damage to a company, which sponsored him. The judge further referred to the video of the athlete’s arrest, which had been unlawfully published, stating "<i>Furthermore, the consequences of the crime are devastating for you. This unspeakable video is still on the Internet.</i>"</p>

6	<p><b>Key consequences or implications of the case with regard to the presumption of innocence</b> (with a focus on public reaction to publications in the media which might lead to a public debate)</p>	<p>According to the Austrian Press Council, the publication of the video is also objectionable for another reason: It inevitably leads to media prejudgement of the person concerned during the criminal investigations against him.</p> <p>The authorities made the video recording solely for evidence and documentation purposes and it was not intended for the video to be passed on to the public. A policeman distributed the video illegally - he is now threatened with criminal and disciplinary consequences. The fact that the video was illegally released by the police officer is another significant factor that speaks against the further distribution of the video by the media (cf. Decision 2015/129).</p>
<p>In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered</p>		
7	<p>What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?</p>	<p>Several persons complained to the Austrian Press Council about the video – the concerned athlete did not.</p> <p>Senate 3 of the Austrian Press Council conducted proceedings on the basis of complaints from several readers (independent proceedings on the basis of complaints). In its procedure, the Senate expressed its opinion as to whether a publication complies with the principles of media ethics. The media owners of "kleinezeitung.at" and "vol.at" made use of the possibility to participate in the procedure, whereas the media owners of "krone.at", "oe24.at" and "heute.at" did not. The media owners of the "Kleine Zeitung" and the "Vorarlberger Nachrichten" recognised the arbitration of the Press Council, whereas the media owners of the daily newspaper "Heute", the "Kronen Zeitung" and "oe24.at" have not yet done so.</p> <p>The lawyers of those media outlets that participated in the procedure made the following arguments in favour of the publication of the video:</p> <ul style="list-style-type: none"> <li>• The issue “doping in top-class sports” is of public interest and the video should raise awareness among the general public on the problem of doping</li> <li>• The athlete concerned did not raise any complaint because of a violation of his personal rights or intimate sphere – thus, the interest to inform the public is of higher weight.</li> <li>• The case is not a matter of private concern, it is rather a criminal offence which affects the entirety of skiing sports – thus, the public interest is of higher weight.</li> <li>• Top athletes are persons of public interest, they act as role models for younger persons.</li> </ul> <p>In the opinion of the Senate, in the present case there was indeed a public interest in being informed about the police action taken in connection with the doping incident. However, this does not necessarily</p>

		<p>mean that a video showing the person concerned caught red-handed in the act should be shown in the context of reporting.</p> <p>Therefore, the Senate classifies the publication of the video as an exposure because the video recording concerns a delicate moment: the athlete is seen doping his own blood, surrounded by police officers. His arrest is imminent. He is visibly nervous and keeps looking at the camera in a frightened way.</p>
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Austrian case study/ media coverage #2

1	<b>Reference details/Name/Title</b> (please indicate here how the case has been publicly referred to)	<p>In terms of the arrest: [Fullname] extradited and arrested in (city).                  In terms of the media reporting: Foto violates the press code of honour (...)                  Press Council reprimands "Kronen Zeitung" for photo of [surname] in underwear</p>
2	<b>Brief description of the case</b>	<p>A former Olympic Judo champion was accused of abusing minors in three instances between 1997 and 2004. The suspect should already have been on trial in (city) at the end of 2016, but had escaped to the Ukraine. Eight months later, he was picked up in Kiev. However, as the suspected criminal acts he allegedly committed were statute-barred according to Ukrainian law at that time, the extradition could not take place.</p> <p>After Ukraine ratified an additional protocol to the European Convention on Extradition in spring 2019, the extradition could take place and the Austrian Ministry of Justice ("<i>Bundesministerium für Justiz</i>") filed an extradition request to the Ukraine. However, the suspect was untraceable at that time. The suspect was found with a forged passport while crossing the border to Poland in September 2019 and was arrested. The extradition to Austria could take place. The suspect then wanted to return to Austria voluntarily after his imprisonment and asked the Austrian consulate for help. Two investigators from the Federal Criminal Police Office ("<i>Bundeskriminalamt</i>") travelled to Lviv and took over the ex-Judoka.</p> <p>The Kronen Zeitung reported on this and used two photos of the suspect. One of the photos showed the suspect sitting on a couch with his hands cuffed behind his back, dressed only in underpants. The photo was from his arrest in Kiev in 2017, his face is pixelated.</p> <p>The Austrian Press Council decided in January 2020 that the usage of this photo violates the Austrian press code of honour. In particular, it was in violence of the protection of personality and the intimate sphere of the suspect.</p>

3	<p><b>Timeline of events</b> (briefly outline major events in order to capture the nature of the case)</p>	<p>19 December 2016: the public trial on sexual abuse of minors should have taken place in the Criminal Court (city), but the suspect escaped to Ukraine</p> <p>1 August 2017: the suspect was picked up in Kiev but could not be extradited to Austria as the cases were statute-barred according to Ukrainian law.</p> <p>March 2019: the Austrian Ministry of Justice filed an extradition request to the Ukrainian authority but the suspect was untraceable</p> <p>7 - 12 September 2019: the suspect was caught at the Ukrainian Border to Poland, transported to Austria and arrested in (city)</p> <p>13 September 2019: an article in the Kronen Zeitung reported about the arrest and extradition of the suspect, using a photo of the suspect in which his hands were cuffed behind his back and he was wearing underpants</p> <p>2 December 2019: the suspect was sentenced to five years of prison for the sexual abuse of minors (decision not final)</p> <p>10 January 2020: the Austrian Press Council decided that this photo is not in line with the code of honour.</p>
4	<p><b>Media coverage</b> (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)</p>	<p>Media coverage in different media included the full name and an unpixellated photo of the suspect.</p> <p>The Kronen Zeitung reported:      “For 225 days there was no trace of [fullname] - now the handcuffs clicked for the former star Judoka. [Surname], who is suspected of sexual abuse, had been hiding in a small apartment in the Ukrainian capital Kiev. The deep fall of a former sports icon: dressed only in underpants, the double Olympic champion sits on the couch - handcuffed in a small, shabby apartment in the middle of Kiev. For exactly 225 days the Viennese had successfully hidden from Austrian justice.” The article included a photo and a video of the suspect in underpants and handcuffed behind his back.      Kronen Zeitung, Bang effect: [Surname] arrested in the Ukraine, 1 August 2017</p> <p>“Austrian ex-Judoka [full name] was extradited from the Ukraine on Thursday after months of playing tug-of-war. The former sportsman was admitted to the Josefstadt prison this afternoon. [Surname] was apprehended on Saturday when he allegedly tried to travel from Ukraine to Poland with a forged Austrian passport.”      Österreichischer Rundfunk (Austrian Public Podcast), [Surname] nach Wien ausgeliefert, 12 September 2019.</p> <p>Der Standard, [full name] aufgegriffen und nach Wien ausgeliefert, 12 September 2019.</p>

5	<p><b>Key issues</b> (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)</p>	<p>The photo of the suspect with handcuffs behind his back is a major allegation of guilt in the media. In December 2019, after two days of public trial, the now 59-year-old was found guilty in full of the charges (i.e. guilty of severe sexual abuse of minors, sexual abuse of minors and abuse of a relationship of authority). All three witnesses / victims who testified were "extremely credible" for the court, as the judge emphasised. The accused had claimed to be the victim of a conspiracy at the beginning of the trial and had not pleaded guilty. The accused was sentenced to five years in prison. The sentencing was mitigated by his previous innocence, the fact that the offence had been committed a long time ago and that no further criminal acts of the ex-Judoka had come to light for about 15 years. However, the court also considered the coincidence of several crimes and offences, the fact that there were several victims, and the long period of offences. The decision is not final.</p>
6	<p><b>Key consequences or implications of the case with regard to the presumption of innocence</b> (with a focus on public reaction to publications in the media which might lead to a public debate)</p>	<p>The Austrian Press Council stated that the coverage of the criminal proceedings against the suspect was of public interest. On the one hand, the suspect was a top athlete, who in principle enjoys less protection of personality than a private person. On the other hand, he was accused of the serious sexual abuse of minors when the article was published. To a certain extent, the reporting of sexual crimes also serves to deter potential other perpetrators and to prevent the crimes from happening in the first place. However, according to the Austrian Press Council, this does not mean that photos that show the person concerned in a compromising situation can be published. Despite of the pixilation of the face, the person depicted remains easily identifiable to the readers. Thus, the Press Council criticised the publication of the photo to above all "<i>serve the voyeurism and curiosity of certain readers</i>".  Österreichischer Presserat, Kompromittierendes Foto von [full name] verletzt Ehrenkodex, 17 January 2020.</p>
<p>In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered</p>		
7	<p>What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?</p>	<p>The opinion of the Austrian Press Council was disclosed by the Austrian Press Agency and published in several newspapers. The Kronen Zeitung did not accept to publish it.</p>