Learning about the charges: the suspect's right to information

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There are many signs that the European Union is currently undergoing a time of crisis. But whatever may be the future of the economic union, Europe has in the last few decades ceretainly made great and important steps toward creating a common area of freedom, security and justice (see Art. 3 (2) Treaty on European Union), extending to criminal justice. The Charter of Fundamental Rights confers several rights specifically applicable in the context of criminal proceedings (Arts. 47-50 Charter of Fundamental Rights), and since 2010 three EU Directives have urged Member States to provide specific rights to individuals suspected of a crime.[1] A further Directive on the presumption of innocence has been adopted by the Council.[2] With these initiatives, the European Union moves toward a comprehensive recognition of suspects' rights, which brings it into unison with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), especially its Article 6 on the right to a fair trial.

In spite of these most welcome developments, much work still needs to be done in spelling out the contents and limits of individual aspects of the suspect's legal position in the criminal process. In what

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[1] See the Directives on interpretation and translation (DIR 2010/64/EU), on the right to information (DIR 2012/13/EU – see more on this Directive in text at notes 13 et seq.), and on the right of access to a lawyer in criminal proceedings(DIR 2013/48/EU).

[2] The draft can be viewed in http://data.consilium.europa.eu/doc/document/PE-63-2015-INIT/en/pdf

follows, I will concentrate on one particular right, namely the right to be informed about the charges. It is my honour and pleasure to present this little vignette to Professor Nestor Courakis, one of the leading Greek scholars in criminal law and procedure, with happy memories of youthful times spent together in the Max Planck Institute for Foreign and International Criminal Law in Freiburg.

The Basis of the Right to Be Informed: A Necessary Prerequisite for Any Defense

In the ancient inquisitorial process, the suspect was a mere source of evidence. He was obliged to answer questions, and it was a frequent tactic of interrogation to keep him in the dark about the nature and scope of the suspicion against him so as to better elicit incriminating information from him. But this passive position of the defendant in the inquisitorial process cannot be reconciled with the modern view, based on human rights law, that the suspect and later the defendant is an autonomous actor in the criminal process: he is a party of the proceedings, not a mere object of the process.[3] The justice system today recognizes the suspect's right to conduct a defence, which can be active or passive or mixed, at the suspect's choice.

The first prerequisite for conducting a useful defence is to know what to defend against.[4] The suspect should not be surrounded by a dark cloud, not knowing from which direction he is being attacked; rather, he should be aware of the charges so that he can properly organise his defense. The suspect's information right is thus closely related with his right to be heard,[5] and prompt information on the

[3] Cf. Rogall, in Wolter (ed.), *Systematischer Kommentar zur Strafprozessordnung* (SK-StPO), 5th edn, 2016, vor § 133 notes 59-65; Gillmeister, 'Strafverteidiger Forum' (StraFo) 1996, 114, 115.

[4] See European Court of Human Rights (ECtHR), *Pelissier and Sassi v. France*, 25444/94, 25 March 1999, § 54.

[5] See ECtHR, *Kamasinski v. Austria*, 9783/82, 19 Dec.1989, § 102. As to the fundamentally adversarial and dialectic character of fair proceedings see Demko,

charges is a necessary element of a fair trial. As the European Court of Human Rights has put it: "In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair."[6] The information must be given at such a time and in such a manner as to enable the suspect to build his defence strategy on it.[7] Since it is important that the defence can be active even during the pretrial investigation,[8]the suspect needs to be informed as soon as investigatory proceedings have been instituted, not only when they have been completed.

The suspect's right to be informed about the accusation at the early stage of criminal proceedings needs to be distinguished from the defendant's right to learn about the prosecution evidence before trial. The latter right, sometimes termed a right to inspect the prosecution file or a right to disclosure, also is a prerequisite of a fair trial. However, the timing of defence inspection is more fluent and needs to be balanced

Menschenrecht auf Verteidigung' und Fairness des Strafverfahrens auf nationaler, europäischer und internationaler Ebene, 2014, 347 et seq.

[6] *Pelissier and Sassi v. France* (note 4, supra), § 52. See also ECtHR, *Sipavicius v. Lithuania,* 49093/99, 21 Feb. 2002, § 28; *Drassich v. Italie,* 25575/04, 11 Dec. 2007, § 32.

[7] See ECtHR, *Mattoccia v. Italy*, 23969/94, 25 July 2000, § 59: "The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair." § 60: "While the extent of the 'detailed' information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence." *Trechsel, Human Rights in Criminal Proceedings*, 2005, 194-195, has criticized the ECtHR for adopting a "functional" approach rather than recognizing that the right to information is an independent, "absolute" right of the suspect. Although Trechsel correctly points out that a violation of Art. 6 (3) (a) ECHR may occur even where it is not shown that the defense has been prejudiced by withholding the relevant information, the obligation to inform still is functionally related to enabling the suspect to devise and conduct an efficient defence.

[8] Frister *Strafverteidiger* (StV) 1998, 159, 162.

against possible countervailing interests in protecting the confidentiality of all or some evidence.[9]

International Guarantees

Because of its fundamental character, the right to be promptly informed of a criminal accusation has been enshrined in several international human rights instruments.

Article 6 (3) (a) ECHR guarantees everyone charged with a criminal offence the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". Article 14 (3) (a) of the International Covenant on Civil and Political Rights contains the same guarantee. It can hardly be doubted that the right to be informed applies in the early stages of a criminal investigation, because it applies as soon as a person has been "charged", that is, he has been informed of the fact that an official criminal investigation concerning his conduct has been instituted.[10]At that point in time, the police or prosecution have a positive obligation to inform the suspect even if he has an independent right to access the

[9] See, e.g., ECtHR, *Fitt v. UK*, 29777/96, 16 Feb. 2000, § 44: "The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6 § 1 requires (…) that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (…). § 45: "However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused …" See also EU Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, Preamble (31) and (32).

[10] Cf. ECtHR, *Imbrioscia v. Switzerland,* 13972/88, 24 Nov. 1993, § 36; *John Murray v. United Kingdom*, 18731/91, 8 Feb. 1996, § 62. The contrary view of Trechsel (note 7, supra), 199-200, that the right of information refers to the "indictment" would not give Art. 6 (3) (a) any useful meaning, because the indictment must in any event be transmitted to the defendant, and it is important that he knows about the (possible) charges during the *pre-indictment* phase of the proceedings.

case file.[11] The suspect must be informed not only of the acts of which he is accused but also of the legal characterization given to those acts.[12]

Another important source pertaining to the right of information about the charges is EU law. In line with the mandate of the Stockholm Roadmap, and based on Article 82(2) of the Treaty on the Functioning of the European Union, the European Parliament and the Council have in 2012 issued the Directive on the right to information in criminal proceedings.[13] Like several other EU instruments purporting to strengthen the rights of defendants in the criminal process, this Directive is meant to enhance the mutual trust of Member States in each other's criminal justice systems and thereby to facilitate mutual recognition of decisions in criminal matters.[14]

As is the case with the ECHR guarantee, the EU Directive links the right to information to the suspect's ability to prepare his defense and to the fairness of the proceedings.[15] The Directive provides a precise definition as to the time when the information is to be given: from the time a person is made aware by the competent authorities that he is suspected or accused of having committed a criminal offence until the final determination of the question whether the accused person has committed the criminal offence.[16] Any suspect is to be informed, in necessary detail,

– about the criminal act he is suspected or accused of having committed;
– of the reasons for his arrest or detention, if applicable;

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[11] *Mattoccia v. Italy* (note 7, supra), § 65.

[12] *Pelissier and Sassi v. France*(note 4, supra), § 51: "Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed."

[13] Directive 2012/13/EU of 22 May 2012.

[14] Directive 2012/13/EU, Preamble (3), (7), (9) and (14).

[15] Directive 2012/13/EU, Preamble (27), (28).

[16] Art. 2 Directive 2012/13/EU.

- at the lateston submission of the merits of the accusation to a court, on the nature and legal classification of the offence, as well as the nature of his participation;
- of any changes in the information given previously, where this is necessary to safeguard the fairness of the proceedings.[17]

In a separate Article, the Directive provides that Member States "shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence."[18] Access shall be granted at the latest upon submission of the merits of the accusation to the judgment of a court.[19] Exceptionally, access to certain materials "may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation" or seriously harm national security.[20]

German Law

It may be of interest to contrast these international instruments with national legislation and practice on the matter of information. Since I am most familiar with German law, I have chosen Germany as an example.

The German Code of Criminal Procedure (CCP) provides that any judicial warrant ordering the arrest of a suspect must contain a statement as to the time and place of the suspected offence, the applicable legal provision and the elements of the offense.[21] As soon as the suspect has been arrested, he is given a copy of the judicial warrant.[22]

[17] Art. 6 Directive 2012/13/EU.
[18] Art. 7 (2) Directive 2012/13/EU of 22 May 2012.
[19] Art. 7 (3) Directive 2012/13/EU of 22 May 2012.
[20] Art. 7 (4) Directive 2012/13/EU of 22 May 2012.
[21] § 114 sec. 2 no. 2 CCP.
[22] § 114a CCP.

Even if the suspect has not been formally arrested, he shall, at the beginning of his first interrogation, be informed what offence he is charged with and which provisions of the criminal law may be applicable.[23] This obligation applies to judges, prosecutors and police officers; but police are not required to state the applicable legal provisions, because they are not deemed to have sufficient legal expertise.[24] If, however, a police officer indicates the applicable provision of the criminal law, that information must be correct.[25]

Although German law thus seems to be in compliance with international standards, there is a hitch: There is no general legal rule that obliges the prosecutor or the police to inform a suspect of the initiation of a criminal investigation concerning him, even if the investigation has focused on the particular suspect. The Code of Criminal Procedure provides only that a suspect has to be interrogated *before the end* of an investigation leading to an indictment.[26] This means that the prosecutor may conduct a lengthy investigation against a suspect and dismiss the case (for lack of evidence or for other reasons) without ever informing the suspect of the investigation.[27] Of course, if the suspect is not even informed of the fact that an investigation is focusing on him, he will not learn what he is or may be accused of. This state of the law reflects the ancient inquisitorial system of the 19th century: the suspect is treated not as a party of the proceedings but as a mere object of a secret investigation, used for evidentiary purposes as needed and otherwise ignored.[28]

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[23] §§ 136 sec. 1, 163a secs. 3 and 4 CCP.

[24] § 163a sec. 4 CCP. See Rogall(note 3), § 136 note 40.

[25] Rogall (note 3), § 136 note 40; Eisenberg, *Beweisrecht der StPO*, 9th ed. 2015, note 547.

[26] § 163a sec. 1 CCP.

[27] According to § 170 sec. 2 CCP, the prosecutor is required to inform the suspect of the dismissal of prosecution for lack of sufficient evidence only if the suspect had been interrogated or arrested, had specifically asked for a notice of dismissal, or if his particular interest in notification is "evident".

[28] See the critical assessment of Gillmeister *StraFo* 1996, 114, 115.

Even if the results of the investigation cause the police and the prosecutor to conclude that the suspect should be indicted and brought to trial, they can withhold the suspect's interrogation – and consequently, his information about the possible charges – until the very end of the investigation.[29] This tactic not only leads to a serious restriction of the suspect's defense rights, which after all apply even during the investigation phase. Keeping the suspect in the dark is also unwise, because it precludes the possibility of obtaining his cooperation in searching for a compromise resolution of the case which might make a trial unnecessary.[30]

Since the European Convention on Human Rights is directly applicable as a source of domestic law in Germany, a suspect who has deliberately been kept ignorant about the charges against him could rely on his information right under Article 6 ECHR, regardless of what secrecy the German Code of Criminal Procedure might permit.[31] In practice, German police and prosecutors seem to prefer an open style of investigating criminal offences and do not as a rule attempt to keep the investigation concealed from the suspect. This may explain the fact that no case seems yet to have been brought against Germany before the European Court of Human Rights challenging the rule of secrecy and non-information as a violation of Article 6 (3) (a) ECHR.

Problem Areas

1. *Timing ("promptly")*

But would a complainant succeed in Strasbourg? This question leads to the general issues and problems connected with the right to information. Let us start with the question of what "prompt" information may mean. A suspect complaining of the fact that he was the focus of a lengthy investigation without being told about it may face an obstacle in showing that he was "charged with a criminal offense", which is the

[29] § 163a sec. 1 CCP.
[30] Gillmeister *StraFo* 1996, 114, 118.
[31] Frister *StV* 1998, 159.

threshold requirement for being afforded the rights listed in Article 6 (3) ECHR. The problem lies in the fact that the ECtHR employs an *interactive* criterion for defining when a person has been "charged" with a crime. The ECtHR as well as the EU Directive of 2012 on information rights considers a person to be "charged" only from the time that he "is *made aware by the competent authorities* that he is suspected or accused of having committed a criminal offence".[32] The information about a suspicion need not be conveyed by a formal order or decree of inculpation; it is sufficient that an official act, such as an arrest warrant signed by a judge, indicates that a particular person is suspected of a crime and that an investigation is taking place. However, that act must be communicated to the suspect; a secret order authorizing the surveillance of his telecommunication, for example, does not suffice for "charging" him with a crime, even if surveillance is permissible only against persons suspected of crime.

If a suspect must be informed of the accusation only when he has been "charged" in that sense, even the European legal instruments do not grant an effective protection against an investigation carried out in complete secrecy. This raises the question whether there flows from Article 6 (3) ECHR a right to be charged, that is, a right to be informed of the existence of a suspicion on the part of the police or prosecution. Some German authors claim that such a right exists,[33] which would then trigger the right to be informed about the charges. But there are some valid objections against a general right to be charged at the very first instance where an individualized suspicion arises:

– It is unclear whose suspicion should trigger the right to be charged – any police officer's, or the prosecutor's suspicion?

[32] See cases cited in note 10 supra. See also Art. 2 Directive 2012/13/EU; *Esser*, in: Löwe/Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar, 26th ed. 2012, Art. 6 EMRK note 539.

[33] See Fincke, 'Zeitschrift für die gesamte Strafrechtswissenschaft', *ZStW* 95 (1983), 918, 937 et seq.; Egon Müller, in Brüssow *et al.* (eds.), *Strafverteidigung und Strafprozeß. Festgabe für Ludwig Koch*, 1989, 191, 197; Frister *StV* 1998, 159, 160-161.

- Suspicion is a fluent concept, and an initial suspicion may disappear quickly. Wouldn't there have to exist a strong or persistent suspicion to give rise to a right to be charged as a suspect?
- If the right to be informed is functionally connected to the right of devising and conducting an effective defence, isn't it sufficient to be informed as soon as defence activities are necessary and feasible, for example, when a suspect is to be interrogated or arrested or his home is to be searched?[34]
- There may be legitimate grounds for not alerting a person to the fact that he is suspected of a crime, for example, the need to collect information without his knowledge or without providing him with a chance to interfere, e.g. by putting pressure on a witness.

With regard to the last point, there seems to exist a broad consensus that information about the charges may be withheld as long as informing the suspect would jeopardize the purpose of the investigation, especially when secret surveillance measures need to be taken[35] or when there exists a concrete risk that the suspect, if informed, will destroy evidence.[36] It is, on the other hand, not permissible to refrain from informing the suspect of the accusation in order to prevent him from undertaking legitimate defence activities, such as the collection of exonerating evidence.[37]

If one agrees on these limiting rules, it does not make much difference whether one regards early information as the rule and accepts certain exceptions, or whether one prefers not to grant the suspect a right to instant charging but leaves the exact point of charging to the discre-

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[34] See Directive 2012/13/EU, Preamble (28), suggesting that "the information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority". See also Esser (n. 32), Art. 6 EMRK note 543.

[35] Gillmeister *StraFo* 1996, 114, 116; Frister *StV* 1998, 159, 161.

[36] Fincke, *ZStW* 95 (1983), 918, 971; Ambos, *ZStW* 115 (2003), 583, 598; Esser (n. 32), Art. 6 note 542.

[37] Frister *StV* 1998, 159, 162; *Esser* (note 32),Art. 6 note 548.

tion of the relevant law enforcement officials, provided that they do not abuse their discretion. The guiding consideration must in any event be the effectiveness of the defence: a suspect must be charged and provided the requisite information as soon as necessary for him to implement efficient and legitimate defence activities.

2. *Scope*

According to Article 6 (3) (a) ECHR, the information afforded the suspect needs to cover "in detail" the "nature" and the "cause" of the accusation. The European Court of Human Rights has held it to be sufficient that the notification of the suspect includes the offence of which he is accused, the place and the date of the alleged crime, the name of the victim, and a reference to the relevant articles of the Criminal Code.[38]

The scope of the information to be provided is related to the purpose of enabling the suspect to conduct an effective defence. This means that the format and manner of providing information is not important.[39] What counts is that the suspect must be enabled to understand the seriousness of the charges and the facts that they relate to; otherwise he may not become aware of the necessity of preparing a defence and of the main issues on which the defence should concentrate. In light of this purpose, it is useful to combine the information about the charges with the information about the permissible defence options (especially the right to remain silent) and the right to consult with a lawyer.

The term "cause" of the accusation seems to relate to the *factual* basis of the charge, that is, the conduct that gives rise to the suspicion of criminal wrongdoing. This factual background needs to be described in outline. If the information is provided early in the investigation process, not many details may yet be available. However, if the police have

[38] ECtHR, *Brozicek v. Italy*, 10964/84, 19 Dec. 1989, § 42.

[39] Cf. *Pelissier and Sassi v. France* (n. 4), § 53; see also ECtHR, *Niculescu v. Romania*, 25333/03, 25 June 2013, § 119 (suspect – who was lawyer – was expected to infer the charges from a report on her wiretapped telephone conversations).

more than one hypothesis about the relevant facts, they should inform the suspect of all of them.[40] If the investigation extends to several separate incidents, the majority view in Germany would permit the police to inform the suspect of only one incident and to introduce the other incidents later in the course of an interrogation.[41] The police are not obliged to disclose everything they know about the case but may withhold information for tactical reasons. However, they must not mislead the suspect about the seriousness of the charge by, for example, interrogating him about an alleged assault when they know that the victim had died.[42]

Information on the facts that have given rise to the suspicion must be distinguished from information on evidence. The majority view in Germany,[43] which appears to be in line with the interpretation of the ECHR by the ECtHR,[44] accords the suspect no right to be told about the sources of police information, that is, relevant witness testimony or other incriminating evidence. The opposing view regards information about the available evidence as necessary for the suspect's preparation of an effective defence: he might conclude that it is better to confess than to remain silent if he knows that the police already have available strong incriminating evidence indicating his guilt, or *vice versa*.[45] Although that observation is correct in terms of defence tactics, it remains

[40] Frister *StV* 1998, 159, 161.

[41] Diemer, in: Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung*, 7th. edn. 2013, § 136 note 8; *Meyer-Goßner/Schmitt*, Strafprozessordnung, 59th edn. 2016, § 136 note 6. For a different view see Gleß, in: Löwe/Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz*. Großkommentar, 26th edn. 2007, § 136 n. 24 (claiming that all factual allegations have to be disclosed immediately).

[42] Federal Court of Justice (*Bundesgerichtshof*), Judgment of 6 March 2012 (1 *StR* 623/11), published in: *Neue Zeitschrift für Strafrecht* 2012, 581.

[43] Fincke *ZStW* 95 (1983), 918, 959-960; Gillmeister *StraFo* 1996, 114, 116-117; Frister *StV* 1998, 159, 162; Meyer-Goßner * Schmitt (n. 41) § 136 note 13.

[44] See Trechsel (n. 7), 200 (citing decisions of the European Commission on Human Rights).

[45] Grünwald, *Das Beweisrecht der Strafprozeßordnung*, 1993, 63; Gleß (note 41), § 136 note 22.

true that the "cause" of the accusation is not identical with the sources of that cause; and although the police and prosecutors should beware of entrapping or misleading the suspect, he has no claim to being told from the start everything the police know about the case. His access to relevant evidence is part of his right to have access to the prosecution file, which follows different rules.[46]

Information of the suspect, according to Article 6 (3) (a) ECHR, is to extend to the "nature" of the accusation. This implies that the suspect must be told about the legal relevance of his alleged conduct. The information about the applicable law must be clear and precise, and it must be comprehensible to the suspect. It is therefore not sufficient that a suspect is told an unfamiliar legal term[47] or shown a string of paragraph numbers referring to the Penal Code.[48] Although the information on the law has to be correct, the ECtHR saw no breach of Art. 6 (3) (a) ECHR in a case where the prosecutor verbally specified the charge correctly but cited an inapplicable subsection of the relevant Code provision.[49]

German law, as has been mentioned, does not require police officers to tell a suspect about the applicable law.[50] This rule, which has been explained by the lack of police officers' legal training, seems to conflict with the ECHR requirement that the information of the suspect must extend to the relevant provisions of the law. But most suspects may not

[46] Trechsel (n. 7) 200-201.

[47] See ECtHR, *Campbell and Fell v. United Kingdom*, 7819/77, 28 June 1984, § 96 (leaving open the question whether it was sufficient to tell a prisoner that he was suspected of having committed "mutiny").

[48] See the decision of the German local court (Amtsgericht) of Backnang of 19 Sept. 2012 (2 Ls 90 Js 58693/12; available online: https://www.burhoff.de/insert/?/asp_weitere_beschluesse/inhalte/1932.htm). In that case, the defendant had ticked a box indicating that he had "committed" an offence which was characterized only by a paragraph number of the German Penal Code. The court held that this was an invalid basis of convicting the defendant. See aso Diemer (n. 41), § 136 n. 9; Gleß (n. 41) § 136 n. 26.

[49] ECtHR, *Gea Catalan v. Spain*, 19160/91, 10 Feb. 1995, § 29.

[50] § 163a sec. 4 CCP.

be interested in being told paragraph numbers; and if they wish to learn about the presumed legal relevance of their conduct, the police may be obliged to refer them to the prosecutor or to ask the prosecutor's office for the relevant information.

3. *Changing circumstances*

Information about the cause and nature of the accusation must be given at an early stage of the investigation. It often happens that law enforcement staff later discover new facts which let the suspect's conduct appear in a different light. For example, what was originally thought to be a case of simple theft may later turn out to have been committed by force, thus amounting to a robbery. The EU directive of 2012 succinctly states what has to be done in such a situation: "Where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence."[51] Again, the purpose of enabling the suspect to conduct an effective defence is the relevant consideration: The suspect must be told of changes concerning the factual situation or its legal appreciation as soon as the change becomes relevant for his defence position. The European Court of Human Rights has repeatedly had to deal with this type of situation; the Court has insisted that it is incompatible with a fair trial to surprise the suspect or the defendant with a new view of the facts or the law without affording him the opportunity to adapt his defence to the new situation.[52]

Even if relevant changes have not been communicated to the sus-

[51] Directive 2012/13/EU, Preamble (29).

[52] See, e.g. *Pelissier and Sassi v. France* (note 4), § 62;*Dallos v. Hungary*, 29082/95, 1 March 2001, §§ 49-52; *Drassich v. Italie* (note 6), §§ 37-40 (emphasizing that it is not relevant to know what line of defence the suspect could have taken against the new allegations). For similar views under German law, see Esser (note 32), Art. 6 note 541; Rogall (note 24), § 136 n. 40; Gleß (n. 41) § 136 n. 26.

pect in time, however, the ECtHR has negated a violation of Article 6 ECHR where the suspect was still able to address all relevant legal and factual aspects of his case, even if only on appeal.[53] But a violation was held to exist where the court of appeals did not take into account the new defence submissions which reacted to a changed view of the prosecution.[54] One may well have doubts about this "functional" line of reasoning, which is due to the Court's strictly retrospective approach to the violation of procedural rights. If the suspect was not aware of critical facts during the pretrial investigation and/or throughout the trial, his capability of effectively defending himself may have been irretrievably damaged, and the possibility of raising the issue on appeal will often not be sufficient to restore him to the proper procedural position. In a dissenting opinion, Judge *Van Djik* eloquently made this point: "If the first-instance proceedings fail to meet those requirements [of fairness], that failure cannot be remedied simply by the fact that the appeal proceedings are fair; this would make the fairness issue of the first instance proceedings completely irrelevant. The failure would only be remedied if the appeal court, in view of the shortcomings in fairness, quashed the first-instance decision and ordered a retrial."[55]

4. *Remedies*

This debate leads to the question of what remedies are available for a suspect who has not properly been informed of the accusation against him.

The ECtHR accepts as a sufficient remedy the fact that the accused

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[53] See *Sipavicius v. Lithuania* (note 6), § 31-32; *Mulosmani v. Albania*, 29864/03, 8 Oct. 2013, §§ 132-133; *Mihelj v. Slovenia*, 14204/07, 15 Jan. 2015, § 44 (no violation if the defendant fails to appear for trial and fails to bring the change of charges to the attention of the appeals court).

[54] *T.v. Austria*, 27783/95, 14 Nov. 2000, § 71; *Dallos v. Hungary* (note 52), §§ 49-52; *Abramyan v. Russia*, 10709/02, 9 Oct. 2008, §§ 37-38.

[55] *Twalib v. Greece*, 24294/94, 9 June 1998, Partly Dissenting Opinion of Judge Van Dijk. See also Frister *StV* 1998, 159, 164.

has been given an opportunity to defend against the new accusations in a court of higher instance. If that opportunity has not been afforded and the violation persists, a monetary compensation under Article 50 ECHR is granted. An alternative approach, which has been adopted by the German Federal Court of Justice with respect to violations of various defendants's rights, would be to grant the defendant a reduction of sentence as a compensation for the fact that he was not afforded the necessary information on the charge.[56]

Under national German law, the question has been raised as to whether statements which the suspect makes during the investigation are admissible as evidence if he had not been told what crime he was suspected of. The Code of Criminal Procedure provides for inadmissibility of any statement made as a result of "deceit" (*Täuschung*) committed against the suspect (or any witness).[57] If the police or prosecutor intentionally misrepresent the situation in order to make the suspect confess to what he thinks is a minor misdemeanour, this may well amount to "deceit" and make his statement inadmissible.[58] But merely neglecting to provide complete information on the applicable law or facts will not normally be regarded as "deceit".[59]

Even if withholding information on the charges is not regarded as "deceit", however, the violation of a critical defence right may lead to the inadmissibility of statements made in an interrogation. This unwritten rule applies, for example, where the police omit to inform the suspect of his rights to remain silent and to consult with a lawyer.[60] But

[56] See Frister *StV* 1998, 159, 164.

[57] § 136a secs. 1 and 3 CCP.

[58] See, e.g., *BGH*, Judgment of 31 May 1990, 4 StR 112/90 (37 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 48): Police interrogated a suspect as a witness about a "missing person"; they failed to tell him that the dead body and severed head of the person had been found. *BGH* held this to be "deceit" under § 136a CCP.

[59] German courts define "deceit" as an *intentional* misrepresentation of facts. For an opposing view emphasizing the relevance of the *effect* of a statement on the suspect, see Gleß (n. 41), § 136a n. 49-50.

[60] *BGH*, Judgment of 27 Feb. 1992, 5 StR 190/91, 38 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 214; Judgment of 29 Oct. 1992, 4 StR 126/92, 38

the majority view does not regard the information about the charges as equally important, and therefore negates an "automatic" exclusion of any statement that a suspect makes when he has not sufficiently been informed about the nature and cause of the accusation.[61] According to the Federal Court of Justice, a statement must be excluded only if it can be shown that the lack of information on the accusation has had an influence on the suspect's decision to make a statement and thus affected his right against self-incrimination. The Federal Court of Justice has, however, denied that possibility in a case where the Court assumed that it was "obvious" to the suspect what he was charged with.[62] In that case, the defendant was not told, in spite of repeated questions, that the victim of his assault had died. Despite the Court's assertion to the contrary, it was thus anything but obvious to the defendant that he was in fact suspected of murder. Generally, the majority view may give insufficient weight to the right to be informed from the beginning of the investigation. I would therefore argue in favour of a rule of exclusion, with a narrow exception for cases where there can be no doubt that the lack of information had no negative impact on the effectiveness of the defence.[63]

The Connection with the Right to a Lawyer

At first blush, the suspect's right to be informed of the charges and his right to have the assistance of a lawyer appear to be unrelated to each other: A suspect must be informed of the nature and cause of the accusation even when he has no access to a lawyer, and that information may be of some help to him when trying to devise an effective de-

Entscheidungen des Bundesgerichtshofes in Strafsachen 372; Judgment of 22 Nov. 2001, 1 StR 220/01, 47 *Entscheidungen des Bundesgerichtshofes in Strafsachen* 172 at 174.

[61] See Gleß (note 41), § 136 n. 103; *Rogall* (n. 24), § 136 n. 97.

[62] BGH, Judgment of 6 March 2012, 1 StR 623/11, published in *Neue Zeitschrift für Strafrecht* 2012, 581.

[63] For similar views, see Neuhaus *StV* 2013, 485, 489-490 (arguing, persuasively, that knowledge of the accusation is the necessary basis on which to build the defense); Jahn *JuS* 2013, 658.

fence. But in fact these two rights are interdependent: The great majority of suspects lack the skill and general knowledge for making proper use of the information provided; and even an excellent lawyer cannot effectively assist his client if he has no information what crime the client has been charged with. If we put the focus on the right to be assisted by a lawyer even at the earliest stages of criminal proceedings, the right to be informed about the accusation is thus a necessary precondition for the lawyer's effective assistance; and if we focus on the right to be informed, this right is of little use to the suspect unless he has access to a lawyer who can explain the consequences and options to him.

This interdependence of rights leads to the consequence that a statement made by the suspect is normally admissible into evidence only if he has been advised of his right to a lawyer, has been given access to a lawyer, *and* has been informed of the charges. Only if these conditions have been fulfilled can the suspect make an intelligent decision on how to respond to the accusation. An investigation of whether a person has committed a crime is a serious matter. No one should be the target of such an investigation without being told what it is about, and where he can find professional assistance.