

Austria¹

1. Introduction

Austria today has approximately 8.3 million inhabitants.² Of all persons living in Austria, 10.3% are foreign citizens; the largest groups are citizens of Serbia and Montenegro, Germany, Turkey and Bosnia-Herzegovina, each with a share of about 2%. The percentage of foreigners in bigger cities is much higher, amounting up to 19% in Vienna.³

Austria is a member of the Council of Europe since 1956 and party to both UN International Covenants since 1973.⁴ It ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1958 and Protocol No. 6, abolishing the death penalty, in 1984.⁵ The ECHR forms part of the Austrian constitution according to a Federal Constitutional Law of 1964. Since 1995, Austria is a member of the European Union. It is also party to the European Convention for the Prevention of Torture (CPT) since 1989. So far, Austria has only signed the Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)⁶ (2003).

Besides the CCP and binding international legal norms, in particular the ECHR, the Federal Constitutional Act of 29 November 1988 on the protection of personal freedom – the Personal Freedom Act (“Bundesverfassungsgesetz zum Schutz der persönlichen Freiheit”) – and the Federal Constitution of the Republic of Austria (“Bundes-Verfassungsgesetz, B-VG”)⁷ are relevant to the criminal procedure, both having a constitutional character. The Personal Freedom Act consists of eight articles and contains, *inter alia*, the *habeas corpus* guarantees. Art. 1 emphasises the principle of proportionality, Art. 2 and 4 outline the grounds for arrest and detention as well as further preconditions. In Art. 5, the imperative for a speedy procedure can be found; Art. 6 prescribes the need for review of arrest within one week and the regular review of detention. Art. 7 guarantees compensation in cases of unlawful arrest or detention.

With regard to the constitutionality of legal norms as well as acts of the authorities, two constitutional bodies are important: The Constitutional Court examines the constitutionality of laws passed by Parliament, the legality of regulations by Federal ministers, and alleged infringements of constitutional rights of individuals through acts of the administration (Art. 137 pp.). Since 1981, Austria also has an Ombudsman Board: the Volksanwaltschaft (148a BV-G).⁸ It is entrusted with the task of examining all alleged or presumed grievances arising in connection with the public administrative system. The Ombudsman Board may also take up matters on an *ex officio* basis, i.e., without a prior complaint, if it has reasons to suspect an administrative irregularity. In all annual reports, at least a few cases of pre-trial detention matters can be found.

¹ The author, Christine Morgenstern, wishes to thank Dr. Judith Stummer-Kolonovits, University of Vienna and Dr. Walter Hammerschick, Institut für Rechts- und Kriminalsoziologie Vienna, for providing important information on current developments and for indicating relevant bibliography.

² <http://epp.eurostat.ec.europa.eu> (last retrieved 2 January 2009).

³ Statistik Austria 2008, p. 25-27.

⁴ <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last retrieved 8 January 2009).

⁵ It is party to all protocols but No. 12, where it is a signatory. The complete status can be found at <http://conventions.coe.int> (last retrieved 7 January 2009).

⁶ http://www2.ohchr.org/english/bodies/ratification/9_b.htm (last retrieved 7 January 2009).

⁷ The current German text is available for download at:

<http://www.bka.gv.at/DesktopDefault.aspx?TabID=4780> (last retrieved 1 December 2008). A slightly older version (2000) is available for download in a synoptical edition in English, French and German at <http://www.bka.gv.at/DocView.axd?CobId=12597>. (last retrieved 1 December 2008).

⁸ <http://www.volksanw.gv.at/>. The annual reports since 1998 are also available in English.

The Austrian CCP⁹ regulates arrest (“Festnahme”) and pre-trial detention (“Untersuchungshaft”) in §§ 170-189 CCP; these sections of the law also contain provisions for the enforcement of pre-trial detention. The CCP underwent a far-reaching reform with the Code of Criminal Procedure Reform Act of 2004, which entered into force in January 2008.¹⁰ Already in 1993, important reforms of the legal provision governing arrest and detention had brought significant changes to the detention practice, resulting in decreasing numbers of detention orders and detainees.¹¹ According to scholars, the new reform can be partly assessed positively, e.g. with regard to the need to make reasoned requests (police, prosecutor) and reasoned orders (court). But it also contains some changes for the worse and contradicts aims of the 1993 reform, e.g. with regard to the timeline for review of detention.¹²

The Penal Code regulates how pre-trial detention is considered with respect to the sentence. Special regulations for juveniles can be found in the Juvenile Justice Act (“Jugendgerichtsgesetz”). Compensation is regulated in the Detention Compensation Act (“Strafrechtliches Entschädigungsgesetz”).

2. Empirical background information

Table 1 presents a comparative overview of recent data; it comprises data from three sources that are widely used for comparative research in particular. In all cases, the most current data available for all categories is given. According to these sources, the percentage of pre-trial prisoners among the overall prison population used to be around 23-25%; according to the most recent data available, it has now dropped to less than 20%. With regard to the SPACE I data, it should be mentioned that the Austrian authorities report data concerning remand detainees under the heading of “untried prisoners”. As far as can be seen, these detainees represent the complete group of remand prisoners. The category “others”, with about 500 prisoners according to the latest SPACE I¹³ data, refers to persons in custody pending deportation, administrative detention etc.

The prison population (including remand detainees) in Austria rose significantly between 1989¹⁴ and its peak in 2004 (see Figure 1 and Table 2): from less than 6,000 to 9,043. At the beginning of 2007, the number was 7,845. The numbers of remand prisoners remained more or less stable, at least if one compares the years 1989 (2,025 remand detainees) and 2007 (2,007 remand detainees). In the meantime, however, the number of remand detainees had dropped to 1,535 in 2000 and risen again to 2,456 in 2004. It should be added that the crime statistics¹⁵ show a significant increase in the number of suspects per year: it rose from less than 180,000 in 1980 to more than 245,000 in 2004; a slight decrease can be seen since. Data published by the Ministry of Justice shows that in the last two years the total number of prisoners as well as the number of remand prisoners has decreased. This development has accelerated much since January 2008, which is probably linked to the legislative reforms that came into force in January 2008 (the so-called “prison relief package” or “Haftentlastungspaket”¹⁶, bringing a bundle of new or altered legislation, both in the Penal Code and in the CCP). The data in Table 1 concerning 1 January 2007 has to be regarded with caution, because the due date “1 January” often does not fully reflect reality (prisoners might be absent for Christmas leave, the summons for the beginning of the execution of the sentence refers to a later date etc). This is why the data for December 2006 is

⁹ As far as can be seen, no English translation for the current Code exists. All legal texts are available in the original version at <http://www.ris.bka.gv.at/Bund/>. Basic information on the criminal procedure in English is provided by Kier 2005. It is still of some use to provide a general understanding. However, it has to be noted that the information relates to the former version of the CCP and is therefore partly outdated.

¹⁰ For details, see Hammerschick et al. 2008, and, with particular regard to the defendant’s rights, Soyser/Kier 2008. For criticism on the practice and need for reform of pre-trial detention, see already Soyser 2001.

¹¹ Pilgram 2009.

¹² Venier 2006, p. 620.

¹³ Aebi/Delgrande 2007. Table 4.

¹⁴ For older data, see Gratz/Held/Pilgram 2001, p. 6-7.

¹⁵ *1980-1999 Polizeiliche Kriminalstatistik, 2000-2005, Kriminalitätsbericht. Statistik und Analyse* (annual report published by the Ministry of the Interior).

¹⁶ The data and more details can be found at

http://www.justiz.gv.at/cms_upload/docs/20080730_Justiz_Bilanz_Vorhaben.pdf (last retrieved 31 December 2008).

given too. Very recent information from the new website of the Prison Administration in Austria states that on 1 March 2008 the prison population was 8,600, including 1,678 pre-trial detainees. Around 5% of the detainees are females, 3% are juveniles (14-18 years old), and 8% are young adults (18-21 years old).¹⁷ Further details on the development of the average yearly number of prisoners in Table 2 affirm that in particular the number of pre-trial detainees dropped significantly between 2007 and 2008. The statistics provided by the Ministry of Justice¹⁸ suggest that this development can partly be explained by the fact that the average time spent in pre-trial detention has decreased between 2007 and 2008 for all prisoner categories: from 94 to 89 days for male remand prisoners; from 78 to 73 days for female remand prisoners; from 78 to 73 days for juvenile remand prisoners between the ages of 14 and 18; from 99 to 93 days for foreigners who are not citizens of the EU; and from 82 to 79 days for foreigners from other EU Member States. Other data provided by the Ministry of Justice relates to the total number of foreign inmates during the year; here, a significant decrease in the number of non-EU citizens can be observed (from 5,931 in 2004 to 3,450 in 2008) – a fact that also may have contributed to the overall decrease.

Comprehensive research on the use of pre-trial detention was carried out in 1996.¹⁹ Since then, only some bits of empirical information were processed by researchers. It remains to be seen (and will be subject for further studies)²⁰ how the reform of the criminal procedure will impact the legal practice, in particular with regard to arrest and detention. The 1996 study examined, *inter alia*, the probability that a person is detained once he is suspected of an offence (taken not from the police statistics but from the statistics of the prosecution authorities) and the length of remand detention with particular regard for regional disparities. According to the study, the federal average of detained suspects as a share of all suspects is 8.6%, varying between 14% in Vienna and 5% in Innsbruck. These differences were partly explained with local traditions, less with factual grounds.

¹⁷ Strafvollzug in Österreich. <http://strafvollzug.justiz.gv.at/index.php> (last retrieved 12 January 2009).

¹⁸ The author wishes to thank Mag. Christian Pilnacek, who provided comprehensive and current data on behalf of the Minister of Justice via e-mail in February 2009.

¹⁹ Hanak/Karazman-Morawetz/Stangl 1996.

²⁰ A study is planned by the Austrian Institute for Legal Sociology (“Institut für Rechts- und Kriminalsoziologie”), information by W. Hammerschick (see footnote 1).

Table 1: Prison population characteristics (latest data from different sources)

Source	Date	Total prison population	Number of remand detainees	Pre-trial detainees as a percentage of the total prison population	Total prison population rate per 100,000	Pre-trial detention rate per 100,000	Foreigners in prison ²¹ (numbers and percentage)		Female prisoners (numbers and percentage)		Prisoners under 18 (numbers and percentage) ²²	
							All prisoners	Remand detainees	All prisoners	Remand detainees	All prisoners	Remand detainees
ICPS ²³	1 August 2008	7,909	1,582	20%	95	19	---	---	---	---	---	---
							42.2%*	---	5.27%*	---	1.8%*	---
SPACE I (Council of Europe) ²⁴	1 September 2006	8,780	2,040	23.3%	105	24	3,768 42.9%*	1,207 59.2%	444 5.1%	---	120 1.4%	---
National Statistics ²⁵	1 December 2006	9,005	2,160	24%	108	26	---	---	---	---	173	94
	1 January 2007	7,845	2,007	25.6%			3,498 44.6%*	1,149 57.3%**	---	---	173 1.9%*	94 4.35%**

--- No data available; *: of all prisoners; **: of all remand detainees; data in italics represent own calculations

²¹ Please see paragraph 8.3 for explanations, in particular with regard to citizenship.

²² Data from Bruckmüller/Pilgram/Stummvoll (2009).

²³ ICPS 2008.

²⁴ Aebi/Delgrande 2007.

²⁵ National Prison Statistics cited after Bundesministerium für Inneres (2008). There are some reservations with regard to the 2007 data, see above.

Figure 1: The prison population according to legal status: absolute numbers on a due date, 1989-2007²⁶

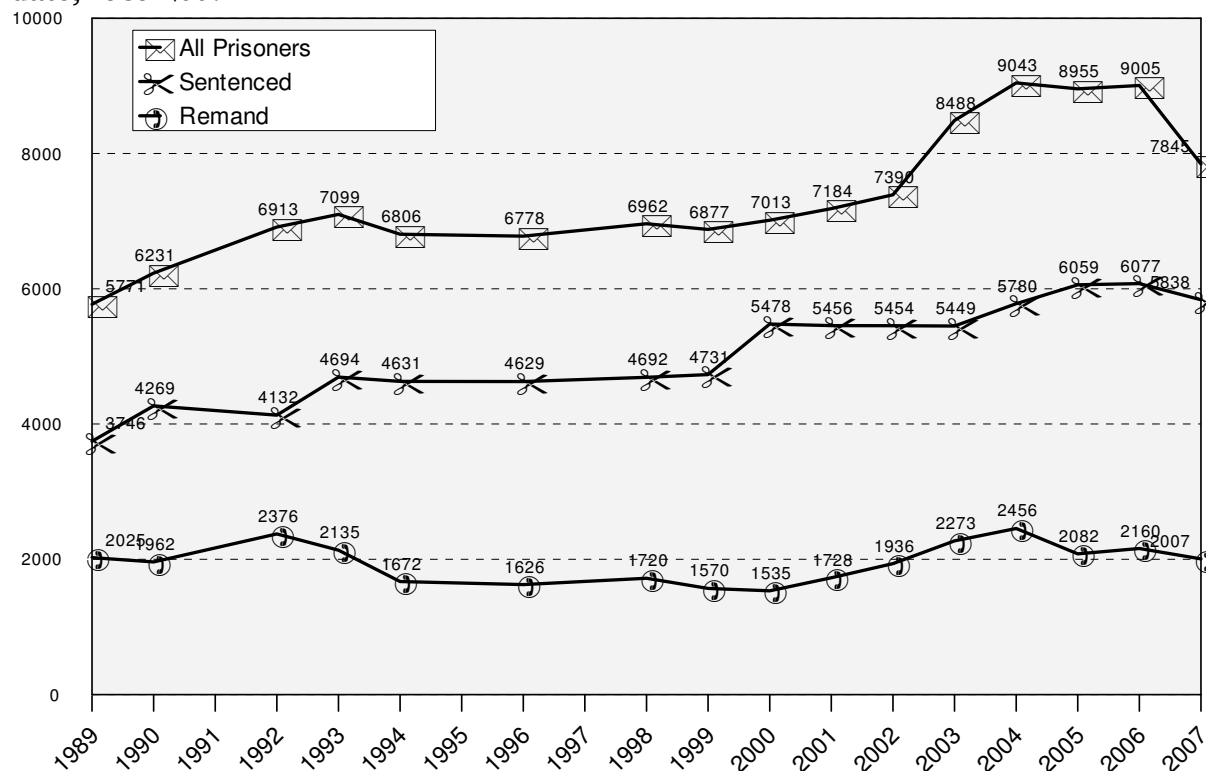


Table 2: The prison population according to legal status: yearly averages, 2002-2008²⁷

Year	Sentenced prisoners	Remand prisoners	Others	Total
2002	4,919	1,920	837	7,530
2003	5,079	2,062	683	7,881
2004	5,285	2,305	853	8,443
2005	5,865	2,197	801	8,863
2006	5,959	2,136	766	8,881
2007	5,984	2,062	913	8,959
2008	5,587	1,693	935	8,215

3. Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

According to §§ 173 pp. CCP, pre-trial detention (“Untersuchungshaft” – a in the true sense of the word “investigation detention”) is the deprivation of liberty of an untried or not yet finally convicted person following a decision by the court. The term “pre-trial detention” used in this text is therefore, in principle,

²⁶ Source: Data for 2002-2007 (1 January of each year) by Bundesministerium für Inneres 2008. Data for 1999-2001 taken from SPACE I (1 September of each year). Earlier data has been taken from the Council of Europe’s Penological Bulletins. Sentenced and remand prisoner numbers are own calculations on the basis of numbers and percentages given there. The data from the Council of Europe has been used because the national statistics before 2002 were collected as yearly averages; only from 2002 onwards, the prison population for a due date was also stated in the statistics.

²⁷ Source: Ministry of Justice, Vienna. See footnote 17. The term “Others”, according to the Ministry, refers to persons in detention pending extradition, persons in administrative/financial detention (“Verwahrungs-/Finanzstrafhaft”), persons in detention pending expulsion (“Schubhaft”), and persons detained on the basis of a measure for mentally ill or dangerous offenders (“Maßnahmenvollzug”).

not correct, because “Untersuchungshaft” comprises a longer period: not only the pre-trial phase but also the time a person spends in detention during an appeals procedure.

Several other forms of (preliminary) deprivation of liberty have to be distinguished. In the first place: arrest (“Festnahme”) of up to 48 hours according to §§ 170-172 CCP (see below); the time is limited to 24 hours in the case of persons suspected only of administrative offences, §§ 35, 36 Administrative Offences Act (“Verwaltungsstrafgesetz”). The police may further hold persons for up to six hours for the purpose of establishing their identity. Persons detained under the Aliens Act (“Fremdenpolizeigesetz”) can be held by the police for 48 hours. The detention of foreign nationals awaiting deportation (“Schubhäftlinge”) should, as a rule, not exceed two months but can be longer (up to ten months within a two-year period, §§ 76-80 Aliens Act).

3.2 Primary objective and underlying principles of pre-trial detention

The objective of pre-trial detention follows from the Personal Freedom Act as well as § 173 (3) CCP, and lies in securing the procedure: to prevent the suspect or accused from absconding, or to prevent collusion, the obscuring of evidence or the obstruction of the “ascertainment of truth” in any other way. The prevention of new crimes of a certain gravity similar to the offence under investigation (or of the completion of the alleged offence) is also accepted as an objective of detention by Art. 2 of the said Act, and as ground for detention (see below). According to the prevailing Austrian doctrine, pre-trial detention may never be “anticipated punishment”,²⁸ even if a reaction immediately following the offence might sometimes seem to be more effective. Thus, the principal aim of detention is to secure the proceedings; this also follows from the presumption of innocence (§ 8 CCP).

The most important principle governing the law and practice of arrest and pre-trial detention is the principle of proportionality. It can be found in several norms with the aim to restrict the use of pre-trial detention to a minimum and only as *ultima ratio*: Art. 1 (3) of the Personal Freedom Act stipulates that the arrest or detention has to be necessary and may not be disproportionate to the aim pursued. It follows from this provision that an adequate relation between offence and detention has to be secured. This argument is emphasised by Art. 5 (2) of the said law, prescribing that deprivation of liberty is not allowed if milder measures are sufficient to achieve the aim. In the CCP, apart from a principle norm that also contains the principle of proportionality in § 5, more concrete provisions can be found: according to § 173 (5), prolongation of arrest following the apprehension is not allowed if the suspect follows certain orders or obligations. In addition, the grounds for pre-trial detention are refined in the sense that they exclude the use of detention for the purpose of reducing the risk of absconding in minor cases (§ 173 (3) CCP) (see below). Another explicit threshold exists: According to § 173 (2) CCP, “prevention of another crime” can only be used as ground for detention if the current proceeding refers to an act that is punishable with at least six months of imprisonment. However, this threshold is quite weak,²⁹ because most offences in the Penal Laws carry a more severe penalty.

3.3 Beginning, end and duration of pre-trial detention according to law

The detention period begins with the actual apprehension, the so-called “Festnahme” (= arrest). This arrest can last for two times 48 hours (see Table 2 for an overview). The first phase is the time between apprehension and the hearing before a court (§ 172 (2) CCP), which has to take place without undue delay, at the latest after 48 hours. For the police, several duties arise immediately (see below). According to § 171 (3) CCP, after 24 hours at the latest, the police have to provide the arrested person with a written and reasoned motivation for the arrest (if an arrest warrant has already been issued, this written warrant must be given to the suspect or accused). As further detention requires a request to the court by the prosecutor, he has to be informed immediately. If the prosecutor does not request an arrest warrant and further detention by the court within 48 hours, the suspect must be released. Once the arrested person has been heard, the court has to decide about the request without undue delay and after a maximum of 48 hours (the court is granted this extra time to be able to collect more evidence with respect to the grounds for detention or the suspicion, § 174 (1) CCP).

²⁸ Venier 1999, p. 3. As mentioned in Venier, in the past, this was not always uncontested by Austrian scholars (see also below).

²⁹ Venier 2006, p. 619.

It is important to note that every (new) decision to apply detention is linked to a concrete time limit. If this time has elapsed, the suspect must be released or a detention hearing (“Haftverhandlung”) must be held prior to the due date (§ 175, see below). § 178 CCP contains the time limits for pre-trial (in a true sense of the word) detention: a first detention hearing has to take place after fourteen days. Detention can then be prolonged by one month, followed by two more months after the second and each further hearing (and prolongation).

If pre-trial detention is ordered only because of the risk of collusion/obscuring of evidence (“Verdunkelungsgefahr”), it is limited to two months. If other grounds are applied, in case of a “Vergehen” (a crime that is not a “Verbrechen” according to § 17 (2) Penal Code), pre-trial detention cannot be extended to more than six months. In case of a “Verbrechen” (a crime that carries a maximum penalty of more than three years of imprisonment), the limit is one year. In case of a serious crime (a crime that carries a maximum penalty of more than five years of imprisonment or a life sentence), the limit is two years. All extensions over a period of six months have to be motivated by particular complexity or extent of the investigations, and must be limited to situations where ongoing detention seems to be unavoidable, considering the weight of the ground for detention (§ 178 (2) CCP).

Once the bill of indictment has been delivered to the court by the prosecutor, no further explicit time limits apply. This is an earlier point in time than under the old CCP; it was therefore criticised.³⁰

Once the trial has started, a person who had to be released during the investigative phase due to the expiry of the legally allowed period, can only be detained again during the trial for six weeks. However, in principle, this could happen several times.³¹

³⁰ Venier 2006, p. 620.

³¹ Foregger/Kodek 1997, p. 304.

Table 2: Timeline for arrest and remand detention in Austria

TIME Max.	PROCEDURAL ACTION OR EVENT	LEGAL BASIS	WHO? (competent authority to decide)	WHERE? (detention facility, competent authority for execution)
0.00	Actual apprehension	§ 170 (1) CCP § 170 (2) CCP § 80 (2) CCP	Prosecutor – if an arrest warrant has been issued Police – in cases where the person is caught in the act (see paragraph 4 for details) Police – in cases of “imminent danger” when an arrest ground can be substantiated but the prosecutor cannot be reached in due time Anyone – citizens have the right to apprehend a person <i>in flagrante delicto</i> ; the apprehension has to be reported to the nearest police station (or other authority) without undue delay	Police station or police detention centre (“PAZ”), Ministry of the Interior
24 hours	Delivery of a written arrest warrant issued by a judge in cases under § 170 (1) Delivery of a written and reasoned motivation of the arrest	§ 171 CCP	Police	
48 hours	Request of an arrest warrant, otherwise release Transfer of the detained person to a prison Hearing of the detained person, otherwise release Transfer to a prison in case of an arrest warrant already issued	§ 173 (2) § 173 (3) § 173 (2) § 172 (1) CCP	Prosecutor Police Court Police	Prison (“Justizanstalt”), Ministry of Justice
96 hours	Decision to further detain the person	§ 174 (1) CCP	Court	

	or to release him/her; the decision must be communicated orally immediately			
120 hours	Delivery of the written decision to all parties involved	§ 174 (1) CCP	Court	
14 days	First detention hearing, extension of the term of detention (or release)	§ 175 (2) CCP	Court	
1 months + 14 days	Second detention hearing, extension of the term of detention (or release)	§ 175 (2) CCP	Court	
2 months	In pre-trial investigations when detention is ordered because of the risk of collusion/obscuring of evidence (“Verdunkelungsgefahr”)	§ 178 (1) CCP		
3 months + 14 days, then (if the detainee does not waive the right to be heard) every second month	Third detention hearing, extension of the term of detention (or release)	§ 175 (2) CCP	Court	
6 months	In case of a “Vergehen” – a crime that is not a Verbrechen according to § 17 (2) PC (see below)			
1 year	In case of a “Verbrechen” – a crime that carries a maximum penalty of more than three years of imprisonment			
2 years	In case of a serious crime – a crime that carries a maximum penalty of more than five years of imprisonment or a life sentence			

3.4 Competent authorities for arrest/further detention etc.

An overview of competent authorities during the different stages of detention can be taken from Table 2. The Prosecution Service³² is responsible for ordering arrest and requesting an arrest warrant if further detention in the pre-trial investigation is deemed necessary. The CCP reform brought important changes with regard to the distribution of competences, because it re-modelled the whole pre-trial proceeding (§§ 1-219 CCP of the old CCP were replaced). The stage of pre-trial investigations (“Voruntersuchung”), led by the investigative judge (“Ermittlungsrichter”), does not exist in that form any longer. This reorganisation, which relocated judicial competences (and personnel!) from the investigative judges to the prosecutors, took quite some time; this is why the Act – already adopted in February 2004 – entered into force as late as January 2008.

The police are entitled to arrest without an order by the public prosecutor only in cases of “imminent danger” (for the objective of the arrest) when a prosecutor cannot be reached. This restriction has to be taken seriously, because the public prosecutor – with now broader competencies and responsibilities – has the monopoly for initiatives concerning arrest and detention, and performs a legal control and filter function.

This is also reflected in the need for well-reasoned requests to the judge. The new distribution of tasks between prosecution and courts gave rise to critical remarks by scholars,³³ who made it clear that the prosecutors’ expanded rights and duties do not go so far that the judge can simply rubberstamp all requests for detention: He stays responsible for the decision to grant detention (issue an arrest warrant) or not, and must motivate the reasons for his decision.

A citizen’s arrest only exists in a quite limited form as the right to apprehend a person who is in the act of committing a crime, or who is officially wanted by the police (§ 80 (2) CCP). The apprehension has to be conducted in an adequate way (“auf verhältnismäßige Weise”) and should be reported to the nearest police station at the earliest possible moment, otherwise the apprehending person will be violating the suspect’s right to personal freedom.

3.5 Procedure and procedural rights of the accused at the time of arrest/during detention

After apprehension by the police, the suspect has to be questioned as soon as possible. To this questioning, the normal rules apply. This means that the suspect must be informed with which offence he is being charged, that he has the right to remain silent, and that whatever he says may be used against him in a future trial (§ 164 CCP). He also must be told that he can contact (in person or via an investigating official) a close person and a defence counsel (§ 173 (3) CCP).

The questioning has to include facts that refer to the suspicion itself and to the ground for detention. If it reveals that the initial ground for the apprehension cannot be validated, the person has to be released immediately. Otherwise, the police have to issue a reasoned written motivation and hand this to the detained person within 24 hours (this means: before the maximum time limit for the involvement of the prosecutor has come). This new provision is intended to put some pressure on the police not to arrest persons without good reason, and to alleviate the giving of evidence by the detained person if he or she wants to have the initial arrest reviewed at a later stage. This innovation in the law was particularly approved by scholars.³⁴

The procedure for the decision on detention (partly discussed above) is regulated in §§ 174, 175. The decision to apply detention must contain, *inter alia*, facts indicating why the suspicion and the ground for detention exist, and why less restrictive measures (to be discussed in paragraph 7.3) are not sufficient in the case. During the detention hearings (see below), where it is decided to prolong detention or not, the presence of a defence counsel is obligatory.

Two critical points with regard to the procedural rights must be mentioned: First, the right to the assistance of a defence lawyer that derives from Art. 6 (1) ECHR (fair trial) and Art. 6 (3c) ECHR, is still not fully guaranteed in the Austrian CCP, although it belongs to the basic principles of criminal procedure according to § 7 CCP. The suspect’s right to contact a lawyer, to talk to him and to ask him to be present during the interrogation is prescribed by § 49 CCP. However, during the first 48 hours after arrest, this

³² For more details, see Löschnig-Gspandl 2004.

³³ See Venier 2006, p. 613.

³⁴ Bertel/Venier 2006 ref. 52.

right is seriously restricted by § 59 (1) CCP, that allows the police to supervise the conversation between lawyer and suspect, and to restrict it to “general legal information” (which cannot be considered “legal assistance” as meant in § 7 CCP and the ECHR) if this is necessary to avoid interference with the investigation or evidence. This restriction, more or less, also applies to the period of detention if the ground for detention was the risk of collusion/obscuring of evidence – the lawyer’s activities cannot be restricted to a mere rendering of legal information any longer, but all contacts can be supervised for a period of up to two months. It is argued by critics that this provision contradicts the ECHR as it is interpreted by the European Court of Human Rights.³⁵ In the case *Lanz vs. Austria*, all talks between the suspect and his lawyers took place under surveillance during a period of two months, because of the risk that the applicant might influence witnesses or remove documents not yet seized. The court argued that this general risk was not enough and no “extraordinary features” that would have represented “very weighty reasons” for such an interference with Art. 6 (3c) ECHR could be found. It is doubtful whether the abstract and general provision of the new § 59 (2) CCP is enough to meet the objections made by the ECHR. At least the precondition of “necessity” of such a surveillance according to § 59 (2) CCP must be interpreted in a very restrictive way.³⁶

The second point refers to the right of access to the files. The new CCP makes clear, for the first time, that the suspect and his lawyer are generally entitled to inspect the documents also with regard to the police (§ 51 (1) CCP). But, as in most (if not all) jurisdictions, the right of access to the files can be restricted until the end of the pre-trial period if and insofar it might impede the investigation. As to the number of restrictions, the (new) provision of the CCP is in line with recent ECHR jurisdiction against Germany, because it grants access to all information in the files that is necessary to assess the suspicion and the grounds for detention (§ 51 (2) CCP). In these decisions,³⁷ the court acknowledged the need for criminal investigations to be conducted efficiently, which may imply that part of the information is to be kept secret in order to prevent suspects from tampering with evidence. This legitimate goal, however, may not, according to the court, interfere with the rights of the defence, who must have access to all information essential to the assessment of the lawfulness of the detention.

Still, there is criticism that the new provision does not go far enough, because the right to inspect the files only starts when pre-trial detention commences. Before, no access to the files has to be granted. According to the critical voice, to implement the ECHR decision in a consequent manner, it should also be possible to have access to the files during the very first hours and days after the arrest.³⁸

4. Grounds for pre-trial detention

4.1 Grounds for arrest

The justification for an initial arrest has to be distinguished from the justification for detention. According to § 170 (1) CCP, a person can be arrested if:

- he or she was caught in the act or immediately after, or was found with evidence indicating the involvement in the offence;
- he or she is absconding or hiding, or certain facts indicate that he or she will abscond or go into hiding;
- he or she tried to tamper with evidence by influencing witnesses, by removing evidence or in another way;
- it is probable that he or she will commit another offence that is directed against the same legal right, or continue the offence he or she is charged with.

With regard to the three last grounds, a mere “suspicion” that the person has committed an offence is enough, but it has to be substantiated somehow. § 170 (3) CCP stipulates that arrest is not allowed if it is disproportionate to the importance of the case.

³⁵ The court expressed its view in the cases *Öcalan vs. Turkey*, Application no. 46221/99, decision of 12 May 2003; *Murray vs. The United Kingdom*, case no. 41/1994/488/570, Grand Chamber decision of 8 February 1996; and *Lanz vs. Austria*, Application no. 24430/94, decision of 31 January 2002.

³⁶ Venier 2006, p. 616.

³⁷ E. g. *Lietzow vs. Germany*, Application no. 24479/94, decision of 13 February 2001; *Mooren vs. Germany*, Application no. 11364/03, of 13 December 2007.

³⁸ Venier 2006, p. 618.

On the other hand, Austrian law contains (even after the reform) a so-called “conditional-mandatory” ground³⁹ for arrest in § 170 (2) CCP: If a person is charged with a serious crime that, according to the Penal Code, carries a minimum penalty of ten years of imprisonment (murder/manslaughter, human trafficking, serious cases of robbery, rape under aggravating circumstances etc.), he or she has to be arrested unless certain facts indicate that none of the above-mentioned reasons for arrest apply in the case. This means that, in such cases, prosecutor and police may restrict themselves to stating that no facts can be seen that would allow for not arresting the suspect, instead of actively justifying arrest.

4.2 Grounds for detention and further preconditions

With regard to the preconditions, it has to be underlined that, according to Austrian law, not any degree of suspicion is enough to justify detention; it must be an “urgent” suspicion (“dringender Tatverdacht”). All grounds for detention have to be interpreted in a way that leaves room for the principle of proportionality, so in general, detention is not possible if the objective (mainly securing the proceeding, see above) can be met otherwise. Additionally, some explicit thresholds apply, which will be discussed together with the grounds for detention. With regard to the principle of proportionality, the Austrian Supreme Court⁴⁰ has tried to develop a three-step argumentation that considers the expected sentence to be the crucial aspect: First, the judge deciding about the detention has to consider character and extent of the sentence that can realistically be expected in the case. Secondly, he has to consider whether a fine or a conditional (or partly conditional) sentence can be expected, i.e., if the suspect or accused will actually be in prison or not. In a third step, in particular when it comes to assessing the grounds for extension of detention, the competent judge has to consider whether or not – and at what point of time – a conditional release would be relevant. However, this argumentation is not without risk: The tangible anticipation of the custodial punishment comes close to a violation of the presumption of innocence, and – more concrete – the fact that the judge competent to order pre-trial detention assesses a potential prison sentence, already stipulates the (custodial) outcome of the trial.⁴¹

The grounds for detention can be found in § 173 (2) CCP and partly repeat the grounds for arrest explained above. Detention is justified in cases of:

- risk of absconding or hiding (“Fluchtgefahr”);
- tampering with evidence (“Verdunkelungsgefahr”);
- the need to prevent new crimes (“Begehrungsgefahr”);
- the need to prevent the continuation of the offence that the suspect is charged with (“Ausführungsgefahr”).

With regard to the risk of absconding, it is important to note that, according to the explicit wording of the law, the “character and extent” of the possible penalty may indicate such a risk (besides other reasons to believe that the person might abscond). Certain restrictions (a threshold), however, apply if detention is justified only on the basis of the risk of absconding: If a person fully integrated into society is suspected of a crime that carries a maximum penalty of no more than five years of imprisonment, this ground may not be used unless the suspect has made concrete preparations for his flight. It has been elaborated in an extensive study that the connection between social integration and the risk of absconding may lead to discrimination with regard to poorer persons⁴² and to foreigners (who will be discussed below). Another problematic connection can be seen in the severity of the penalty as an indicator for the risk of absconding. Prevailing Austrian doctrine and jurisdiction approve the fact that (apart from the special regulation of § 180 (6) CCP, see below) an expected long prison sentence as such is never sufficient as ground for detention. Still, much case-law can be found that points in another direction: In particular if the suspect is not fully integrated into society, the risk of a longer sentence is indicated as the actual ground for detention.⁴³

The risk of committing new crimes as a ground for detention can only be employed under certain conditions that are carefully differentiated in the law (§ 173 (2) No. 3 a-c): It is only possible if the offence the suspect is charged with carries a penalty of more than six months of imprisonment (a threshold, but a

³⁹ See Bertel/Venier 2006, p. 141.

⁴⁰ OGH Erk 14 Os 30/94, decision of 8 March 1994. An analysis of this decision can be found in Venier 1999, p. 142. For decisions of the high courts, go to <http://www.ris.bka.gv.at/Jus/>.

⁴¹ Venier 1999, p. 143 with further references to the jurisdiction of the ECHR and its interpretation.

⁴² Venier 1999, p. 58 pp.

⁴³ See references in Venier 1999, p. 60, 63.

low one). In general, all alleged new offending must be directed towards the same legal right (meaning that if the offence the suspect is charged with is assault, a prior offence like theft would not be sufficient). It should be noted that, since a reform in 1983, the Austrian legislator has tried to avoid infringements of the presumption of innocence by avoiding the word “re-offending”: Instead of the term “Wiederholungsgefahr” (direct translation: “risk of repetition”), the more neutral “risk of committal” is now preferred.⁴⁴

This means that there must be a risk of reoffending (which has to be substantiated by facts) and that it must be clear that the offender is not impressed by the current proceedings. But not any imminent offence is enough. It must be:

- an offence with serious consequences; or
- an offence with more than slight consequences if the person was convicted before of such an offence or if he is charged (in the current proceedings) with repetitive forms of offending in the same way.

However, if the offender has been convicted for the same type of offence twice before, it is enough that the imminent re-offending is punishable by at least six months of imprisonment. The 2004 reform of the latter provision was criticised, because the threshold (which did not exist before) is too low and in fact erodes the principle of proportionality. In practice, even before the reform, the “Wiederholungsgefahr” was (too) easily applied by practitioners – they simply stated that a certain number of offences showed “a particular criminal energy” etc.⁴⁵

The above-mentioned “conditional-mandatory” ground⁴⁶ for arrest also applies to detention (§ 173 (6) CCP for alleged crimes punishable with a minimum of ten years of imprisonment). As a rule, detention has to be ordered unless concrete grounds allow for a less restrictive measure to secure the proceeding. Some scholars and court decisions have tried to interpret the regulation (which was contained in § 180 (7) of the old CCP and kept in the same wording in the new CCP, § 173 (6)) in a restrictive manner – not as an assumption that pre-trial detention has to be ordered as a rule, but rather in a way that excludes detention if the suspect is socially integrated and no facts substantiate a risk of absconding.⁴⁷ Notwithstanding these efforts, it must be noted that the Austrian government, in a 2002 survey,⁴⁸ answered with a clear “yes” to the question “Is pre-trial detention mandatory under certain conditions?” This answer might reflect the current practice better. It can thus be said that the attempt to interpret the quasi-mandatory ground for detention in a restricted way failed, as Supreme Court jurisdiction later also showed.⁴⁹ With regard to crimes carrying a minimum penalty of at least ten years, detention is only excluded in cases where the suspect is virtually not able to abscond. Basically, the risk of absconding is assumed in all cases where at least a theoretical possibility to abscond exists. It should be mentioned, however, that milder measures should, according to the law, always (§ 173 (1) and (5) CCP) be applied if the objective can be reached without detention. In a way, this seems to contradict the absolute wording in § 173 (6) CCP with regard to the quasi-mandatory ground for detention. According to Austrian scholars, it can be assumed that this ground for detention is also intended as a means to calm down public outrage in serious crimes cases, and that such a practice was defended by the parliamentary board competent for judicial matters (“Justizausschuss”) in certain cases. This would contradict the limitation to the official objectives of detention as stated above.⁵⁰

5. Review of pre-trial detention

Pre-trial detention is monitored by means of the regular “Haftverhandlungen” (detention hearings) mentioned above. These take place every time the detention period expires and the judge has to decide on

⁴⁴ Foregger/Kodek 1997, p. 279.

⁴⁵ Venier 2006, p. 619.

⁴⁶ See Bertel/Venier 2006, p. 141.

⁴⁷ Higher Regional Court of Vienna (“OLG Wien”) in a decision of 1972, cited after Venier 1999, p. 31. See also Reindl 1997, p. 163 pp.

⁴⁸ Questionnaire for Member States on pre-trial detention and alternatives to such detention, Brussels, 18 July 2002 JAI/B/3/TL, question 5.

⁴⁹ Supreme Court decision of 20 September 1995 (Erk OGH 12 Os 134/95) cited after Venier 1999, p. 32.

⁵⁰ Venier 1999, p. 33; Reindl 1997, p. 165.

the prosecutor's request to prolong detention. This means that during the investigation, fourteen days after the first arrest, the court has to check if the reasons for detention still exist; it then decides whether the detention has to be prolonged or the suspect must be released. Consequent detention hearings have to take place one month after the initial hearing and two months after each following hearing. After the bill of indictment has been delivered to the court, no regular hearings take place. However, the detained person can apply for them (§ 175 (5) CCP). These hearings are not public sessions but the suspect and his lawyer can be present. The decision of the court may be appealed ("Beschwerde", §§ 87 pp. CCP) to the Court of Appeals ("Oberlandesgericht") within three days of the decision. Additionally (after all regular remedies have been used), since 1992, a "Grundrechtsbeschwerde" (appeal with regard to basic rights) can be brought before the Supreme Court ("Oberster Gerichtshof") against the decision of the Oberlandesgericht. In this appeal, the accused has the chance to argue that the decision of the Oberlandesgericht infringed his right to freedom. This remedy complements the normal constitutional review of the Constitutional Court ("Verfassungsgerichtshof").⁵¹

It should be noted that in case the court decides not to extend the detention period or the appeal was successful, in certain cases the victim of the (alleged) offence has to be informed of the release of the offender. In cases of domestic violence, this has to be done *ex officio*.

6. Length of pre-trial detention

The legal provisions for the maximum length of detention periods in the current CCP are described above. Nevertheless, reference should be made to certain problematic points in the reality of law.

The imperative of a speedy criminal procedure can be found in various parts of the legislation: in the Personal Freedom Act, as a principle in § 9 CCP, and in § 177 CCP for all detention matters ("besondere Beschleunigung" – "particular acceleration"). The Austrian legislator intended to speed up the procedures by indicating stricter time limits in the Reform Act of 1993, and tried to put some pressure on the judicial authorities⁵² by explicitly introducing the mitigating sentencing factor of lengthy procedures in the Penal Code (§ 34 (2) CCP).

Several times, Austria lost cases before the European Court of Human Rights for overlong detention periods.⁵³ Most of these verdicts, however, date back to the 1970s and 1980s. Of course, this does not mean that the duration of detention in Austria nowadays is always justified; this is underlined by domestic jurisdiction. In particular the period starting with the presentation of the bill of indictment to the court might be too long in relation to the later outcome of the trial.⁵⁴

It still has to be acknowledged, however, that the time limits stipulated for the investigation phase have had their impact: According to the above-mentioned study⁵⁵ from 1996, the average length of pre-trial detention decreased significantly as compared to the years before 1993. In Vienna, the average duration of pre-trial detention was 41 days. According to the "Sicherheitsbericht" of the Austrian government, published in 2008,⁵⁶ the average length of the overall detention period was 71 days in 2006 and 68 days in 2008. It is calculated on the basis of the flow to the remand prisons (entrances in the institutions per year) and the average stock (how many prisoners were detained on remand on average in the respective year).

⁵¹ Seiler 2002, p. 86.

⁵² Hollaender 2005, p. 39.

⁵³ For a detailed analysis of these decisions see Reindl 1997, p. 121-140.

⁵⁴ See for details Venier 1999 and Reindl 1997. With regard to a more recent decision of the OHG, see Venier AnwBl 2004, 12.

⁵⁵ Hanak/Karazman-Morawetz/Stangl 1996.

⁵⁶ Bundesministerium für Inneres 2008.

7. Other relevant aspects

7.1 Consideration of pre-trial detention in the sentencing stage

According to § 38 Penal Code, all the time the suspect or accused has spent in detention prior to the final conviction during the proceedings with regard to the same offence has to be taken into account (with a ratio 1:1).

This is also true for foreign custody, be it pre-trial detention, be it surrender proceedings (although it is not explicitly mentioned in the law).⁵⁷ With regard to foreign criminal convictions, it is interesting that the Austrian Penal Code (§ 73 PC) takes into account all foreign verdicts as far as the principle of double criminality applies and the proceedings have been accomplished in accordance with the principles of Art. 6 ECHR. This, of course, might be a difficult matter to decide. But this matter must not be considered if the verdict is favourable to the suspect or accused. This means that in cases where the consideration of a foreign conviction leads to the deduction of time spent in prison (§ 66 CCP), the whole period of detention abroad must be taken into account, regardless of the quality of the foreign trial (so no exception to the general rule of § 38 PC applies with regard to foreign pre-trial detention).

7.2 Mechanism for compensation

A principal norm with regard to compensation can be found in Art. 7 of the Personal Freedom Act, which guarantees compensation to every person who has been deprived of his or her liberty contrary to the law. In the 2005 version of the Detention Compensation Act (“Strafrechtliches Entschädigungsgesetz”)⁵⁸, this right to compensation for unlawful arrest or detention (*ex ante*) is extended to the right to compensation for unjustified detention (*ex post*) in cases where the applicant was later acquitted or the proceedings were discontinued. No fixed tariffs can be found in the law but amounts of around 100 Euros per day are not unusual.⁵⁹ Under certain conditions, i.e., if the person concerned puts him- or herself under suspicion intentionally, no compensation will be granted.

7.3 Alternatives to pre-trial detention

As the principle of proportionality demands that detention is only applied as a means of last resort, it can be deduced from the law that priority must be given to alternative measures in order to secure the proceedings. It is also explicitly mentioned in § 173 (1) CCP; this is why the prosecutor and the court have to establish a reason why a milder alternative was not implemented. As an exception to this rule (and somehow contradictory⁶⁰), in serious cases, the “conditional-mandatory” ground for detention (see above) more or less automatically leads to detention, so no specific reasoning why a less severe measure was not chosen is necessary.

The CCP provides a wide range of alternative measures (“gelindere Mittel” – milder measures):

- the formal pledge not to leave the place of residence without prior permission of the prosecutor;
- the pledge not to impede the proceedings;
- in cases of domestic violence, the obligation not to contact the victim and/or to leave the house (including the surrender of all keys);
- compliance with certain orders (e.g. not to drink alcohol);
- compliance with the order to indicate each change of domicile;
- the (preliminary) confiscation of certain documents;
- preliminary probation;
- bail;
- compliance with an order to undergo medical or other treatment (with explicit consent of the suspect).

⁵⁷ Fabrizy 2006, § 38 ref.3.

⁵⁸ The full title is: “Bundesgesetz über den Ersatz von Schäden aufgrund einer strafgerichtlichen Anhaltung oder Verurteilung (Strafrechtliches Entschädigungsgesetz 2005 - StEG 2005)”, NR: GP XXII RV 618 AB 636 S. 78. BR: 7130 AB 7133 S. 714., published StF: BGBl. I Nr. 125/2004.

⁵⁹ This information can be found on the website www.deranwalt.at (last retrieved 3 January 2009).

⁶⁰ Reindl 1997, p. 160 pp.

In this European comparison, the “preliminary probation” option should be considered as an example of good practice, because it extends the scope of possible assistance by the probation service⁶¹ to suspects who would otherwise be detained. It thus could also help to implement the idea of an integrative (or end-to-end) probation and treatment concept. According to § 179 CCP, preliminary probation can be ordered if the suspect consents and if it seems necessary to assist him in his pledge to lead a law-abiding, crime-free life.

7.4 Execution of pre-trial detention (legal basis; practical living conditions)

The execution of remand detention is governed by the legislative provisions of §§ 182-190 CCP. Further, the provisions of the Prison Act of 1969 that refer to prisoners with sentences of up to eighteen months also apply to remand detainees. § 182 (2) CCP contains some basic rules for the treatment of remand detainees. It states, for instance, that the principle of the presumption of innocence always has to be borne in mind while executing remand detention.

The other provisions constitute, *inter alia*, the right to wear own clothing and obtain personal items as far as this is possible with respect to the functioning of the prison, the objective of detention itself, and the safety and well-being of other prisoners. It is important to note that remand prisoners who want to work can do so (of course, no duty to work exists) under the conditions for sentenced prisoners. As a consequence, a prisoner who wants to work but cannot be provided with a workplace (which frequently is the case) is entitled to receive 5% of the payment according to the lowest category (§ 185 (3) CCP). This is in fact a very small sum of money, but the provision still goes further than most other jurisdictions. Remand prisoners are entitled to at least two half-hour visits a week (which is more than under the old Code). As a rule, correspondence and phone calls are monitored (§ 189 (1) CCP); further restrictions and supervision measures can only be ordered by the public prosecutor (during the pre-trial phase) and the court (during the trial phase).

All remand prisoners are accommodated in one of the 16 Austrian Court Prisons (“Gerichtliche Gefangenenhäuser”), which are located near the courts. In principle, the relatively high number of such institutions in a relatively small country makes it possible to accommodate the suspect or accused close to his or her residence. The Court Prisons also house sentenced prisoners with sentences of up to eighteen months. They should be segregated from unconvicted prisoners following the segregation principle laid down in § 185 (1) CCP (it must be underlined that this is not mandatory, according to the wording of the law).

During the recent years, overcrowding has been a serious problem in Austria, also with respect to the Court Prisons,⁶² but it should be alleviated now by the obvious success of the “Haftentlastungspaket” – at least if these effects will be long-lasting.

As in many countries, the opportunity to pursue meaningful activities while being detained on remand is a problem for most remand prisoners. It is more the rule than an exception that prisoners stay in their cells for 23 hours a day without anything to do.⁶³

It might be worth noting that Austrian media⁶⁴ relatively often report suicides in prison and also pay attention to this subject in more detailed features. On average, 15 prisoners per year commit suicide in Austria. The stress experienced by newly arrived prisoners, in particular remand prisoners, is thought to play a role in most of these cases.

⁶¹ The Austrian probation service has been privatised; probation activities are carried out by the organisation Neustart (which is basically financed by the government). More information can be found at www.neustart.at.

⁶² For details observed by the CPT during its last visit to Austria (which took place in 2004), see CPT 2005.

⁶³ Stummvoll 1994, Venier 1999, CPT 2006 with examples from the visited prisons in Linz and Vienna.

⁶⁴ As cited in Venier 1999, p. 3; see also a feature by the radio station Ö1 in 2006, [http://oe1/orf/at/highlights/52738](http://oe1.orf/at/highlights/52738). (last retrieved 2 January 2009).

It is also documented in forensic research. See:

<http://www.thieme-connect.com/ejournals/abstract/psychiat-praxis/doi/10.1055/s-2001-17774> (last retrieved 3 January 2009).

8. Special groups

8.1 Juveniles⁶⁵

For juveniles, the preconditions for remand detention are stricter than for adults according to the relevant provisions, §§ 35 pp. Juvenile Justice Act (“Jugendgerichtsgesetz”, JGG). The maximum duration is shorter and – in addition to the alternatives provided by the CCP – detention can be avoided by applying a family law or youth welfare law directive. This is the case, for example, if the aim can be achieved by the minor undergoing treatment for drug addiction or placement in a residential care facility. The maximum period for pre-trial detention of minors is three months. In cases within the jurisdiction of mixed courts or jury trials, it is six months; this can be extended up to one year in extraordinary cases.

The principle of proportionality has even more importance than in the proceedings against adults. This is why, in a recent ruling, the Supreme Court⁶⁶ stated that as a consequence of this principle, pre-trial detention for juveniles is not possible as long as no enforceable penalty at all is to be expected (conviction without sentence, conviction with suspended sentence). To protect the rights of minors as comprehensively as possible, the JGG grants minors a special right of involving trusted adults in the first pre-trial proceedings. In addition to this, juveniles are entitled to the assistance of a lawyer; if necessary, a court-appointed legal defence counsel must be provided. The juvenile’s parents must be notified of the arrest, unless there is a plausible reason for not doing so.

There is no mandatory segregation of juveniles and adults in prisons. In this regard, Austria has made a reservation to Art. 10 of the International Covenant on Civil and Political Rights, which it ratified on 10 September 1978. Juveniles can be accommodated together with young prisoners below the age of 25, who do not represent a potentially harmful influence.⁶⁷

According to statistics, in recent years, the numbers of juveniles detained has risen slowly but steadily. This can be explained by a general increase of foreigners (from third countries) among suspects, mostly accused of drug offences. In the years 2003 and 2004, one out of twenty juvenile suspects (5%) was taken into custody for at least a short time. During these same years, juveniles in pre-trial detention clearly outnumbered juveniles in custody. In total, more than 50% of all juveniles in Austrian prisons were in pre-trial detention. In other words: juveniles spend a large part of their incarceration as pre-trial detainees. The results from the above-mentioned study are also reflected in the statistics provided by the Ministry of Justice,⁶⁸ which show that, in recent years, the total of juvenile inmates in remand detention was always much higher than the total of sentenced juvenile prisoners (e. g. in 2004, 1,398 juveniles entered remand prisons and 648 entered normal prisons; for the year 2008, these numbers are 637 and 387 respectively), but the flow itself has become much smaller. The duration of pre-trial detention (see also above) increased from 67 days in 2004 to 78 days in 2007, and then decreased again in 2008 to 73 days.

8.2 Women

No special regulations exist with regard to the ordering and enforcement of remand detention, the only exception being the segregation principle, which in this case is mandatory (§ 185 (3) CCP). Statistics⁶⁹ show that the average duration of pre-trial detention for women is clearly below the average for male prisoners (in 2008, 73 days for women and 89 days for men).

8.3 Foreigners⁷⁰

As can be seen in Table 1, Austria has a very high share of foreign prisoners: About 45% of all prisoners and 57% of all remand prisoners are citizens of foreign countries. This is a significant over-representation, both considering the overall share of the foreign population and the share of foreigners among all suspects

⁶⁵ For a comprehensive overview in English, see Bruckmüller/Pilgram/Stummvoll 2009. All information in this part of the report has been taken from this study.

⁶⁶ Cited after Bruckmüller/Pilgram/Stummvoll 2009.

⁶⁷ Questionnaire for Member States on pre-trial detention and alternatives to such detention (Brussels, 18 July 2002 JAI/B/3/TL), question 5.

⁶⁸ See footnote 17.

⁶⁹ See footnote 17.

⁷⁰ The following part of the report basically summarizes some results of the study by Pilgram/Hofinger 2007, which provides for a comprehensive description of the situation.

(according to data from the Ministry of Interior, the percentage of foreign suspects lies between 23% and 29% (data from 2001 to 2005)).

On the basis of data published in a study conducted in 2007,⁷¹ it can be calculated that in the year 2005, 36.9% of all remand prisoners were Austrian citizens, 14.1% were citizens of other EU countries (including many from the new members Bulgaria and, in particular, Romania) and 49% came from third countries. Among the overall prison population, the shares differ: 55.5% of all prisoners were Austrians, only 8.2% were citizens of other EU countries, and 36.3% came from third countries. To a large extent, the growth of the prison population is a result of the increase in the number of foreign prisoners. This was already the case in the 1990s, when a liberal criminal policy was predominant, because Austrian citizens profited much more from alternatives to pre-trial detention and early release.⁷² Later on, in the times of harsh responses to criminal behaviour, this trend accelerated; the (remand) prisons were filled with foreigners who, as a rule, had a weak residence status.

Several regulations in the CCP and the Prison Act take the situation into account, e.g. by granting translations and the right to an interpreter during the hearings, or by offering special regulations concerning religious practice, food, library content or German lessons. According to the above-mentioned 2007 study, the legal provisions can be considered sufficient whereas the practice is problematic. It also remains a question whether the legislator does not have to go further and provide more active assistance to foreign prisoners, instead of just providing formal legal equality. It was explained above (grounds for detention) that the risk of absconding is not assumed when the suspect is socially integrated and resides in Austria permanently, and the alleged offence carries a prison sentences with a maximum of five years (except when certain facts indicate that the suspect or accused is preparing his flight). The problem with regard to foreigners lies in the attribute “socially integrated” – what about foreigners who are fully integrated in their home country? The risk that this provision leads to discrimination is realistic, because some decisions indicate that courts deduce from it in a reverse assumption that the risk of absconding always exists when a foreigner has a fixed abode in his home country.⁷³ It has to be noted, however, that the *Verfassungsgerichtshof* (Constitutional Court), which is competent to decide in matters regarding the personal Freedom Act, decided as early as 1957 (and repeated this in later decisions) that the fact of a permanent residence abroad does in itself not constitute sufficient substantiation of the risk of absconding. In the comprehensive study on pre-trial detention cited before, it is therefore argued that, in less severe cases, the social integration of foreigners in their home countries should also be taken into account as ground for exclusion of pre-trial detention: Many of the foreigners suspected of committing crimes in Austria come from neighbouring countries and might want to travel to Austria again; often they have to for business reasons.⁷⁴ This argument can be supported. However, the fact that the legislator – despite the general reform of the CCP – kept the provision with the same wording as before, still considering only those with a permanent residence in Austria, points in another direction.

A few words on the treatment of foreigners in remand detention. On admission, prisoners receive written information sheets in different languages. According to the information the Austrian government gave to the CPT during its 2004 visit, the house regulations of the various prisons were provided in 14 languages. However, the CPT observed that many foreigners were not in possession of information in a language they could understand and were complaining about a general lack of information.⁷⁵ Other problems refer to the possibility of contact with the outside world. Prisoners from foreign countries usually receive very few visits for obvious reasons, but the possibility to make phone calls – the only direct way of communicating with friends and relatives – is also restricted during remand detention, because prisoners have to apply for a permit to make phone calls; this is a lengthy process. A report from a Court Prison⁷⁶ (accommodating pre-trial detainees and short-term prisoners) reveals that these prisons sometimes have to cope with detainees from over 30 different countries, resulting in severe language problems. One of the

⁷¹ Pilgram/Hofinger 2007, table 2.

⁷² This can also be seen in the current law itself: § 173 (3) CCP limits the use of pre-trial detention on the ground of the risk of absconding to more severe offences (see above) only for suspects who are fully integrated into society and have a permanent residence in Austria. For others (homeless persons, foreigners), this limitation does not apply.

⁷³ OLG Innsbruck 1994, cited after Venier 1999, p. 50.

⁷⁴ Venier 1999, p. 54.

⁷⁵ CPT 2006, § 108.

⁷⁶ Bevc 2007, p. 55-57.

measures taken in the respective prisons is the offering of language classes, not only in German but also in English, to find a possible common language for as many prisoners as possible. This measure for the prisoners is accompanied by English classes for staff also. Another problem mentioned by the author concerns the provision of services for religious minorities: According to the report, aggressive missionary work can sometimes be observed. Another, much more comprehensive, study⁷⁷ shows that a great part of the focus group of this research – Africans from Sub-Sahara Africa – were in pre-trial detention only for relatively small drug offences⁷⁸. Inmates also reported regular discrimination with regard to the initial investigation that was initiated against them – often Austrian citizens were not even interviewed. Moreover, another study revealed significant differences between “black” and “white” suspects with regard to the length of pre-trial detention.⁷⁹

Finally, it should be noted that the so-called “Haftentlastungspaket” that came into force in January 2008, introduced the possibility to refrain from executing a prison sentence if the foreign prisoner consents to be deported to his or her home country (§ 133a StVG); re-entry to Austria is then prohibited. According to the Ministry of Justice⁸⁰, 152 persons from thirty countries made use of that possibility. No special regulations with regard to foreign pre-trial detainees were included in the legislative measures. However, the total number of foreign prisoners with non-EU citizenship decreased from 10,022 in 2004 to 7,247 in 2008 (a difference of almost 28%). The drop in the number of remand prisoners was even more remarkable: from 5,931 to 3,450 (a difference of more than 40%). The decrease in the total number of foreign remand prisoners from other EU Member States was far less pronounced (from 2,761 in 2004 to 2,462 in 2008).

8.4. Alleged terrorists

If the risk of re-offending is used as ground for detention, according to § 173 (3) CCP, the prosecutor and the judge have to consider in particular if the risk derives from the suspect being a member of a criminal organisation or a terrorist organisation.

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⁷⁷ Stummer-Kolonovits/Platzer 2007.

⁷⁸ Stummer-Kolonovits/Platzer 2007, p. 75.

⁷⁹ Kravagna 2005, ECRI 2005.

⁸⁰ http://www.justiz.gv.at/_cms_upload/_docs/20080730_Justiz_Bilanz_Vorhaben.pdf (last retrieved 31 December 2008).

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