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The Development of Negotiated Justice on the European Continent and the Necessary Extension of Human Rights During the Pre-trial Investigation

In the last decades, several EU member states on the continent have introduced alternative criminal proceedings to speed up lengthy criminal trials. A relatively underestimated, but relevant development thereby is the introduction of so-called 'negotiated justice'. Negotiated justice implies the agreement between the defence and the judicial authorities, in which the defendant waives his right to a full fledged criminal trial in exchange for a lower sentence. Mostly, informal discussions take place between the public prosecution and the defence at the end of a preliminary investigation. Hereafter, the agreement concluded is assessed by a judge who in complete autonomy decides whether or not the accused is guilty to the alleged criminal offence and whether or not to consent to the agreement on the penalty.

Negotiated justice derives from the Anglo-American plea bargaining, which finds its roots in predominantly accusatorial systems where the defendant naturally has a stronger position throughout the criminal procedure. Not holding the ideology of substantive truth finding, an agreement on facts and law between prosecution and defendant is not regarded problematic as such and leads to a speedy conclusion of cases.

The introduction of pre-trial agreements in continental criminal justice systems in this light is rather surprising and not without problems. A study to negotiated justice within the Italian, German and French criminal justice systems shows how different solutions have been adopted to problems such as the central aim of substantive truth finding and the position of the defendant and victim during the negotiating process. However, these solutions respond mostly to problematic aspects of negotiated justice itself. Neither of these countries has succeeded in the creation of a negotiation procedure that responds to the guarantees of a fair trial and at the same time integrates well within the continental framework of the criminal justice system.

The main reason for not succeeding in the creation of such a procedure is that the structure of the pre-investigation phase has not been adequately modified. In particular, defence rights have not been sufficiently extended. Recent case-law by the Strasbourg Court (a.o. regarding the right to legal counsel) could therefore be regarded not only a valuable step towards a stronger position of the defendant in the normal criminal procedure, but also as an important contribution to fair negotiation procedures.