

LEGAL AID AS PART OF OUR INTERNATIONAL OBLIGATIONS

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the Council of Europe on 4 November 1950. The European Court of Human Rights (ECHR) was established to implement this convention. In Hungary the convention took effect as of 5 November 1992 and was proclaimed by Act XXXI of 1993. The Convention observed the Universal Declaration of Human Rights announced by the United Nations General Assembly on 10 December 1948. The aim of the Declaration (*inter alia*) is to reach the universal and efficient acknowledgement and maintenance of the rights set forth therein and protect and enhance human rights and fundamental freedoms. Article 6 of the Convention defines the right to fair trial and public hearing before independent and impartial tribunals within reasonable time and with specific guarantees related to criminal proceedings. [1] Protocol No. 12 sets a material provision for legal aid that the principle of non-discrimination should not prevent member states from taking measures to discriminate legal subjects provided there is an objective and reasonable justification for those measures. The Council of Europe has already interpreted Article 6 of the Convention in many cases. It finally concluded that even though the Convention had not explicitly defined the right to tribunal, the right to fair trial also included the former right. [2]

In concert with the intentions of the Convention, those in monetary distress may employ state legal assistance in scope of legal aid. Further personal conditions may prohibit clients in effectively communicating their case, effectively exercise their right to tribunal or acting efficiently in legal matters. [3]

The European Court of Human Rights allows for positive state measures to be implemented from time to time to perform the obligations resulting from the Convention. Let me furthermore note that even though the Convention does not require representation in civil proceedings, in certain cases, the state shall ensure the participation of a legal representative. I find it important to stress that working out alternative solutions for dispute settlement in avoidance of said proceedings is the task of state codification. [3]

It may not, however, mean that free legal assistance is required in each civil dispute since citizens, due to their personal social, material and educational conditions may actually be able to assert their interests and exercise their rights efficiently.

Therefore we may state that the practice of the European Court of Human Rights proves that in certain cases the right to effective and actual public hearing shall not suffer even in the absence of a legal representative. States can furthermore be required to simplify proceedings, implement effective cost exemption systems and alternative dispute settlement methods in place of said proceedings. [3]

Article 6 of the European Convention for Human Rights proclaims the guarantees for fair trial and the right to legal assistance relating to 'civil rights' and 'criminal charges'. [3]

COUNCIL OF EUROPE RECOMMENDATIONS

In connection with the topics of legal assistance several recommendations have been made by the Council of Europe for Member States the primary aim of which is building out judicial cooperation between the member states, ensuring an adequate standard and access.

The Council of Europe lays special emphasis on the question of legal assistance since they have issued numerous recommendations to the governments of the member states on the topic. These recommendations declare that the right to access justice shall be a fundamental element in every democratic society. This fundamental principle shall be placed in the forefront since for private persons disadvantaged in terms of monetary or social aspects proceedings at court is often very costly, time-consuming and highly sophisticated process and therefore they can exercise their rights in part or they may be restricted in exercising these rights.

Recommendation on measures facilitating access to justice

This recommendation [4] declares the right to justice to be fundamental to all democratic societies. The Council of Europe criticises court proceedings for being highly complex, time-consuming and costly so much so that especially socially or materially disadvantaged parties may not be able to exercise their rights unobstructed.

The recommendation defines vital principles to ensure the balanced exercise of rights by the needy: the simplification of proceedings, reduction of time, effective application of the cost exemption system and access to information re the activities of judicial organisations. [4]

Recommendation on effective access to the law and to justice for the very poor

This recommendation [5] declares that also monetarily deprived people should be allowed to employ legal instruments and access justice. Their legal representation shall be ensured by establishing legal consultation services and advancing alternative dispute settlement processes. The Council of Europe emphasizes a more active role of social organisations in dispute settlement. [5]

Right to justice

Legal aid institutions vary from one member state to the other since different models have been designed to accommodate difference social, economic and cultural needs. Eligibility is the main aspect to consider; who may be eligible for legal aid and under what conditions. It is regrettable that people may need state aid in legal representation or for other reasons because they cannot pay the high procedural fees and other costs for monetary reasons. Exemption from costs or dues may often be granted to cover procedural costs only while lawyer's costs shall not if the lawyer is selected by the client.

DOMESTIC LEGAL ASSISTANCE ORGANISATION

Constitutional law

The Republic of Hungary is an independent constitutional democratic state as declared by our constitution. Codification is to define the guarantees for constitutionality, ensuring juridical security and asserting human rights. [6]

In order to assert civil rights and obligations, setting criteria for the system of law and institutions, establishing courts and authorities to ensure their operation guaranteeing equal opportunities is a supreme obligation of the state.

Legal assistance

The first legal rule to declare the system's foundations was Governmental Order no. 1172/2002. (X.10.). As a result of extensive and professional legal work to reform legal assistance Act LXXX of 2003 on Legal Assistance was passed laying the ground for the institution of legal assistance to date. This Act focuses on legal protection comprehensively and coherently.

Establishing the institutional system was defined as governmental task. [7] Governmental Order no. 303/2006. (XII.23.) on the Office of Justice sets forth the rules governing the competence and organisation of the Office of Justice.

Inevitable transformation

The general elections of 2010 set the integration of legal aid in governmental institutions a long-term objective. I consider the inevitable introduction of integrated public administration services vital since all citizens can obtain comprehensive information about the ways of right assertion there. One of the greatest challenges for public administration is to establish a client-friendly and client-centred compensatory, equalising and highly professional institutional network.

In my opinion, the system is propelled by the incentive to create positive discrimination to promote equal opportunities initiatives by actually ensuring equal opportunities also for the already-mentioned deprived social strata.

The European Court of Human Rights holds that positive state measures may be allowed and implemented in case the right to justice is endangered by material and personal but not legal circumstances since the aim is to eliminate any incidental legal impediment on the state level.

Special regulations

Under Hungarian law, the separation of out-of-court actions and actions at law during proceedings that shall also define the dispute and the type of the case as aspects to differentiate between seekers of justice is a special feature of legal assistance and it shall furthermore differentiate between the forms and possibilities of assistance based on income and financial status.

Council directive no. 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

A speciality and definite advantage of legal assistance is that it is possible for people with registered permanent addresses or places of abode in Hungary to employ legal assistance in terms of cost exemptions in civil or business disputes pending at courts or authorities of other member states.

Out-of-court information, consultation and document preparation system

Out-of-court legal assistance is to ensure equal opportunities for clients being unable to assert their rightful interests for their monetary, social or personal conditions.

Act LXXX of 2003 on legal assistance took effect as of 1 April 2004. The assistance ensured by law was specifically aimed at information and consultation activities and offered help in preparing documents to the socially deprived with the cooperation of qualified legal assistants and lawyers.

Out-of-court resolutions may include consultation, information or drafting documents, which services are rendered by qualified legal assistants. The office is responsible for exercising official rights in cases requiring resolutions and approving or denying applications. Legal assistance, however, has major obstacles as well; Act LXXX of 2003 also defines the scope of assistance excluded from those available in legal matters.

Turning points in the way to legal proceedings

Legal assistants have the right to inspect legal proceedings. It is also of great importance because since 1 January 2008 legal assistants having filed a petition in a given case and initiated out-of-court procedural acts, prior to the actual lawsuit, are permitted to act as litigation friends.

Litigation friends in civil proceedings

Act CLI of 2007 amending other acts on legal assistance allowed for the further development and transformation of out-of-court legal assistance by expanding its scope with a view to modern requirements. [8] Therefore, as of 1 January 2008, representation by litigation friends in legal proceedings has been moved to the competence of the Office of Justice.

In the event the court grants personal legal aid to a client under its procedural rules, the proceedings are exempt from charges or under the act on legal assistance the state assumes the costs of the litigation friend. These costs shall be borne by the state unless the court obliges the adverse party to pay the same in part or in full.

However, under the act on legal assistance, a new and modern version of the system has been introduced by allowing for advancing these fees in civil proceedings. Thereunder, the lawyer's fee can be advanced for maximum one year [9] provided the client is entitled to record material costs or is in need.

Litigation friends in criminal proceedings

A further speciality in criminal proceedings is that the codifier shall ensure representation by a litigation friend for the injured party, private prosecutor, substitute private prosecutor, private party or other parties concerned and grant personal exemption for the substitute private prosecutor from charges provided the eligibility criteria are met. Under the Act, it is possible for the state to assume or advance the fee of the litigation friend. It is, however, important to note that legal aid may qualify as a recorded-type assistance in criminal proceedings.

Employee subsidies

Another speciality is that in labour disputes started before 6 February 2008 the former practice of cost exemption had to be applied while in cases started later material costs shall be recorded. As of 1 January 2010, Order no. 73/2009. (XII. 22.) IRM allows for employees involved in labour disputes as parties be entitled to subsidies without examining further conditions provided their gross monthly average pay derived from the employment at dispute upon submitting the petition, or if the employment terminated earlier, upon its termination, or in case the lawsuit was started for the unlawful termination of employment, at the time employer issued its declaration to terminate employment does not exceed double the gross monthly average pay published by the Hungarian Central Statistical Office two years prior to the above-specified dates. [10]

Common characteristics of litigation friend representation

Apart from material considerations, there is a dual condition of granting aid:

- the party's lack of knowledge in legal matters, and

- due to the intricacy of the case the party would not, by proceeding personally, be able to successfully represent their interest in the suit or effectively exercise their procedural rights, and therefore through legal aid efficient exercise of the procedural rights shall be ensured and, last but not least, clients whose lawful legal representation is obligatory shall be considered. [9].

RULES RELATED TO FEES OF LITIGATION FRIENDS

The rules governing the fees payable to litigation friends are set forth in Order no. 7/2002. (III. 30.) IM, and under 5.§. (3) thereof the fee payable to the litigation friend of the winning party shall equal the lawyer's fee defined in Order no. 32/2003. (VIII. 22.) plus expenses and VAT if applicable. [7]

SUMMARY

As part of our international obligations legal assistance shall ensure

- citizens' right to tribunal by state codification,
- the right to defence,
- the requirement of adjudicating clients' case by an impartial authority,
- the efficient operation of the right assertion mechanism,
- access to the latter.

Establishing the modern institutional framework of legal assistance was indispensable for citizens' legal equality, since ensuring the right to access tribunals, emphasising the right to assert rights and allowing for alternative dispute settlement procedures is a fundamental need of any modern democratic member state. Only caring states are able to provide caring administrative services, which shall ensure high-standard codification. A client-friendly, transparent, predictable and traceable service rendered as part of a cost-efficient and differentiated right assertion system is emphasised ensuring a predictable and accessible system of subsidies and assistance.

Expanding globalisation cannot be forestalled in our fast-moving world. Accelerated interferences between countries and cultures shall inevitably widen the scope and enhance institutional sophistication of international and national courts and jurisdiction while inferring the efficient operation of client-friendly public administrative services.

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