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in Central and Eastern Europe**

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PREFACE

This special issue of the Parker School Journal on East European Law is devoted to an important topic which has been overlooked in the process of transformation undergone by the legal systems of Central and Eastern Europe in the last decade. Collected in this issue are papers presented at an Experts Meeting held in Oxford, England, April 2-4, 1998, on Access to Legal Aid for Indigent Criminal Defendants.

The meeting was organized by the Project on Access to Justice in Central and Eastern Europe, a joint initiative of three organizations: Columbia Law School's Public Interest Law Initiative in Transitional Societies, the London-based Interights and the Budapest-based European Roma Rights Center. The Ford Foundation and the Open Society Institute's Constitutional and Legal Policy Institute (COLPI), based in Budapest, provided financial support. In addition, COLPI contributed to the substance of the meeting through its research arm, and it has joined the efforts of the Project on Access to Justice in Central and Eastern Europe to plan follow-up activities.

This issue of the Parker School Journal of Eastern European Law includes papers discussing the current situation with respect to legal aid to indigent criminal defendants in five countries: Bulgaria, the Czech Republic, Hungary, Poland and Romania. In addition, there is a comparative survey synthesizing these papers prepared by Károly Bárd, the Research Director of the Constitutional and Legal Policy Institute. A paper by Marek Antoni Nowicki, a member of the European Commission of Human Rights, outlines the jurisprudence of European Convention on Human Rights on the right to legal assistance in criminal proceeding. Finally, Jeremy McBride, a lecturer at the University of Birmingham, provides an overview of obstacles to access to justice more broadly, relying on European Convention jurisprudence.

The papers contained in this special issue identify many shortcomings in the provision of legal assistance to those who cannot afford to hire a lawyer in criminal cases. Generally, the fee structures and budgets of the *ex officio* mandatory legal defense systems that predominate in the region are inadequate, and the quality of legal assistance provided is seriously flawed. Moreover, current legal frameworks in the region generally provide for legal aid only for the most serious criminal cases, providing either discretionary guarantees or no guarantee at all in other criminal matters which result in the loss of personal liberty. These deficiencies arguably violate the guarantees contained in Article 6(3)(c) of the European Convention of Human Rights, which states that everyone charged with a criminal offense has the right "to defend himself in person through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

Legal assistance in civil proceedings was not the subject of the Expert Meeting and the papers associated with it, but the need for adequate legal aid in the interest of access to justice clearly goes beyond criminal proceedings alone.

The effort to bring attention to access to justice issues in Central and Eastern Europe falls squarely within the mandate of the organizers' institutions. The Public Interest Law Initiative

assists the development and facilitates the networking of public interest law communities in the countries of Central and Eastern Europe, Russia and Central Asia. Interights is an international human rights center which provides legal advice, assistance and information on human rights cases. The European Roma Rights Center is an international public interest law organization which monitors the situation of Roma in Europe and provides legal defense in cases of human rights abuse. The Constitutional and Legal Policy Institute contributes to the development of open societies in the countries of Central and Eastern Europe and the former Soviet Union through legal reform and support of basic rights and modern democratic institutions.

The papers contained in this special issue of the Journal of Eastern European Law represent a first attempt to define the parameters of an important topic which deserves further study. The Project on Access to Justice in Central and Eastern Europe intends to facilitate such efforts and to continue bringing attention to the need for better means of providing legal aid to the socially disadvantaged.

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Country Report: Hungary

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I. INTRODUCTION AND THE ORGANIZATION OF THE SYSTEM OF JUSTICE

General Background

In Hungary, the administration of justice more or less follows the European pattern. This includes the court system and other agencies operating within the judicial system. However, some institutions still show the impact of the communist regime. The majority of the population (10.17 million, in total) lives in urban areas. About 62.8 % of the population lives in the capital and other cities. The differences between a city and a village are not always considerable. It is the difference between the capital, Budapest, and the rest of the country which is significant. This is also reflected by the fact that out of the approximately 8,000 attorneys in Hungary, 3,800 practice law in Budapest.

The Court System After the 1997 Reform

In 1997, there were significant changes in the organization and the structure of the court system. Parliament decided to replace the three level court system (local courts, county courts, Supreme Court) by a four tier system which prevailed in Hungary before the Second World War.²⁹⁶

The competence of the different courts in criminal cases has not yet been finalized, because the draft for a new Code of Criminal Procedure is still being debated in Parliament.²⁹⁷ According to the draft, the so called local courts (the lowest courts) would act as first instance courts with general competence. More serious cases specified in the law would be decided in the first instance by the so called county courts, which would also act as second instance courts in cases when the local courts' decisions are appealed. The newly established appellate courts would proceed as second instance courts in cases when the county courts' first instance judgments are appealed. They would also act as third instance courts, a more or less second appeals court which reviews only legal issues, in cases originating in local courts.

The Supreme Court would act as a third instance court presiding over the more serious cases which originated in the county courts. This is the highest judicial body in the nation. It is envisaged to look to various institutions in order to provide for the uniform application of law as well as remedy the gravest errors found in final decisions.

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296 See Act LXVI of 1997 on the Organization and the Administration of the Courts.
297 It has been enacted in the meantime.

The new Law on the Organization and Administration of the Courts is also significant in that it guarantees judicial independence. The new law established the so called National Judicial Council (NJC), which has taken over functions previously exercised by the Minister of Justice. This body is made up of nine judges elected by the assembly of judges, the Minister of Justice, the prosecutor general, the chairperson of the National Chamber of Attorneys and two members of Parliament nominated by the Constitutional and Justice Committee and the Committee for Financial and Budgetary Affairs, respectively. The council is headed by the President of the Supreme Court.

The execution of all the tasks related to the administration of the courts is the responsibility of the NJC. This includes control over the administrative activity of the presidents of the courts, preparation of the draft budget for the court system and organizing the training of judges. The NJC also nominates a candidate for the position of President of the Supreme Court, appoints the presidents of the appellate and the county courts, and performs a number of other tasks related to personnel policy.

It is the task of the Hungarian Supreme Court to guide the activity of the courts and to assure the uniform application of the laws. The Supreme Court, in some cases acting as an appellate court, under exceptional conditions reviews final judgments and passes resolutions explicitly aimed at the uniform application of legal provisions in matters of principle. Whereas the uniformity of the administration of justice is guaranteed by the Supreme Court, the homogeneity of the legal system and its compliance with the Constitution is supervised by the Constitutional Court, which has distinguished itself among similar bodies in the region by its activism.

The Prosecuting Agency

The public prosecution agency in Hungary is independent of the executive. The Prosecutor General is elected by Parliament for a term of six years and is responsible to the legislature. The primary function of the organization is prosecution. This involves the supervision of police activity during investigations and bringing and representing charges before the courts. The investigation of certain criminal offenses (such as violence against an official, duress used by the police during interrogation, brutality in official proceedings, and criminal offenses against the administration of justice such as perjury or false accusation) is in the exclusive competence of the prosecutor's office. In other words, the police have no power to investigate in these cases.

It is the prosecution agency which oversees the lawful execution of prison sentences and enforces the respect of the rights of the individuals detained on any ground. According to §10.2.b of the Law on the Prosecutor's Office of the Republic of Hungary,²⁹⁸ the prosecutor's office has some additional functions outside the criminal justice system. For instance, the prosecutor may initiate a civil suit if the person concerned is unable to enforce his claim.

The prosecutor's office is a hierarchical organization headed by the Prosecutor General. Prosecutors may be given instructions exclusively by the Prosecutor General and his

²⁹⁸ See Act V of 1972 on the Prosecutor's Office.

subordinates. The Hungarian prosecution agency is bound by the principle of legality. As a general rule, prosecutors may not take expediency into account in decisions on investigating and bringing cases before the courts. However, for juveniles the prosecutor may postpone the filing of an indictment and prescribe certain rules of conduct for the defendant. If the juvenile succeeds in observing the rules during the "probation period," the prosecutor's decision not to bring the case before the court becomes final. A similar provision is envisaged in the draft to the new CCP for adults.

The Bar

Attorneys (advocates) are private lawyers who do their job either individually or as members of an attorney's office. Any Hungarian national with a clean record is entitled to be admitted to the bar provided she/he graduated from a law school, passed the qualification examination after at least two years practicing as an attorney trainee, establishes permanent residence in Hungary and disposes of an adequate premise for office.

Attorneys are members of an attorneys' chamber, which are organized on the county level, with one in the capital. The chambers are the self-governing bodies of attorneys which protect their own interests and rights. Several organs of the chambers decide on admittance to and exclusion from the chamber, determine the chambers' budget and account for its use, act as disciplinary bodies, provide for the training of attorneys, decide on the appropriateness of the premises serving as the attorneys' office, and perform several other functions. The National Chamber of Attorneys decides on appeals submitted against decisions of the individual chambers; reviews the lawfulness of the chambers' activity in general; and is the body authorized to form and express the opinion of the attorneys on legislation, draft legislation or on any issue related to the administration of justice and to submit it to the relevant bodies.

Case load - Defendants in Custody

The criminal justice system in Hungary faces the same problems as criminal justice systems in the rest of Europe. Courts are overburdened and delays are considerable. The annual number of first instance court proceedings in which the public prosecutor's office participates is around 95,000. This breaks down into 91,893 before local courts, 1,476 before county courts, and 1,908 proceedings before military tribunals in 1996. In the same year county courts heard appeals from 16,133 cases. There were about 9,000 private prosecution cases, in which the injured party, not the public prosecutor agency acts as prosecutor. These were cases of minor gravity, such as slander, defamation, light bodily injury, etc. The overwhelming majority of these cases were settled, or the private accuser failed to appear at the trial.

About 10% of those sentenced await trial and verdict in pretrial detention. This applies to juveniles as well (7,217 and 696 out of the 74,653 convicted adult defendants and the 7,769 juvenile defendants respectively were kept in pretrial detention in 1996.)

II. OUTLINE OF THE CRIMINAL PROCEDURAL LAW

The Commencement of the Criminal Process, the Arrest of the Suspect, and the Phase of Investigation

Criminal procedure in Hungary, as in many civil law countries, starts with a formal decision issued by the police on the commencement of criminal prosecution. Criminal prosecution can be based on a reasonable suspicion that a criminal offense has taken place.²⁹⁹ In the event of urgency, a formal decision is not required. Any procedural act of the police, such as search or inspection on the scene of the crime will introduce the criminal process, although a formal decision has to be passed afterwards.

The commencement of the criminal procedure (procedure *in rem*) and the involvement of the individual suspect (procedure *in personam*) do not necessarily coincide. This means that the formal rules laid down in the Code of Criminal Procedure apply even if there is no individual to be suspected of having committed the criminal offense. Furthermore, the deadline prescribed by the law for the accomplishment of the investigation starts on the date of the formal decision on the commencement of the criminal process, irrespective of the existence of an individual suspect.³⁰⁰

An individual may be prosecuted if there is a well founded suspicion that he committed the criminal offense. At this point he is the object of the suspicion and may make use of the rights provided for suspects by the code of criminal procedure. In other words, that is the moment when he may make use of the services of a defense lawyer among exercising other rights. This is what the constitutional provision, according to which defendants are entitled to the assistance of a lawyer in each stage of the proceedings, provides.³⁰¹

A person suspected of a criminal offense is not necessarily arrested. The majority of suspects remain free during the investigation and the trial. After the communication of the suspicion, which is limited to a brief description of the facts making up the allegation and information on the relevant sections of the criminal code (thus evidence supporting the allegation need not to be communicated), the suspect has to be informed of his rights. This includes the right to appoint a lawyer or to ask for a lawyer's appointment by the investigating authority. If the defense is mandatory, the investigating authority has to inform the suspect that if he fails to appoint a lawyer within three days, appointment will be made *ex officio*.

The interrogation of the suspect normally takes place immediately after the communication of suspicion. The law requires that it take place within 24 hours of the communication. Prior to and after the communication, the investigating authority will take the necessary measures for securing evidence (hearing witnesses, appointing experts, etc.). Both the suspect and his defense lawyer can be present at the experts' hearing, at the inspection of the scene of the crime, and at some other procedural acts. The defense lawyer also has the right to be present at the interrogation of the witnesses during the investigation.

²⁹⁹ The Hungarian Code of Criminal Procedure, Act I of 1973 (CCP), uses the term "well founded suspicion."

³⁰⁰ According to section 131 para. 2 investigation has to be completed within two months. However, this period may be extended; after six months it is the general prosecutor of the Republic who may extend the period of investigation.

³⁰¹ Section 57 Para. 3 of the Constitution.

The alleged offender may be arrested by the police if he was apprehended in the course of committing the offense and his identity may not be established or if there are grounds for pretrial detention (*see below*). Arrest may be authorized either by the police or the prosecutor. In practice it is ordered by the former. Arrest is frequently ordered on the basis of urgency, i.e. the formal decision on introducing criminal procedure is taken afterwards (*see above*).

Without a judicial decision, the suspect may be held in custody for a maximum of 72 hours. He is either released during this period or the prosecutor has to make a motion to the judge for ordering the suspect's pretrial detention. The motion has to be submitted in time so as to enable the judge to make a decision within 72 hours of the suspect's initial detention.

Contact with the Defense Counsel

According to the law, defense is mandatory when the individual is detained. This applies not only to pretrial detention but also when a new procedure is introduced against someone serving his prison sentence or if the individual is detained for mental illness. However, arrest does not make defense mandatory. This is due to the already cited provision of the Constitution and the CPP, which declares that everyone is entitled to a defense lawyer from the commencement of the criminal process. These provisions, in principle, do not prevent the individual from contacting his lawyer. The suspicion has to be communicated to the detained persons and they have to be interrogated within 24 hours of their detention. The defense lawyers may be present at the interrogation.

In practice, detained persons are seriously disadvantaged. As indicated by the report of the Ombudsman and the jail monitoring program carried out by the Constitutional and Legislative Policy Institute (COLPI) and the Hungarian Helsinki Committee, it is extremely difficult to retain a lawyer while in jail. In some regions, a request for representation is simply rejected by the prison administration or is forwarded to the investigator of the case. Further, making phone calls from jail is impossible. The detainee's relatives may notify a lawyer and ask him contact the suspect. Even if a lawyer is contacted, he encounters extreme difficulties entering the jail. As reported in the summary of the jail monitoring project, "the officers want to see the authorization given by the detainee to the lawyer but to give such an authorization to an attorney is hardly possible without first meeting personally." One should add that authorization may be given by the relatives as well. In addition, "jail guards would like to limit the visits of lawyers to 'office hours', and if an attorney visits his client at a different time, the guards are not very obliging."

Detainees in need of *ex officio* appointed lawyers face additional challenges. As stated above, the authorities are not obliged to appoint a lawyer until three days have passed since the communication of the suspicion. Since normally the communication of the suspicion is followed immediately by the suspect's interrogation, the *ex officio* appointed lawyer is not usually present at the suspect's first interrogation. However, even defendants at liberty represented by lawyers of their own choice have difficulties in having their lawyers present at the interrogation. In spite of the already cited provisions, suspects are only informed of their right to counsel immediately

before their interrogation. In theory at least, defendants may insist on the presence of their lawyer at their interrogation.

The law provides that lawyers and their clients may confer in private, without the presence of the representative of any state agency. According to §97.1 of the CCP, pretrial detainees may not be hindered in exercising their right to defense. According to para. 2 of the same section, “oral and written communication between pretrial detainees and their relatives and other persons is to be controlled by the proceeding agency.” However, this provision does not apply to communication between the detainees and their lawyers. Nevertheless, the report of the Ombudsman revealed a number of practices by which detainees were hindered in communicating freely with their attorneys. In several regions special “contact rooms” were set up where the conditions of uninhibited communication were not guaranteed. In some places, communications between the attorney and his client were restricted to “office hours” (between 8 am and 3.30 pm), which were interrupted by the staff’s lunch time. There are also jails where communication with the lawyer is only permitted after consultation with the officer in charge of the investigation of the particular case. However, in other places conditions permit only oral communication, as the gates between the lawyer and the client prevent them to study the files together, for example. According to the report of the Ombudsman, these shortcomings violate the rule of law principle and the right to defense, both guaranteed in the Constitution.

The Defendant’s Right to Choose his Defense Counsel; the Defense Counsel’s Presence in the Procedure

The right of the accused to choose or to change his officially appointed lawyer is not secured under Hungarian law. However, the accused has the general right to make motions and he may indicate the person he wishes to act as lawyer on his behalf. To accept his motion is the discretion of the police, the prosecutor, or the court (depending on the stage of the process at which the appointment takes place). On the other hand, the appointed defense lawyer may also ask the proceeding agency to relieve him of the obligation of acting on behalf of the accused.

The new Code of Criminal Procedure envisages changes in this respect, which will only modestly improve the position of the accused. The new rule is confined to an explicit declaration of the right of the accused to ask for the appointment of another defense attorney, without obliging the proceeding authorities to satisfy the request of the accused.

As indicated above, the defense attorney has the right to be present at certain procedural acts during the investigation. This rule applies to the court hearings over the issue of ordering pretrial detention. According to section 379A(2), the defense lawyer has to be notified of the hearing. If he fails to appear, the hearing may be held in his absence. The defense attorney is not obligated to attend all such acts, even when mandatory defense is involved.

The general rule has not been applied to juveniles since September 1, 1995.³⁰² When a juvenile is prosecuted, the defense attorney has to be present at all the hearings (section 302A). In this respect, it is worth mentioning that the amendment to the CCP adopted by Parliament in 1995 significantly improved the guarantees protecting juvenile defendants. The amendment

³⁰² See Act XLI of 1995.

obliges the proceeding authorities to appoint the defense lawyer immediately after the communication of the charge.³⁰³ For adult defendants, the amendment maintains the previous rule according to which the authorities have to inform the suspect that in case he should fail to retain a lawyer to act for him within three days of the communication of the charge and the authorities appoint a defense counsel *ex officio* if the defense is mandatory (section 132 para. 2). In addition, the law does not provide for adults the exact period of time within which the defense attorney has to be appointed. Quite frequently, in practice the attorney is appointed just before the completion of the investigation.

If defense is mandatory, the trial may not be held in the absence of the defense attorney. A violation of this provision results in the annulment of the verdict, unless the defendant is acquitted (CCP §250.II.d and §251.3).

The Right to Be Informed of the Right to Defense and Exclusionary Rules

The Hungarian CCP contains relatively strict rules governing the duty of the authorities to inform defendants of their right to counsel. According to §132.2, after the communication of a charge based on a well founded suspicion, the suspect has to be informed of his right to retain a lawyer to represent him or to request for the appointment of a defense counsel. Where mandatory defense is required, he is informed that if he fails to retain a lawyer within three days the authorities will appoint a defense counsel *ex officio*.

In theory, the failure of the authorities to provide information on the right to defense counsel could lead to the exclusion of some evidence. Section 60.3 of the CCP contains the general rule, according to which evidence obtained in violation of the CCP may not be used in the process. Some decisions of the Hungarian Supreme Court tend to indicate that in practice the exclusion of evidence is restricted to those cases in which the law explicitly provides for the exclusion as a consequence of a violation of a specific provision, such as the exclusionary rule. In reality, this is limited to a few specific circumstances.

The first concerns the failure of the police, the prosecutor and the court to inform the defendant of his right to remain silent. According to §87.2, before his interrogation the defendant has to be informed that he is not obliged to make any statement and that he may exercise the right to remain silent at any stage of the procedure. If the authorities fail to provide that information, the defendant's statement may not be used as evidence.

Section 60.2 of the CCP contains the general prohibition of using force, menace, intimidation or similar methods in order to obtain confession, without explicitly determining their consequences. Some court decisions suggest that a violation of §60.2 results in the exclusion of the confession.

Evidence also has to be excluded if the proceeding authorities disregard the rule on persons who may not be heard as witnesses. Section 65 of the CCP provides that the defense counsel may not be heard as a witness concerning facts he learned of in the course of performing

³⁰³ The CPP uses the term "communication of the well founded suspicion."

his duties as defense counsel. Nor are individuals who are unable to make reliable testimony because of mental or physical deficiencies allowed to act as witnesses. Finally, individuals bearing state or official secrets who have not been relieved of their obligation of secrecy may not be heard as witnesses. Testimony may not be used if the witness has not been informed of his privilege. This is the case when the duty to testify would violate the privilege against self-incrimination. Individuals bound by professional secrecy also have the right to refuse to testify. In all these cases it is up to the potential witness to exercise the privilege. What invalidates the testimony is the authority's failure to provide the necessary information on the right not to testify.

In summary, despite the small number of judgments making reference to the general rule on illegally obtained evidence (§60.3 of the CCP),³⁰⁴ decisions of the Supreme Court indicate that the general practice is inclined to limit the exclusion of illegally obtained evidence to instances explicitly referred to in the CCP. Accordingly, the failure of the authorities to inform the defendant of his right to counsel is not likely to result in the exclusion of something like a statement made by the defendant.

Representation in the Procedure Following the Final Judgment

Ex officio appointment authorizes the defense counsel to represent the defendant until the final court decision has been passed. Accordingly, his representation does not extend to retrial or revision, both being extraordinary remedies of final court judgments. If the conditions which make defense mandatory still exist, such as when the convicted person is deprived of his liberty or is mentally handicapped, the authorities have the duty to appoint a new defense counsel.

It follows from all the above provisions that *ex officio* appointment does not extend to the preparation and submission of complaints to international human rights bodies and representation before them.

The rules governing *ex officio* appointment apply to lawyers on retainer. They are entitled to act on behalf of their client until the final court judgment has been delivered, unless the defendant and the lawyer agree otherwise.

III. LEGAL RULES, ACCESS TO COURTS, THE INDIGENT DEFENDANT

Access to Courts According to the Constitution

The Constitution of the Republic of Hungary provides that everyone is entitled to bring his/her case before a court. The right to counsel is listed among the minimum guarantees to which defendants are entitled.

³⁰⁴ See, for instance, the decision according to which the statement of an illiterate suspect may not be used if two so called official witnesses have failed to be present at the interrogation as prescribed by the law (FBK 1995/9) or according to which the statements of the defendant made during the psychological examination may not be used (JD 1995/449).

However, there are a few omissions in Hungarian legislation which weaken the express constitutional principle granting the right to access to the courts. First, although the Constitution on a general level declares that claims originating from violations of basic rights are to be enforced before the courts (§70/K), these claims are normally rejected unless they invoke an explicit provision in the implementing legislation. Furthermore, even if as a general rule administrative decisions can be challenged before the courts, there are still some exceptions.

Mandatory Defense

According to the CCP, legal assistance in criminal cases is mandatory if:

- (1) the defendant is detained (with the exception of arrest which may last, as indicated above, for a period of maximum 72 hours);
- (2) if he/she is blind, mute, deaf or otherwise physically or mentally handicapped;
- (3) if the defendant does not understand Hungarian;
- (4) if he/she is suspected of having committed a criminal offense for which a prison sentence exceeding five years may be imposed;
- (5) the defendant is a juvenile;³⁰⁵
- (6) if proceedings take place in the absence of the defendant; or
- (7) in the event of a special procedure used primarily for flagrancy offenses in which simpler rules may be applied for investigation and indictment.

In addition, the proceeding authority may appoint a defense lawyer if requested by the defendant, provided that the request is deemed justified by the proceeding authority.

Responsibility for the provision of legal aid is shared by the authority acting in the given phase of the procedure and the attorneys. Accordingly, it is the task of the police, the prosecutor or the court to rule on the appointment, whereas it is the responsibility of the lawyers' chambers to ensure that their members be available for appointment. In theory any member of the Bar may be appointed *ex officio*. In practice, many lawyers try to avoid appointment. This was especially true before the elimination of the *numerus clausus* in 1991 among those who acted as legal advisors at state owned companies or in the local government and therefore lacked any experience in criminal cases. The lawyers' chambers collect the names of those advocates who are willing to act upon appointment and forward the list to the courts, the prosecution agencies and the police. However, it is important to emphasize that the law does not distinguish between lawyers who are willing to take criminal cases on appointment and those who are not. According to the relevant legislation, all attorneys have the duty to perform the tasks related to the appointment.³⁰⁶

According to the Law on the Bar, defense lawyers appointed *ex officio* are private attorneys paid on a case by case basis. Under Hungarian criminal procedural law, appointment of lawyers *ex officio* is not limited to indigent defendants. Any defendant who is not able or willing to retain a lawyer is provided with an appointed lawyer if defense is mandatory.

Officially appointed lawyers are entitled to be reimbursed for the first hour of the trial or any other procedural act, including those in the investigation phase of the process, by 1000 HUF

³⁰⁵ A person is a juvenile if he/she is under 18 years of age at the time of the perpetration of the criminal offense.

³⁰⁶ See section 8 para.3 of Law-Decree No. 4 of 1983 on the Bar.

(approximately \$5) and by 500 HUF for subsequent hours. Officially appointed attorneys are not paid for the time they communicate with their clients, even if the defendant is in detention. Only travel and accommodation expenses are reimbursed.

Indigent Defendants, Victims and Witnesses : ex officio Appointed Defense Counsel

Ex officio appointment is not related to the financial resources of the defendant. In contrast to the Code of Civil Procedure, the term indigence is not mentioned in the CCP. Individuals in civil cases, who for lack of financial resources are unable to cover the expenses of the process, are entitled to certain privileges. Thus, they are not obliged to pay court fees, they are relieved from paying costs arising in the process, such as witness or expert fees, the fee for interpretation, etc., they may be exempted from providing assurance, and they are entitled to the appointment of an attorney acting on their behalf as a free protector. Parties to a civil suit are entitled to these benefits if their income does not exceed the current minimum amount of old-age pension and if they do not possess any property except the normal essentials of life. This provision will also apply to defendants in the criminal process following the entry into force of the new CCP.

In addition to the privileges linked to indigence, there are certain types of civil cases in which the parties are exempt from paying the costs of the suit irrespective of their financial conditions. These include paternity actions, cases for the discontinuation or restoration of parental supervision, child maintenance actions, cases related to custody and the majority of the suits arising from labor contracts.

On the other hand, in criminal cases *ex officio* appointment is linked to the defendant's inability or unwillingness to retain a lawyer to act for him. Sociologically it is mostly the poor defendants who lack the capacity of retaining a lawyer for the simple reason that they do not have acquaintance with this strata of the population. Nevertheless, irrespective of his financial resources, the defendant faced with a mandatory defense is provided with an officially appointed attorney if he fails to retain a lawyer to act for him. The rationale underlying this approach seems to be clear. If legislation prescribes the obligatory participation of the defense attorney, the defendant has no choice. He may not waive his "right" to a defense counsel. It would be unacceptable to force him to retain a lawyer. Thus, it is not the indigence of the defendant that justifies the *ex officio* appointment but the interests of justice.

Interests of justice also explain the possibility of appointing an attorney in cases other than those involving a mandatory defense. In these cases the defendant may request the appointment of a lawyer but the proceeding authority is not bound by the request. It will appoint a lawyer only if it considers the request to be justified. In practice defendants rarely make use of this opportunity. However, appointment is generally granted when requested. It should be added that the police, the prosecutor or the court may also appoint *ex officio* and without the defendant's request, a defense lawyer if they regard it necessary, even in cases which fall outside the scope of the mandatory defense.

According to court practice, the authorities should appoint a lawyer in cases outside the scope of the mandatory defense if the case is complicated, evidentiary problems arise, or if the

defendant has difficulties in defending himself effectively in person, such as when defendant serves his military term.³⁰⁷ If the police, the prosecutor or the first instance court should make an erroneous evaluation and fail to appoint a lawyer when the interests of the defendant so require, the second instance court will annul the decision and remand the case to the first instance court. Although in practice the provisions on appointment outside the cases of mandatory defense are rarely invoked, appointment is seldom denied when requested.

In sum, the interests of justice, not the defendants' lack of financial means, explain the institution of the *ex officio* appointment. The defendant's financial conditions, however, may count in certain cases. According to §219 of the CCP, on the request of the appointed defense lawyer the court may oblige the defendant to pay the lawyer as if he had given the lawyer a mandate. In such cases, this payment replaces the fee to be paid by the court to the defense counsel. In judicial practice,³⁰⁸ the defendant's financial conditions are taken into account when the court decides on the defense lawyer's request. The other decisive criterion is the attorney's performance. For instance, if the trial lasts for a long period of time, the attorney attends and is sufficiently active, he may be awarded the requested sum. Judicial practice in this respect reveals the somewhat cynical approach or assumption of the legislation according to which *ex officio* appointed attorneys are normally rather passive, justifying the low fees. If they proceed contrary to this negative expectation, the defendant may be forced to pay for the attorney's unusual performance.

It is also worth mentioning that the CCP contains a provision frequently criticized by defense attorneys according to which §219 does not apply to acquittals. The rationale of this provision is that innocent defendants should not be ordered to pay if defense is mandatory. In other words, they have no option to not be represented. On the other hand, the criticism is justified in that it deprives defense lawyers of requesting a higher fee in cases where they have performed an excellent job.

To make it abundantly clear, *ex officio* appointment does not mean that the defendant is relieved from paying the fees of the appointed attorney. It simply means that payment will be postponed. The attorney receives his fee from the state. If the verdict is guilty, the state will enforce its claim against the defendant, irrespective of the convicts' financial conditions. Thus, the provisions of the present CCP are not completely in line with para. 3/c of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. However, even under the Convention indigence alone does not justify free legal assistance. There is justification only if "the interests of justice so require."

Even the provisions of the present CCP can be applied in such a manner that they are in compliance with the Strasbourg standards. This holds at least for a certain group of cases. §217.3 authorizes the court to exempt the defendant found guilty from paying the costs of procedure, totally or in part, where the costs of the process are disproportionate to the gravity of the criminal offense. In practice, the provision is used in relation to extremely expensive expert opinions necessary for a conviction of a relatively minor offense. In theory, courts are empowered to relieve the convict from paying any costs, including the *ex officio* appointed

307 See JD, case no. 54/1981

308 See JD, case no. 353 of 1983

attorney's fee, on the ground that the individual lacks financial resources. This is so, provided that the costs of the procedure are disproportionate to the criminal offense. When comparing the costs of process with the offender's guilt, courts may consider the offender's financial conditions.

The new CCP envisages significant changes for both mandatory defenses and the right to an officially appointed counsel. Furthermore, it envisages free legal assistance depending on the defendant's indigence. First, it distinguishes between cases in which defense is mandatory throughout the whole procedure and those in which participation of a defense attorney is obligatory only during the trial. The first group comprises the following cases:

- (1) the defendant is detained (with the exception of arrest)³⁰⁹;
- (2) the defendant is deaf, blind, mute or mentally ill, or for some other reasons is hindered from defending himself personally; or
- (3) the defendant does not speak Hungarian or the language of the procedure (according to the draft Code the language of a national minority can also be the official language of the procedure provided that special legislation lays down the detailed criteria). Defense should be mandatory during the whole process when the defendant is proceeded against *in absentia*.

In court procedure, the defense lawyer's participation is obligatory in cases which come before the county court as the first instance court. These are the more serious cases. According to the Penal Code, in cases of criminal offenses for which the Code provides a penalty of five years or more imprisonment, the Code also requires a defense lawyer's obligatory participation.

The defense lawyer's participation in court procedure is also mandatory if the subsidiary private accuser initiates the court proceeding. If the prosecutor discontinues the investigation and refrains from bringing the case before the court, the victim may request a continuation of the procedure. If the court grants leave to prosecute the victim, a subsidiary private accuser may perform the functions of the public prosecutor. However, the subsidiary private accuser has to be represented by an attorney. In order to guarantee the equality of arms, the new Code makes defense in this case mandatory.

Differences in wealth and social power result in varying potential to enforce one's claims. The new CCP is likely to widen the gap. For instance, it envisages the participation of an attorney who could be present at the interrogation of the witness (also during the investigation) and who could assist the witness primarily in making use of his privilege not to testify. However, indigent witnesses will hardly be able to make use of this type of assistance as no *ex officio* appointment is envisaged for those who lack the necessary resources for obtaining a lawyer of their choice.

Indigent victims will face more serious difficulties when wishing to act as subsidiary private accusers. According to the new Code, the participation of an attorney on behalf of the victim is mandatory in case of subsidiary private accusation. The appointment of an attorney is

³⁰⁹ See above under II.

not granted for those who cannot afford to pay for the services of the legally skilled expert. Thus the new Code, which in principle considerably broadens the rights of the participants in the process, is likely to create differences in the potential to access the justice system to an extent which is hardly tolerable in a society governed by the rule of law.

For cases arising out of a mandatory defense envisaged in the new Code, the defense counsel's participation during the whole procedure is also obligatory in

- (1) proceedings directed against juveniles,
- (2) cases when the accused is proceeded against according to the rules of simplified investigation (primarily in case of flagrant offenses), and
- (3) if, for the defendant's pleading guilty, the court imposes sentence outside the trial.

According to the new Code, the proceeding authorities also have a duty to appoint a defense lawyer *ex officio* if the defendant is not in a position to retain a lawyer of his own choice for lack of financial resources. The envisaged modification is extremely significant because the fees of the *ex officio* appointed attorney, in contrast to the present regulation are paid under indigence by the state irrespective of the outcome of the procedure.

As indicated above, it is private lawyers who perform the duties of *ex officio* appointed lawyers. For the last few years, law clinics have also provided legal assistance to certain groups of criminal defendants. For example, within the framework of the clinic set up in Budapest in 1997, such cases have been selected which are likely to disclose deficiencies in legislation or in practice and their clients are mostly indigent defendants. The work is done by private lawyers who are paid by the program. The project has also an educational component. The students whose work is recompensed by a fellowship are assigned to an individual lawyer. The idea is that the students should also take part in the proceedings in addition to discussing the cases with the lawyer. However, the relevant legal provisions limit their participation to presence at the discussion between the lawyer and the client if the latter is at liberty. The legal problems related to the individual cases are then analyzed by the students under the guidance and with the assistance of university professors.

IV. THE DEFICIENCIES OF THE SYSTEM OF OFFICIAL APPOINTMENT IN THE LIGHT OF RECENT STUDIES

The Report of the Parliamentary Ombudsman

Even if comprehensive studies on the operation of the system of *ex officio* appointed attorneys have not yet been done, everyday experience as well as research on a relatively low number of criminal defendants clearly shows the serious deficiencies of the system. I confine myself to two recent sources referred to above. The first is the examination of the Parliamentary Ombudsman (National Assembly Commissioner for Civil Rights) carried out in 1996. The second is the jail monitoring program of the Constitutional and Legislative Policy Institute (COLPI) and the Hungarian Helsinki Committee, also conducted in 1996.

The report of the Ombudsman's Office was partly based on a 1996 inquiry carried out by the National Prison Administration. This inquiry comprised almost 1000 detained individuals who were asked to report on their experience with their defense counsels. Of these, 67.7 per cent had *ex officio* attorneys. When questioned whether the detainees were satisfied with their defense counsels' performance, 21.6 per cent expressed extreme dissatisfaction, while 15.8 per cent reported that they were simply not satisfied with their attorneys' performance. The detainees also responded to the question whether they had sufficient contact with their lawyers. 233 individuals were of the opinion that the number of meetings with the lawyer was satisfactory, 52 blamed the police for the low number of meetings with their lawyers, while 322 blamed the attorney.

The statements of the detainees were corroborated by interviews of staff members at the Budapest Prison. They reported that, with few exceptions, defense lawyers do not make any requests to the prison administration. It is primarily the detainees themselves who make attempts to contact their lawyers.

The report of the Ombudsman identified a number of reasons for the *ex officio* appointed lawyers' poor performance. The first concerned the lack of adequate legal provisions motivating appointed counsel to do their best in the interest of their clients. The decree of the Minister of Justice No.1/1974 (II.15) IM on the fee and expenses of the *ex officio* appointed defense attorney in criminal proceedings does not provide for compensation for maintaining contact with the clients unless the attorney has to travel to a place outside the seat of his office.

The report of the Ombudsman correctly criticizes the present regulation as clearly contrary to Hungary's obligations under international law, because it does not exempt indigent defendants from paying the attorney's fees while only providing for advance payments by the state.

Improper rules in the CCP are also responsible for the appointed attorneys' poor performance. As pointed out in the Ombudsman's report, the CCP provides only for the right of the defense counsel at certain procedural acts during investigation. The lawyer's attendance is not required. This regulation also refers to the hearing at which decision on pretrial detention is taken (with the noted exception of juvenile cases). Accordingly, the arrested individual can be placed in pretrial detention and be thereby deprived of his liberty for a relatively long period of time without having an opportunity to consult a person skilled in legal matters. In the Ombudsman's view, this violates the rule of law principle as well as each individual's right to defense.

According to the findings of the report, the lack of precise provisions for the time of appointment and the vague rules on the defense counsel's access to the files are likely to curtail the defendants' right to effective defense.

Finally, the report raises the question of the lack of effective control over the activity of the appointed counsel. Disciplinary procedure seems to be rather ineffective simply because of the low number of complaints. In 1996, there were two cases in Budapest in which the reckless performance of appointed lawyers was at issue, both cases directed against the same attorney.

The relatively mild disciplinary sanctions imposed also account in part for the problem of *ex officio* performance. The Minister of Justice does not have effective means to enforce proper performance. His supervisory powers extend solely to verify decisions taken by certain bodies of the Bar on their formal legality. In addition, the minimal requirements that appointed defense counsel should meet have not been determined.

The Findings of the 1996 Jail Monitoring Project

The conclusions drawn from the jail monitoring program of COLPI and the Hungarian Helsinki Committee were similar to the findings of the Ombudsman's report. The monitoring program involved over 400 suspects held in pretrial detention. Almost 60 per cent of those who responded to the questionnaire had *ex officio* appointed defense counsel.

The difference between the performance of the lawyers on retainer and that of the *ex officio* appointed attorneys was clearly indicated by the detainees' replies concerning their contact with the lawyers. According to the replies, almost 20 per cent of all the detainees could make contact with their lawyers immediately after their detention and almost 90 per cent of these "fortunate" suspects had lawyers on retainer. More than 30 per cent of those who had lawyers on retainer could make contact with them immediately, whereas only 5.2 per cent of those who had *ex officio* lawyers could make such contact. 23.7 per cent of the respondents stated that they had not met their lawyer yet (at the time of the inquiry), and almost 81 per cent of those had *ex officio* appointed defense counsels. Within the group of defendants with appointed defense counsel, the ratio of those who had no contact with their lawyers at the time of the inquiry came up to 43.7 per cent, whereas the ratio for defendants with lawyers on retainer amounted to only 8.1 per cent.

The jail monitoring project revealed several kinds of deficiencies related to the system of *ex officio* appointed defense attorneys. Thus, suspects with appointed attorneys are practically left without the support of a legal expert when they are informed of the charges based on a well founded suspicion. Many of the suspects are simply not informed of the possibility of the appointed counsel. Foreigners are hindered in contacting the appointed counsel due to the police' failure to provide an interpreter. Several suspects complained that the *ex officio* appointed attorneys tried to receive a retainer from them. Lawyers sometimes make a hint that in exchange of a fee they could use their police contacts to have the detainee released. Sometimes they simply indicate that they are determined to act only if the detainee pays.

The Ombudsman's Recommendations

As their findings were similar, it is not surprising that both the Ombudsman and the experts involved in the jail monitoring program formulated similar recommendations for improving the system of *ex officio* appointed defense counsel. Both reports propose to rethink the whole institution, including its financial aspects. They suggest considering the possibility of introducing new institutions such as the public defender's office or specialist defense counsel in criminal cases.

The report of the Ombudsman also contains recommendations concerning the amendment of a number of existing laws. It proposes to formulate precise provisions for the CCP on the time limit within which the police are obliged to appoint counsel in cases of mandatory defense. They also propose to make the presence of the defense counsel at the court hearing that decides upon pretrial detention obligatory. It urges the modification of the CCP in order to reduce the discretionary powers of the police in notifying the defense counsel of the procedural acts and to guarantee for the counsel easier and wider access to case files than that ensured at present under the law. The report urges the Minister of Justice to prepare legislation exempting indigent defendants from paying the costs of the procedure, determine the precise standards for the performance of appointed defense counsels and to elaborate effective rules providing for appropriate sanctions in case appointed counsels fail to perform their tasks responsibly.

The recommendations addressed to the President of the National Chamber of Advocates provide for the education of the advocate trainees in ethical issues and the supplementation of the existing code of conduct for advocates, with a view to improving the efficiency of the appointed defense lawyers' activity.

Some of the recommendations of the Ombudsman were similar to the approach taken by the committee which drafted the new CCP. For example, the new Code provides that for mandatory defenses, the police and the prosecutor are obliged to appoint the defense counsel immediately if the suspect declares that he does not wish to assign a lawyer. On the other hand, the new Code prohibits the present practice, which allows them to appoint simply a lawyer's office without specifying an individual attorney to represent the defendant. It also obliges the defense counsel to contact the suspect immediately after the appointment and to inform the authorities of the person authorized to substitute him. The rules on the defense counsel's access to the files of the investigation are formulated more precisely in the new Code than in the present CCP. As referred to earlier, the exemption of the indigent defendant from bearing the costs of the process is also envisaged.

The Reaction of the Bar

In this context it is worth reflecting on the reaction of the Budapest Chamber of Attorneys on the recommendations.³¹⁰ In a letter addressed to the Ombudsman, the president of the Chamber welcomed most of the recommendations, such as the prohibition of appointing lawyer's offices without specifying the individual attorney, the recognition of the defendant's right to refuse the individual lawyer appointed by the authorities, the increase of the fees for the appointed attorneys, and the exemption of indigent defendants from bearing the costs of the process.

The president expressed his disagreement with the recommendation calling on the Minister of Justice to prepare legislation setting the minimum standards for the performance of appointed lawyers as legal requirement. In his view, this would only result in formal requirements unlikely to bring about any improvement in substance. He also voiced his strong opposition to the proposal that state control be imposed over the performance of *ex officio*

310 See the reply of the Chambers's President to the Ombudsman in *Pesti ügyv. Id.*, 1997, No.2.

appointed attorneys and expressed his conviction that the only body suitable for control and supervision while respecting the independence of the profession is the Chamber of Attorneys.

The president also expressed his doubts about setting up a state financed legal aid service. Referring to cultural and legal traditions, he was of the opinion that Hungarian society would never trust such an institution. Criminal defendants would never consider public defenders as their benefactors. Rather, they would regard them as state “spies.” Instead of making “doubtful attempts” to introduce a legal aid service, he proposed to set up the list of “attorneys acting in criminal cases” on the basis of German and Austrian examples. The list would include those attorneys who are willing to take criminal cases on appointment. Only the attorneys included in this list could receive authorization to act as lawyers on retainer in criminal cases.

It is difficult to decide whether Hungarian society would actually reject the idea of the legal aid service. Under the present conditions, setting up a state financed legal aid system in the near future seems to be unlikely. The opposition of attorneys is too strong and the Government does not seem to be determined to bring about radical changes. One may only hope that the new Rules of Conduct of the Attorneys’ Profession adopted by the Bar Association setting higher ethical standards, and the new Law on the Bar likely to be adopted by Parliament in 1998 prescribing higher professional and ethical requirements for attorneys and attorney-trainees, will result in the improvement of the situation for those who are unable to retain an attorney of their choice because of the lack of financial resources or other reasons.