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Trial and Sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing Patterns, the Role of the Defence in the Countries in Transition

1. PRELIMINARY REMARKS

The criminal procedure of a given country is traditionally described by its position on an imaginary line stretching between the two polar models, between the accusatorial and the inquisitorial type of procedure or, to use a terminology introduced by American legal doctrine, between the due process and the crime control model. In the new democracies however the structure of the trial, the position of the judge or the role of the defense in the trial stage do not constitute in themselves sufficient indication to define the exact position of the criminal procedure of these countries. To arrive at a correct definition we have to extend the scope of our analysis to the complete criminal process. Thus answers to the questions what exactly is the position of the new codes or the amendments to the old ones between the two polar models and whether they do indicate a shift towards a more accusatorial procedure or on the contrary, are basically maintaining the former inquisitorial principle will depend not only on the position of the parties and the judge's position in the trial but also on the relationship between the trial and the preparatory stage, and particularly on the legal provisions and the judicial practice which govern the use of information – obtained in the course of the investigation – in the trial. Therefore, when analyzing the criminal procedure in the countries of Central and Eastern Europe, I shall reflect upon the relation between the two principal stages of the criminal process, too.

This paper attempts to describe the most important tendencies in the countries of Central and Eastern Europe. The regional restriction seems to suggest that criminal procedures in Central and Eastern Europe differ from those in the Western part of Europe. This again is based on the assumption that:

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a) since regarding the nature of their administration of justice in the era preceeding the political changes, the countries of Central and Eastern Europe, following or even copying the Soviet model, formed a homogenous entity (and consequently they face similar problems in the present) we may rightly use the term 'socialist criminal procedure' to denote it as something distinct from other criminal procedures, and
b) there exists a Western European pattern of criminal procedure.

These assumptions, however, are valid only with considerable reservations. First, the criminal procedure developed in the Soviet Union was copied to varying degrees by the different countries. Thus, the myth of a monolithic communism, in which the countries of the region had absolutely no freedom of action to develop their own legal system must be rejected as unusable. Second, in the development of the so-called 'socialist criminal procedure' itself several phases can be differentiated.

After World War II, important changes were introduced into the legal system of the countries of the region although the alterations concerned primarily the organization of the courts (setting up of special tribunals to adjudicate war criminals; abolition of certain traditional institutions such as the investigating judge and the accusation chamber; introduction of the system of lay assessors). In the early 1950s, the pre-war codes were replaced by comprehensive new procedural laws shaped in the spirit of Soviet legal doctrine (elimination of certain guarantees considered as bourgeois formalities hindering the discovery of 'material truth' and justice; simplification of the appeal system).

In the middle of the 1950s, as a reaction to Stalinist excesses, several countries of the region adopted new laws strengthening the supervisory competencies of the prosecutor over the police, guaranteeing modest rights to the defense and providing for certain institutions aimed at screening out unfounded charges. Most countries returned to the system of cassation and reinstalled the *reformatio in peius* rule.

In the course of the 1960s, important changes took place in the domain of criminal procedural law. The new codes or the amendments to the old ones were characterized, on the one hand, by an effort to transplant the Chrouschovian thesis on socializing the state administration into the sphere of criminal justice and on the other hand by a deviation from the previous Soviet doctrine of uniform procedure (irrespective of the seriousness of the criminal offense in question) and by a shift towards certain differentiation through, among others, the (re)introduction of certain summary procedures. In the criminal procedural legislation of the late 1960s and the 1970s, the principle of differentiation became articulated, the competence of the single judge was introduced or broadened and the traditional guarantees of the criminal process were strengthened.

Depending on which of the above phases exerted the strongest influence on their legislation, the procedural laws of the countries in the region showed considerable differences at the time when the political change began at the end of the 1980s. This is why it is not easy to discover the common traits of 'socialist' criminal justice systems in countries which shaped their legislation more or less on the basis of pre-war patterns or cautiously introduced Western type institutions and in countries which preserved the most absurd 'innovations' of Stalinist criminal justice doctrine until the collapse of the political regime.

On the other hand, there are considerable differences among the criminal justice

systems of the Western European countries, too. Whereas in some of them even the most typical feature of the inquisitorial system, i.e. the lack of the separation of prosecution and adjudication is still maintained, some experiment with the adoption of elements of the Anglo-American process. In addition, the variety of procedural forms in one single country makes it rather difficult to classify the criminal process in that given country as belonging definitely to one or the other group.

Since we wish to describe tendencies we cannot confine ourselves to identifying ends, we must also be concerned with beginnings. Despite the difficulties which arise when we treat the countries of the Central and Eastern European region as a homogenous entity, we shall make an attempt to describe that 'socialist' model of criminal procedure which these countries wish to overcome even if for the reasons mentioned above, we may run the risk of oversimplification and overgeneralization. In order to reduce this risk I shall concentrate on the lessons that can be deduced from the legislation of those countries which represent the average and shall leave out those which represent the unusual, the extreme.

2. THE 'SOCIALIST' TYPE OF CRIMINAL PROCEDURE

The structure of the laws on criminal procedure in the former 'socialist' countries follows the model of the so-called European mixed system, that is, elements of an inquisitorial (investigative, interrogative) procedure are blended with elements of an accusatorial (contradictorial or party) procedure.

The procedure consists of two distinct phases: the pre-trial phase is dominated by inquisitorial elements (*ex officio* procedure; lack of strict separation of functions; secrecy) while the trial phase bears the characteristics of a party procedure (publicity; separation of the prosecution, the defense and the judicature; strict adherence to the prosecutor's charge, etc.). The fact that certain contradictorial elements (e.g. participation of the defense counsel of the accused is ensured within certain limits) are present in the pre-trial phase provides further proof for the mixed nature of the system. On the other hand it should be noted that the trial phase is not entirely free from the elements of an inquisitorial procedure either (the examination of the witnesses and the interrogation of the defendant is primarily the duty of the judge; *ex officio* nature in taking evidence).

One of the most important differences between the 'socialist' procedural law and the Western European model concerns the distribution of competence: 'socialist' procedural laws allow the courts a far less significant role. It is reflected on the one hand, in the fact that in the pre-trial phase the court has almost no power, and it is shown on the other hand, in the fact that, owing to the provisions on the use of documentary evidence in the trial stage, evidence collected in the course of the investigation may almost fully serve as a basis of the court decision.

Another characteristic of the so-called socialist procedural laws also derives from this special system of competence, namely that the police, the militia, the organs coming under the competence of the Ministry of Interior are empowered with far broader licenses than their counterparts in Western Europe.

In the traditional European model the main area of activity for the police within

crime control is prevention, therefore they have only limited powers in formalized 'reactive' procedures. Classical bourgeois procedural laws take the position that coercive power in formal criminal procedure is to be granted solely for the so-called 'judicial authorities' (the court and the office of the prosecutor) and that the participation of the so-called criminal police is to be kept instrumental. Citizens are to obey court and prosecutor orders but not police orders since no independent power is granted for the police which is authorized only to make use of that delegated power which they receive from the court or the prosecutor's office. The other area in which the police is authorized to act is the implementation of the court's/prosecutor's orders.

The codes of the Eastern or Central European countries designate the police as the general investigating authority. Their licenses towards 'third persons' are substantially identical with those provided for the prosecutor in the pre-trial phase. Participants of the criminal procedure are to obey the orders of the police whose 'power' to order the use of coercive measures is almost identical with that of the prosecutor's. The prosecutor's office and the police are linked through the institution of the prosecutorial supervision of the investigation: in this institution licenses enabling the prosecutor to carry out acts of investigation (the prosecutor may give orders to carry out certain acts of investigation, may carry out such acts or can take over the whole investigation) are blended with means intended for the supervision of the lawfulness of the proceedings conducted by the police (the prosecutor as forum of legal remedy).

The distribution of competence affects the status and the position of the defense counsel as well. Although 'socialist' procedural laws do not deny the defendant's right to a defense counsel yet the role of the latter is considerably less important than that of its Western European counterpart. In the most decisive phase of the 'socialist' criminal procedure, the pre-trial stage, the defense lawyer's rights are limited. There are no provisions on the status of the attorneys' offices as concerns searches or seizures and communication between the suspect and his/her attorney is restricted. It is practically the closing moment of the investigation when the defense lawyer finally gets the chance to get acquainted with the files. However, it is not so much the rules of criminal procedure which prevent the defense from interfering with the smooth handling of the case by the police and the prosecutor but rather the legal status of lawyers and the organizational framework within which they exercise their profession. The selection process – resulting from the *numerus clausus* within the advocacy – itself guarantees a certain degree of loyalty. Attorneys may exercise their profession only in organizational units and among others it is the responsibility of the head of the unit to enter into contract with the client on behalf of the organization or to designate the lawyer (in case of mandatory defense when the defendant fails to appoint one). The price which attorneys pay for their relatively high income is that they permanently risk the danger of being submitted to disciplinary or criminal prosecution due to inadequately formulated, obscure legal provisions which apply to them. All these factors guarantee that attorneys do not break their duty of loyalty and one may ponder whether it is this small group of the relatively wealthy privileged or the underpaid judiciary working under miserable conditions which did better service for those in power.

There are some further points which differentiate socialist procedural laws from their Western European counterparts. These differences basically derive from a general

refusal of formalism in criminal procedure, from an underestimation of the importance of legal professional skills and from a limited acknowledgment of the autonomy of the parties. The rejection of formalism is closely linked with an endeavor to simplify and unify procedure. As a consequence, the former three trier court system became replaced by a two trier system, the previously prevalent special forms of procedure became abolished. Lack of formalism and simplicity came to be regarded as a precondition of 'democratic justice', comprehensible for each stratum of the population. In addition, the relatively low crime rate due to tight control of everyday life, the 'coordinated' activity of the crime control, the prosecuting agencies and the judiciary made simplified procedural forms unnecessary. Financial considerations, the idea that limited resources should be rationally distributed were alien to 'socialist' procedural doctrine. Therefore, legislators in the former 'socialist' countries opted for the principle of mandatory prosecution, though the so-called material concept of the criminal offense enabled the crime control agencies to refrain from prosecuting minor offenses. The principle of mandatory prosecution also had an ideological function: as a reflection of 'socialist legality' it symbolized the superiority of 'socialist' law and owing to the relatively low crime rates and the smooth handling of the cases by the official agencies it was simply not necessary to unburden the system.

The rejection of formalism derives not only from an endeavor to 'bring justice closer to the people' and from a general reservation towards lawyers as 'the servants of the former ruling class' but also from the key notion of communist (and perhaps any totalitarian) criminal procedure, namely that the duty of the courts is to discover 'material truth'. This was the principal task of the criminal process and it meant that the courts and the other authorities were obliged to establish facts consistent with objective reality. Of course the concept of material truth is not alien to many Western European criminal procedural laws either. What is specific about the 'socialist' codes, however, is that in them the thesis of material truth enjoys absolute priority almost completely ruling out all other principles and values of the criminal process. The search for material truth oppresses the requirement of procedural fairness and leads to a disregard for the separation of the functions and of the parties' dispositions even in the appellate procedure. Dropping the charge by the prosecutor does not necessarily lead to the termination of the trial and the second instance court, irrespective of the points made by the parties, will review both the first instance judgment in whole and the correctness of the complete first instance procedure. The search for material truth combined with the free use and evaluation of evidence is incompatible with procedural fairness, therefore any type of exclusionary rule is intolerable.

The absolute priority of the duty to reveal material truth in the criminal process results in an underestimation of the principle of legal security. Thus, final court judgments can easily be annulled and altered through particular extraordinary remedies, the preconditions of which are vaguely defined and which are at the disposal not of the parties but exclusively of persons holding top positions in the administration of justice, such as the General Prosecutor, the Minister of Justice or the Head of the highest judicial body.

3. SOURCES OF THE REFORM

It could reasonably be assumed that in reconstructing their criminal procedural codes the countries of Central and Eastern Europe would rely on patterns which constitute a kind of negation to the formerly acknowledged principles. As we shall see, this assumption is more or less valid. However, before analyzing the changes effected in legislation and the practice of the crime control agencies as well as the judiciary, the question where the countries of the region derive models for the renewal of their administration of justice shall be addressed.

3.1. The individual countries' own traditions

For the majority of the countries in the region it is certainly not hopeless to find their way back to the European standards since their criminal justice system before the takeover of the Soviet regime was shaped in line with Western European solutions. In these countries the rules of the agencies in the criminal justice system, starting from the modern prosecutor's agency through the judiciary, separated from the executive to the independent advocacy together with the mixed system of criminal procedure, came about somewhat later than in the Western part of the Continent but basically on the same lines. Therefore it is quite understandable that when reforming their system of the administration of justice, many of these countries turn back to pre Second World War models. This trend is the most obvious in reforms related to the structure of the administration of justice, particularly to the court system. A number of countries returned to their former four level judicial system and the role of the Supreme Court as a kind of Cassation Court also came to be shaped according to the pre-war pattern. Via the Minister of Justice several countries, such as Poland, Lithuania, Romania or the Czech Republic subordinated the prosecution agency to the Government which can also be regarded as a return to their former system. In some countries the Latin model of prosecutors and judges forming together the 'magistrature' came to be reintroduced.

One should, however, bear in mind that to a certain extent the period of Communism is also to be considered as part of the tradition. There are countries in which continuity with the pre-war legal system was upheld to a certain degree during the communist regime, too: some of the institutions were kept alive or after the Stalinist era they were reintroduced step by step. This was the case with some institutions (e.g. the investigating judge) in former Yugoslavia, which makes it understandable why the system of the administration of justice has not been completely altered in the new democracies of the region. The fact that some countries managed to maintain pre-war institutions while others were unable or unwilling to resist 'sovietization' may provide an explanation for the differences in the speed and the degree of radicalism in the new legislations after the political changes. It is perhaps not by chance that in contrast to Russia, where the re-introduction of the jury system and the jury trial represents a radical break with the former criminal procedure, or to Albania, where the new code elaborated on the basis of the 1988 Italian Code radically deviates from the previous legislation, the drafting work for a comprehensive review of the criminal procedural

code could neither in Poland nor in Hungary so far be accomplished; only partial alterations have been effected despite the fact that the areas concerned are extremely sensitive and significant.

The thesis that the communist regime and its legislation form part of the tradition is furthermore reflected in the fact that previous powerful pressure groups have not disappeared. Former powerful actors of the criminal justice system, primarily the police managed to retain their positions, particularly because of the increase in crime. The actual increase in the number of criminal offenses, the change in the structure of criminality and its presentation through the media seem to justify their privileged position. Russian experts note that the new approach breaking with the past purely repressive concept of criminal justice naturally affects the interests of some traditionally influential institutions such as the Ministry of Interior or the secret police services. That is why legislation widening the competence of the judiciary is 'counterbalanced' by legislation on other areas such as public order legislation, legislation on the militia or the acts on operational activities for the detection of crime, or on the security organs. The strong position of the agencies which come under the Ministry of Interior may explain the reluctance of the legislators in some jurisdictions to change radically the structure of pre-trial investigation and to re-distribute the competencies between the militia, the prosecutor and the judge.

3.2. International standards

'Socialist' administration of justice was characterized by a certain disregard for international obligations. Although several 'socialist' countries acceded to international agreements governing, among others, the status of individuals affected by the criminal process, they failed to recognize the competence of international bodies to deal with domestic affairs and due to the national provisions on the relation of international and domestic law, international human rights norms could almost never be invoked before national authorities.

Under these conditions it is hardly surprising that the change in the political domain was accompanied in the countries of Central and Eastern Europe by the re-assesment of the relation between international and domestic law. Several new Constitutions or the amendments to the old ones explicitly pronounced the supremacy of international human rights instruments over national regulations and in order to guarantee the compatibility of domestic law with international agreements, provisions identical with those figuring in international human rights instruments were included in the new Constitutions (or the amendments made to the old ones) and the laws related to the operation of criminal justice were modified accordingly.

However, ignorance of the nature and the exact contents of the different international conventions and particularly failure to distinguish between 'hard' and 'soft' instruments resulted in a distorted ranking of the obligations deriving from international commitments. A good example is provided by the Hungarian law on corrections of the year 1993 which brought Hungarian legislation in line with several 'soft' instruments in the relevant area but which paid little attention to what is required by the European Convention of Human Rights and Fundamental Freedoms. In general,

accession to the Convention was in only a few countries preceded by a deep analysis of the Convention organs' case law and by the accomplishment of the legislative tasks guaranteeing compatibility with the case law. Thus there is a relatively high risk of being found in violation of the Convention whereas in other domains, where international control is much less strict, the countries of the region set for themselves standards which even Western European democracies have not yet envisaged.

Mention should also be made of the potential tensions resulting from the two 'sources' of the reform, the nostalgia for pre-war or pre-revolutionary institutions on the one hand and the efforts to comply with international standards on the other hand. Return to simplified adjudication by justices of the peace performing prosecutional and judicial functions in Russia, e.g. involves the risk of running counter to standards of fair trial set by the European Convention of Human Rights.

3.3. Foreign patterns

The search for tradition goes along with the rediscovery of pre-war relations with the legal systems of other countries. When reconstructing their criminal justice system several countries turn to solutions adopted by countries with which, before the communist takeover, they had close contact and the legal system of which exerted strong influence on their own law in the past. This is most evident in the case of Albania which opted to take the 1988 Italian Code as the pattern (example) for reform, a decision which could hardly be understood without being aware of the traditional links between the legal systems of the two countries. Similarly, in the course of discussions on the reforms in Romania reference is frequently made to the traditions of the French legal system.

4. DIRECTION OF THE REFORM

4.1. Legal security/Strict legality/Formalism

One of the basic features of the new legislation or of the drafts of the former Communist countries is the **turning away from the previous basic philosophical assumptions of the criminal process**. Since the 'socialist' doctrine of criminal procedure was characterized by a rejection of formalism and the objective to be achieved in the criminal process was 'material truth', it is hardly surprising that as a negation much emphasis is laid on the formality of the procedure at present. This is why models coming close to the Anglo-American type are preferred in some of the countries as opposed to the traditional Continental mixed model. The most striking example is certainly the Russian Concept on judicial reform adopted by Parliament in late 1991 and followed by the publication of the Concept for the legislation of criminal procedural law which clearly declares that the Commission sets out from the superiority of procedural law in its relation to substantive law.

The trend to emphasize the significance of formalizing the criminal process is also reflected in the new rules on the so-called extraordinary remedies which may be

submitted to the highest court of the country against finally binding judgments of the courts. At the same time, formalization of the preconditions of these types of remedies aims at the exclusion of any degree of discretion.

In Poland, for instance, the law on the Supreme Court with effect from 1 January 1996 does not provide any more in criminal cases for the so-called 'extraordinary revision' that could be initiated by certain high officials (First President of the Supreme Court, the General Prosecutor or the Ombudsman). Instead, the Supreme Court has cassation jurisdiction. Similar changes took place in Hungary, where the so-called 'protest for the sake of legality', a peculiar type of remedy initiated by the General Prosecutor and the President of the Supreme Court was replaced by an extraordinary remedy called 'review procedure'. Whereas in the former system the introduction of the relevant extraordinary remedy was dependent upon the discretion of the highest judicial officials, the present regulation authorizes the parties to submit the motion for 'review'.

The change in the role of the highest court and in the provisions on remedies against finally binding judgments reflects a general policy in these countries which aims at the reduction of official discretion and the prevention of potential abuse in discretionary decisions. This approach is obviously motivated by a distrust of the authorities and by a wish to have all details regulated in advance by the legislator. As to the basic procedural philosophy the new approach indicates a shift from substantive justice to procedural justice and a break with the commonly accepted Soviet philosophy of material truth to be disclosed in the criminal process. Thus legal security derived from the concept of *Rechtsstaat* is giving preference to materially correct decisions.

Of course, the emphasis on formalism makes the system more rigid and institutions allowing certain flexibility in the administration of justice do not easily find their way into the legal system of the former 'socialist' countries. This is why serious reservations have been articulated with regard to institutions introduced into Western European criminal justice systems with an aim to ease the courts' workload and to prevent the stigmatization of the accused by trial, for example, the broadening of the expediency principle in general, or the prosecutor's power to refrain from bringing the case to trial, or – combined with the defendant's authorization – to prescribe certain rules of conduct for him as well as certain forms of concensual procedures, or settlement outside the court via mediation. These institutions are perceived as such which involve the risk of misuse, run counter to the classical principle of the division of functions and of the monopoly of courts to impose any type of sanction.

In spite of these reservations in some countries, (Slovenia, Croatia, Hungary) a tendency of extending the scope of the expediency principle and authorizing the prosecutor to settle the case may be perceived. The authorization of the prosecutor to refrain from bringing a case to trial, either unconditionally or combined with certain obligations on the defendant, can also be perceived outside cases involving juveniles.

4.2. Judicial activism of the highest courts empowered to care for the constitutionality

An opposing trend, however, can also be perceived. Whereas in the course of the legislation it is attempted to regulate all details in advance and to limit official discretion thereby setting limits to the activism of the proceeding agencies, the highest courts in the region empowered with the task of protecting individuals against the state seem to pursue a rather activist approach. The Constitutional Court of Hungary for instance claims for itself the right not only to interpret the wording of the Constitution but also to disclose the so-called unseeable Constitution. The Supreme Administrative Court in Poland interprets 'its jurisdiction extensively, sometimes even in breach of the letter of the applicable law, although undoubtedly in keeping with its spirit.' The clearly activist approach is certainly due to the fact that the Constitutions of these countries – although meanwhile radically amended – date back to the Soviet times and that the transformation of the legal system as a whole can be accomplished only gradually. That is why outdated norms have to be interpreted autonomously, frequently making reference to international treaties.

4.3. The two faces of the changes

Whereas comprehensive projects for a new criminal process are governed by the idea of respect for human rights and *Rechtsstaatlichkeit* which by necessity concludes in a more complex, complicated and expensive process, as a result of the daily pressure, the administration of justice is faced with and due to previously unexperienced delays, increase in crime and emergence of new forms of criminality legislators are forced to introduce short term measures running in the opposite direction. While, for example, the Commission entrusted with the elaboration of the concept of a new criminal procedure in Russia outlined a relatively complicated due process model, President Jeltsin in his decree of 14 June 1994, introduced tough measures intended to increase the efficiency of the criminal justice system in order to combat banditism and organized crime. Similarly, in Hungary the guidelines for a new code of criminal procedure adopted in 1994, points in the direction of a model which is based on the primacy of the trial phase and in which the adversary elements and the autonomy of the parties become more pronounced. However, the recent amendment of the code adopted in 1995, had the sole aim of accelerating procedures and easing the workload of the courts by, among others, extending the scope of application of the so-called penal order. In Slovakia after its abolition the penal order had to be re-introduced after pressure from the judiciary.

4.4. Towards the accusatorial or the neoinquisitorial type of procedure?

In almost all countries the political change was accompanied by the immediate alteration of the status of the attorneys. Laws enabling the traditional operation of the profession were adopted in consequence of which a great number of jurists have left

their posts, among others, at courts and prosecutor's offices, to pursue a career as a lawyer. At the same time legislation amending the criminal procedural code was adopted and one of the first measures taken in order to remedy the most obvious deficiencies of the administration of justice in criminal cases was the strengthening of the defense counsel's position in the pre-trial stage. In 1992, the defense counsel in Russia acquired the right to participate in the procedure from the moment of the suspect's detention. The modification of the law of criminal procedure in Tchechoslovakia in 1989 expressly granted the right to the suspect to have a defense lawyer at his/her disposal, right after the commencement of the investigation. The modification of the relevant Hungarian law in 1989 guaranteed the right to the defense lawyer to be present at the interrogation of all the witnesses in the pre-trial stage and removed restrictions on free communication between the suspect and his/her defense lawyer.

Thus the modifications adopted immediately after the political changes remedied the most obvious deficiencies in the investigation stage which, according to the results of empirical studies and the everyday experience of practising lawyers, is definitely the decisive phase of Continental criminal procedure. Consequently, neither the transformation of the trial system and particularly of the role of the presiding judge nor the reduction of the significance of the information collected during the pre-trial stage were conceived as a pressing need and the legislation adopted in the majority of the countries immediately after the political change actually fails to touch upon either the structural relation between the pre-trial phase or the role of the judge.

Had legislators continued to restructure their criminal procedural laws on the same line by further extending the scope of licenses provided for the defense in the investigating phase by leaving the present structure of the trial unchanged – as advocated by some authors from the early 1990s – they might as well have arrived at the 'neo-inquisitorial model'. The proposals articulated in several countries in favour of the reintroduction of the institution of the investigating judge actually show in that direction.

Later legislation or draft laws, however, indicate the criminal policy makers' awareness of the need to change the role of the judge during trial in order to ensure impartial adjudication. This endeavour is evident in the re-introduction of the jury trial in Russia, and in the concept of the comprehensive reform of the Russian procedural law (even if some members of the commission indicated their disagreement with the radical views of their chairman to deviate completely from the Continental mixed procedure). But countries maintaining the system of adjudication by professional judges or mixed panels also envisage a change in the judge's role during the trial. Both the Slovenian criminal process and the Hungarian draft are opting for the adversary elements in the trial stage. Accordingly, it is the parties who have the primary duty to present evidence in the court and the former judicial interrogation is to be replaced by an examination by the parties. However, the judge's power to order further proof-taking and address additional questions should be retained so as to indicate that the primary aim of the reforms is to enhance public trust in the 'impartiality of the courts'. The question whether the system may shift towards a genuine adversary model leaving the collection of evidence completely to the parties and enabling the defense to carry out autonomous investigation, is still open.

Of course, the shift towards a genuine adversary type of procedure presupposes

the professional skills of the parties and particularly the high-quality performance of the attorneys' functions. Including this aspect in the analysis makes the chances for a well functioning adversary process relatively low. The 'liberalization' of the profession has not gone together with an increase in legal and moral standards. Particularly disturbing are the shortcomings related to the activity of legal aid counsels. The experience gained by the group of experts invited by the Parliamentary Assembly to examine the conformity of the legal order in Russia with the fundamental principles of the Council of Europe and published in the Human Rights Law Journal is certainly not to be limited solely to the country examined. According to the report 'a serious problem seems to exist with regard to legal aid counsel. They are paid nominal fees only and usually render unsatisfactory services, unless the defendant manages to raise funds in order to supplement remuneration. Complaints to this effect were brought forward by inmates as well as by lawyers and judges.' Similar anomalies have been perceived in Hungary: even though participation of the defense attorney is mandatory from the commencement of the investigation many juvenile defendants are never contacted until the trial phase. Quite frequently attorneys appearing at the trial show complete ignorance as regards the contents of the charge and it is not unusual to see judges in the corridors of the courthouse searching for an attorney who might 'jump in'.

Under these conditions which are partly due to the relatively low standards of professional ethics and skills, it is hardly surprising that decision-makers concerned about potential deterioration of the defendants' position are generally reluctant to go further in the direction of the adversary process which would imply the active role of the parties, the easing to some extent of the prosecutor's obligation to perform his/her duty in an objective manner and would relieve the court from the obligation of taking steps in order to discover the facts of the case. The abolition of these guarantees inherited clearly from the inquisitorial type of procedure would inevitably weaken the defendant's position unless fundamental changes can be effected as regards the defense lawyers' performance.

5. JUDICIAL INDEPENDENCE AND THE JUDGES' NEW IDENTITY

While legislative projects envisaging a new system of trial by relieving the judge from his/her inquisitorial functions have as their objective the stricter observance of the defendant's right to an impartial court, the precondition of impartiality, i.e. the independence of the judiciary, is guaranteed by the new laws governing the status of judges or by the new provisions in the Consitutions.

Taking the risk of overgeneralization I will attempt to identify the trends and to sum up the measures which enable the courts to comply with the requirements of independence.

Under the Communist regime, the Minister of Justice as the representative of the executive had the opportunity to influence the functioning of the court indirectly, through his/her extensive competences in the appointment mechanism and through the control over the operation of the court system.

By now the situation has changed and even in countries where the Minister of Justice has retained certain competences, these are limited primarily to technical issues. However, many countries (Bulgaria, Croatia, Romania) opted for the establishment of new superior judicial bodies which took over the role of managing the court system from the Ministry while in other countries it was the Superior Court of the country which came to assume this task.

Even before the political changes, to become a judge, at least in many countries of the region, meant to be reliable politically, wages were relatively low. Together with the reforms special emphasis has been put on re-establishing the judges' public esteem. Accordingly, the salary of the judges is regulated in most of the countries by a separate law and efforts are made to keep the salaries relatively high. Another condition to bring about a climate of trust is the creation of a transparent and efficient court system. The former three level court system which merged the two different grounds for legal remedy – the one based on law and the other based on fact – has been altered in many countries, as indicated above, and in other countries reforms are also under way to establish a four level court system in order to guarantee a differentiated remedy system.

The principle of the independence of the judiciary is embodied in the Constitutions of the new democracies. Alongside the classical guaranties of independence – judges are irremovable and subject only to the law – special safeguards have been introduced in the nomination procedure. In the majority of the countries judges are appointed by the President of the state, while the competence to nominate is exercised either by the newly established judicial bodies alone or is shared between the Minister of Justice and the autonomous bodies of the judges organized at the different levels of the court system.

Without taking a stand on the superiority of any of these models I wish to point to the criticism voiced by legal experts of those countries which opted for the system of shared competence. According to these critics, the system in which the competence is shared by the Minister of Justice and the judicial bodies may result in a certain degree of confusion and practically may lead to the Minister of Justice's exercising broader powers than envisaged by the legislation.

The procedural arrangements relieving the judge from part of his inquisitorial functions and the organizational safeguards of judicial independence are likely to shape the judges' new identity: the judge may see himself as an autonomous arbitrator in the criminal process deciding on the basis of the law and his own conscience instead of regarding himself as a piece in the chain of the crime control mechanism having the mere task of legitimizing the decisions already passed by the prosecuting authorities. This new identity is reflected in the growing rate of acquittals (even if the increase is relatively modest) and to some extent in the use of milder sentences. I wish, however, to express my doubts as to the continuance of this trend. Owing to the sudden increase in criminality, the appearance of previously unknown forms of crime and the brutality of organized criminality, courts are put under constant pressure to pass more severe sentences. Legislators, too, seem to be determined to introduce tough measures against certain types of criminality as indicated earlier and the laws adopted in Western Europe in the 1990s to fight organized crime are used as arguments against opponents who worry about the loosening of the rule of law standards. One can merely hope that under the particular conditions, in the emerging and somewhat feeble democra-

cies, in which the public is more ready to adopt punitive attitudes than in democracies with a more balanced criminal policy, institutions aimed at fighting organized crime will not frustrate the general trend of constructing an administration of justice which pays due regard to rule of law standards and to the respect of human rights.

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