

THE TRANSFORMATION OF THE INSTITUTIONAL SYSTEM OF APPOINTED DEFENCE COUNSELS AND THE RIGHT TO AN EFFECTIVE DEFENCE

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Abstract: The on-going drafting of bill on criminal procedure contains significant improvements in certain scopes; however in some cases, the bill preserves the existing regulation. The object of my examination is the transform of defense. The previous regulation was concerned many critics. An ombudsman's report, dating from 2012, criticized the foundations of the institution of public defender. The on-going drafting of bill responds to the report, almost point by point, and correct the past mistakes. Presumably the bill coming into force, not only pages, but also in practice, creates the effective protection. It was the fundamental objective of the draft.

Keywords: appointed defence counsels, bill, criminal procedure, effective defence

1. Introduction

1st of January, 2018 it is not only the beginning of a new year but also marks a new era in the history of Hungarian law of criminal procedure. According to the preliminary report of the codification committee and the Government, the new code of criminal procedure will come into effect on 01 January, 2018. Although the entry into force goes through more phases, this new period also promises substantial changes in the procedural law.

The whole criminal proceedings were revised by the Codification Committee (hereinafter referred to as Committee), thus the determining authority will conduct the criminal procedure along a totally new conception. The institution of defence counsels has also been affected by the changes. In my opinion, it could not have happened otherwise since basic and conceptual changes also bring along the reform of certain associated legal institutions; on the other hand, it is timely to transform the legal institution of defence counsels, especially the role of the appointed defence counsels. From here on, I will solely review the change of the defence counsel's institution but of course the discussion of other provisions is also inevitable due to the topic's complexity.

2. Antecedents

The wind of change has been present as the institution of appointed defence counsels was criticized both by defence counsels and by those accused. So the change was reasonable. Critics were not only tangible "within house", the Hungarian Bar Association but the Commissioner for Fundamental Rights also dealt with many complaints. The torrent of complaints has resulted in the report number AJB-

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3107/2012. In the centre of the comprehensive investigation of the ombudsman was the effectiveness of law of the lawyers and the clients they are advising, the practice of bar associations and the constitutional monitoring of the related regulation.¹ To this end, the Commissioner for Fundamental Rights has reviewed the provisions of the Basic Act, the practice of the Constitutional Court, the law of criminal procedures, the provisions of law on lawyers as well as the legal background on the authorities related to the legal profession's field of activity.²

2.1. Hungarian basics

If we want to take a stand on the Draft's provisions concerning defence counsels, we have to shortly review the basics for the right to defence and the legal system as well as the effective regulation. Through these as well as from the awkwardness revealed in the ombudsman's report we will be able to see the direction the Draft should follow in order to make substantial and effective changes in the institution of defence counsels.

From our part, we also intend to review the statutory provisions with regards to the right to counsel, and the operational legislation. However, we - and the discrepancies revealed in the ombudsman report - only wish to do this to an extent necessary to reflect the shortcomings of the current system and to evaluate the proposed provisions, while showing the way ahead. Thus, representing the direction the system must follow in order to facilitate a substantive, efficient change in the institution of the court-appointed lawyer. Please note, that the proposal adopts almost all solutions recommended for the elimination of the discrepancies revealed in the ombudsman report.

The right to counsel is enshrined in the Fundamental Law of Hungary: "Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings."³ The best way to explain this constitutional principle is through the jurisprudence of the Constitutional Court. The Constitutional Court has advocated for the effective assistance of legal counsel ever since an early decision they adopted.⁴ In the Constitutional Court Decision No. 6/1998 (III. 11.), they laid down that "actual and efficient operation of the right to counsel is an essential prerequisite of a constitutional system of criminal proceedings." The practice of the Constitutional Court clearly shows, that they have never settled for the mere formal provision of the right to counsel; they also required its effective operation and extended this right for the preparation of the defendant and the attorney to exercise their rights. Of course, this matter is regulated in its entirety by the Criminal Proceedings Act; in addition to

¹ Alapvető Jogok Biztosának jelentése az AJB-3107/2012-es számú ügyben [The report of the Commissioner for Fundamental Rights in the issue number AJB-3107/2012].

² Hungarian Basic Law: Act CXI of 2011 on the Commissioner for Fundamental Rights (Ajb.); Act CLXXXVIII of 2011 on Hungary's 2012 Central Budget; Act XIX of 1998 on the Criminal Procedure (Be.); Act XI of 1998 on Lawyers; Act CLXIII of 2011 on the Public Prosecutor; Act XXXIV of 1994 on the Police; IM Decree No. 7/2002 (III.30.) on the remuneration and costs that can be established to the supporter lawyer and the appointed defense counsel.

³ Fundamental Law, Liberty and Responsibility, Article XXVIII.

⁴ Constitutional Court Decision No.: 25/1991. (V. 18.).

the definition of persons that may act as a counsel, it provides for the cases where counsel is mandatory, including the appointment process. Therefore, the Court, the Prosecutor, or the Investigating Authority shall appoint an attorney, if (i) the defendant unable to pay for a private attorney requests it; or (ii) legal counsel is mandatory; or (iii) in the interests of the defendant they deem it necessary, and the defendant did not authorize anyone for his defense.

In general, the Attorney Act provides guidance for attorneys' activities. At the same time, we shall note the prominence of the provision mandating attorneys to exercise their profession with due diligence, with conscience and in compliance with the law, as well as to demonstrate a behavior that is expected from a professional lawyer at all times.

Paragraph (2) of section 3 of the Act XI of 1998 on Attorneys at Law, and the Hungarian Bar Association's ethical code no.: 8/1999 (II.22) specifies the following: The attorney shall use all lawful means to defend the interests of his/her client. While handling the case he/she is entrusted with, the attorney shall primarily consider the facts his/her client represented.⁵ Where the defendant is restricted in his/her individual liberties, counsel shall coordinate with the defendant as necessary.⁶ Counsel shall inform his/her client of the state of affairs, the expected procedural actions, including his/her lawfully available possibilities and obligations.⁷

2.2. The international basics

Hungary ratified one the most important documents of the European Community on 5 November 1992 and enacted it on 7 April 1993, by the Act XXXI of 1993. The Convention for the Protection of Human Rights and Fundamental Freedoms is effective as of 3 September 1993. If the Convention - or any of its several supplementary minutes that have been added to date - is violated, anyone may address the Strasbourg European Court of Human Rights for a remedy. Articles 3, 5, 6, 10 and 13 of the Convention govern criminal proceedings and the legal status of counsels. Let me present a few isolated decisions reflecting on the fact that a mere formal provision of legal counsel won't scale up. Defendants are entitled to an effective assistance of counsel. In several cases, the requirements laid down by the Court are also part of our Proposal.

For example, the case of *Artico vs. Italy*,⁸ where, in the judgment adopted on 13 May 1980, the Court has unanimously established violation of paragraph (3) of Article 6 of the ECHR governing the right to counsel. The applicant was not provided with an effective assistance of legal counsel before the Court of Cassation. The Italian Government's defense, including their opinion that by the mere appointment of a legal counsel they had complied with the ECHR provisions, was rejected by the Court. The Court pointed out that the ECHR provides for an effective assistance of counsel; this cannot be fulfilled once and for all just by the appointment of an attorney. This attorney may die, contract a severe illness, may encounter circumstances that hinder

⁵ Ethics Code 3/3.

⁶ Ethics Code 8/4.

⁷ Ethics Code 8/6.

⁸ *Artico v Italy*, App No 6694/74, A/37, [1980] ECHR 4, (1981)

such activity for a long time, or may just not fulfill his/her obligations in any other way. If notified about such circumstances, authorities shall appoint a replacement attorney, or compel the originally appointed attorney to perform its obligations. In this case, Artico was not provided with an effective legal counsel before the Court of Cassation. The Court has also emphasized, that all errors and/or omissions of the Court-appointed attorney may not be blamed on the State. In this case, the ECHR would have expected the Italian administration to appoint a replacement lawyer or to compel the originally appointed attorney to perform his obligation.

Also, in its unanimous decision adopted on 9 April 1984, the Court has found the lack of an effective assistance of counsel in the case of *Goddi vs. Italy*.⁹ The legal counsel of the detained and absent defendant was not notified of the trial before the Appellant Court of Bologna, thus he could not be present, either. In addition to the absence of the originally appointed attorney, the lack of preparation time provided for the replacement attorney (appointed just a short time before the trial) also contributed to the lack of an effective assistance of legal counsel. The new attorney was not provided with the necessary time and opportunity to study the documents of the case, to prepare a defense, or to contact the defendant.

As I have suggested before, the principles of fair trial, including the adversarial system, become fully operative in a court proceeding. This is where it shall be applied. However, in its judgment in the case of *Daud vs. Portugal*¹⁰ dated on 21 April 1998, the Court pointed out, that the requirement of an effective assistance of counsel (including the presence, information regarding the case, exercising of entitlements that make the case progress, right to petition, etc.) exists not only during the trial, but also in the pre-trial (investigation) phase. The Court found that Article 6 (1), providing the right for a fair trial, was violated in the context of point 3/c by not providing the defendant with an effective assistance of counsel in the investigation- and trial phase of the criminal proceeding against him. The Court has emphasized that the ECHR doesn't aim for the provision of theoretical or illusional rights. It aims for practical and effective rights, and the mere appointment of a counsel does not ensure the effectiveness of the legal assistance provided for the defendant. The State may not be held accountable for every omission a court-appointed lawyer commits. Because the lawyer's profession shall be exercised independently from the Government, the actions of the counsel shall only regard the business between the defendant and the counsel, regardless of whether the counsel was appointed by the court or paid by the defendant. Pursuant of point 3/c of Article 6 of the ECHR, the national authorities shall only intervene, if they become aware or are made aware of the errors committed by the legal counsel appointed to provide effective legal assistance. In this case, the court findings were based on the fact, that considering the court-appointed lawyer's (un)preparedness and the behavior demonstrated with regards to the case, he was unfit to deliver the effect required by point 3 of Article 6. The Court noted, that the attorney originally appointed by the Court had not performed any kind of action in the interests of the applicant prior to announcing his illness. Therefore, the applicant attempted (and failed) to act in his own defense. As of the second court-appointed counsel, who was notified of his

⁹ *Goddi v. Italy*, App No 8966/80 [1984] ECHR 4 (9 April 1984).

¹⁰ *Daud v. Portugal* App No 22600/93.

appointment just three days prior to the criminal court's trial, the Court opined that he did not have the necessary time to study the case, to visit the defendant in prison or to prepare the defense. The time between the notification of the appointment of a new attorney and the trial was too short for such a serious and complex case, where investigations were not conducted and the expected penalty was also substantial. The Supreme Court did not remedy the injury. Instead, it rejected the application due to a non-substantiated justification. The Court also explained, that the authority in question - while respecting the principle of independence of the bar association - should have provided opportunity for the applicant to avail the benefits derived from his rights also admitted by said authority. Therefore, the investigating authority, and especially the court(s) conducting the proceedings should have investigated and found the lack of effective legal assistance and the Court-appointed attorney's unfitness for the task. They should've provided a replacement attorney and postponed the trial ex officio.

3. Existing problems

There are two basic problems in relation to the appointment of lawyers. One arises on the side of the accused, while the other concerns the working conditions of the determining defence counsel. Though the abovementioned, incomplete regulation seems to be detailed, the quintessence of problems arising on the side of the accused was supplied by the lack of regulation and the insufficient details. The emerging problems can be categorized as follows:

3.1. The presence of defence counsel and notification

As it was already discussed by the Constitutional Court, it is the constitutional right of the accused to prepare for his/her defence in time in an appropriate manner and to have the possibility to deliver his/her opinions on the matter of facts and laws to the same extent as the prosecution. It is obvious that the accused is in great need of the defence counsel's legal expertise in attitudes of legal questions. It is a known fact for lawyers participating in criminal procedures that statements of the accused made during the investigation phase of the procedure are critically important until the end of the proceedings, that is, they will also have a considerable impact on the content of the future verdict.¹¹ As during the investigation phase the procedural actions related to the accused can be carried out by the authority without the presence of the defence counsel, it is particularly important to ensure the defence counsel's presence in this phase of the procedure in order for the basic law's appropriate effectiveness. It is obviously the interest of the accused concerned to consult an expert before his/her substantial confession influencing the verdict, that is, to prepare with a defence counsel. According to the 2003 research of the Hungarian Helsinki Committee, only 24% of the appointed defence counsels gets into touch with their client up to the first

¹¹ HERKE, CSONGOR – FENYVESI, CSABA – TREMMEL, FLÓRIÁN: A büntető eljárásjog elmélete [The theory of criminal procedure], 2012, Dialóg Campus Kiadó, Budapest-Pécs, 104.

interrogation.¹² This fact is not only the result of the carelessness of lawyers but of the deadlines, the notification method of the authority, and primarily the current regulation of the appointment.

3.2. *Remuneration*

Despite the increased fees, the remuneration of the appointed defence counsels falls behind the remuneration of other people involved in the criminal procedure (e.g. expert, interpreter). Not primarily in view of the hourly fee but concerning other incidental expenses such as the settlement of travel expenses, the investigation of documents and the relationship with the detainee. However, these activities represent a big part of the defence counsel's work. Obviously, the non-payment of these 'incidental expenses' does not motivate the appointed defence counsel to conduct the defence at his/her own expense. This clearly gives rise to dissatisfaction on the side of the accused. Particularly striking was the case in the absence of foreign prisoners accused who does not speak the official language of the Hungarian prosecution. The guard and interpreter fees required to contact the accused in detention is no guarantee of the state.¹³

3.3. *The process of appointment*

One of the most crucial elements of the basic law is the appointment system of defence counsels. The disadvantage of the current system is clearly the fact that the defence counsel is selected for the accused by authorities interested in the success of prosecution – outside the court – during the appointment. This solution leads to the creation of such a dependency link between the investigating authority and the defence counsel which could prevent the effectiveness of the accused party's basic right to defence. This uncertainty is strengthened further by the fact that one part of defence counsels is under the necessity of earning a livelihood, thus it may be possible that the defence counsel will not confront with the authorities aiding his/her living with appointments even if necessary. The current system is unclear; it is the subjective decision of the appointing authority whom they appoint.

4. The solutions

In my opinion, the offering solutions, which have already been adopted by the drafts up to now all serve the improvement of the institution of appointed defence counsels. By eliminating the aforesaid problems, effective defence committed by the draft can be implemented. The specimen for an effective defence counsel may be one who is independent of the appointing authority, unbiased, prepares for his/her job in time and is paid appropriately. In my view, the Draft does everything in its power to achieve it.

¹² "Steps towards a transparent system of appointed defense counsels – research report" (HHC, 2012).

¹³ FENYVESI, CSABA: *A védőügyvéd, A védő büntetőeljárás szerepéről és jogállásáról* [The defense attorney, the defence prosecution role and status], 2002, Dialóg Campus Kiadó, Budapest-Pécs, 162-163.

“The accused has the right to an effective defence in all phases of the criminal procedure.” But the Draft not only discusses the right to an effective defence in principle but it creates its detailed rules.

The court, the public prosecutor and the investigating authority shall ensure appropriate time and actual possibility for the defence to prepare.

The authority is obliged to appoint a defence counsel even in case of emergency measures involving deprivation and limitation of liberty.

The appointment shall be determined by the court, the public prosecution and the investigating authority so that they have to appoint a defence counsel to the accused offered by a system operated by the Hungarian Bar Association ensuring automatic and random appointment.

A defence counsel shall immediately be appointed when the accused is arrested. Otherwise, the defence counsel shall be notified/summoned at the same time when summoning is sent to the accused. The first interrogation of the arrested shall be postponed by 2 hours if the defence counsel has not appeared at the interrogation.

The draft regularizes the connection of defence counsels alternating each other in time. As opposed to the previous regulation, the situation of defence lawyers are hopefully made easier with mutual cooperation as well as the delivery of documents and evidences.

5. Conclusion

The basic aim of finding out the truth in criminal proceedings, on the question of criminal liability for making a decision founded on fundamental rights and procedural guarantees to enforce. It is clear that the effectiveness of a particular criminal proceedings will also be measured, that the above aim at what cost, at what time horizon, and what results can be achieved. The new Criminal Procedure Code made the simplicity, speed and efficiency are important values that have significance attributed to it in determining the detailed rules for each. However, a rule of law in criminal proceedings can not be an end to any price to the question of criminal responsibility for all the decisions and legal institutions subordinated to the basic conceptual level value. It will therefore be sought in the new Criminal Procedure Act that the above principles do not overpower the basic procedural guarantees enforcement of the new procedural points should not result in violation of the basic constitutional principles. During the adoption of the final text, however, the legislature not only marked the premise, but also our country's procedural traditions and international obligations will have to be taken into account.

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