

Independent appointment, Independent Counsel: Pilot Project for the Reform of the Hungarian Criminal Legal Aid System

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1. Outline of the criminal legal aid system

The Hungarian criminal legal aid system is primarily based on the principle of “the interests of justice”, while indigence only plays a secondary role. Under Act XIX of 1998 on the Criminal Procedure (“CCP”), the authority entitled to appoint a defence counsel (i.e. the investigating authority or the prosecutor in the investigation phase) will appoint a defence counsel if defence is mandatory but the defendant has not retained a lawyer.¹ The basic principle of the Hungarian system is that in the interest of justice, a defence counsel should participate in the procedure in all cases where the defendant is “vulnerable” for some reason, i.e. either due to his/her situation (e.g. detention) or a personal characteristic (e.g. minor age, lack of language) he/she is restricted in his abilities to defend himself/herself. Therefore, in general, it is irrelevant whether the defendant has no defence counsel because he/she is indigent or because he/she does not wish to retain a defence counsel for any other reason.

There is however a certain overlap, since in most cases the reason why a defendant does not retain a lawyer is because he/she cannot afford professional legal assistance, but if he/she belongs to one of the categories of mandatory defence, he/she does not have to go through an eligibility procedure – a lawyer will be appointed anyway.

The only instance when the indigence of the defendant is taken into consideration is if he/she is eligible for personal cost exemption and requests a defence counsel to be appointed. In this case, the state will cover the appointed defence counsel’s fees and substantiated costs, while in all other mandatory defence cases these costs are only advanced by the state and have to be repaid as part of the criminal costs, if the defendant is found guilty. Personal cost exemption may be granted to the defendant if (i) he/she lives together with other persons, and the per capita monthly income of the household does not exceed the legally required minimum sum of old age pension (approx. EUR 105); or (ii) he/she lives alone and his/her monthly income does not exceed the double of the minimum sum of old age pension (approx. EUR 210).²

Immediately after the suspicion has been communicated in the investigation stage, the defendant has to be informed of his/her right to choose or to request the appointment of a defence counsel. If the participation of the defence counsel is mandatory in the procedure, the defendant also has to be informed that unless he/she retains a defence counsel in three days, the prosecutor or the investigating authority will appoint a counsel. If the defendant declares that he/she does not wish to retain a defence counsel, the investigating authority will appoint a defence counsel immediately.³ If defence is mandatory because the defendant is detained, the defence counsel has to be appointed before the first interrogation at the latest.⁴

A significant factor in the Hungarian ex officio appointment system is that the mandatory nature of the defence counsel’s participation in the investigation phase does not require the presence of the

¹ CCP, Art. 48 Par. (1)

² Art. 2. of Joint Decree 9/2003 of the Ministers of Justice, Interior and Finances.

³ CCP Art. 179 Par. (3)

⁴ CCP, Art. 48 Par. (1)

defence counsel at individual procedural actions. While the CCP prescribes that the defence counsel should contact the defendant without delay and to use all lawful means and methods of defence at the appropriate times in the defendant's interests⁵ (which of course include participation of the defence counsel at all investigative actions open to him/her), if the defence counsel fails to fulfil these obligations, he/she will commit an ethical misdemeanor at most, but it will not prevent the investigative authority from interrogating the defendant or confronting him/her with any witnesses testifying against him/her. (The situation is different in the judicial phase: if defence is mandatory, no hearings may be held without the defence counsel's presence.)

2. Empirical studies on the functioning of the ex officio appointment system

A review of empirical studies on the subject shows that the Hungarian ex officio appointment system (and within this, the criminal legal aid system) suffers from severe deficiencies and that the same issues have continued to constitute the biggest problems since as early as the times of the Socialist regime.⁶

Criminal legal aid lawyers often fail to attend procedural actions during the investigation, at which stage attendance for counsels is not mandatory but which – due to the nature of the Hungarian criminal procedure and the professional culture of criminal justice organs – may be of crucial importance. Not only the rates of attendance, but also the quality of the work performed by appointed lawyers is often criticised by practitioners and defendants. As a result of these shortcomings, appointed lawyers are often not trusted by their clients, and the mistrust is deepened by the fact that appointed lawyers frequently fail to maintain or even establish contacts with their detained clients.

The dysfunctional nature of the system may be best illustrated by a survey carried out by the Crime Investigation Department of the National Police Headquarters. The survey involved the 23 regional investigation units of the National Police (the county headquarters, the Budapest headquarters, the

⁵ CCP, Art. 50 Par. (1)

⁶ See:

- Research conducted by the Metropolitan Chief Public Prosecutor's Office in 1988 on the basis of 130 one-defendant cases selected randomly [Mihály Tóth: Nyomozás és védelem (A fal lehet üveg is) (Investigation and defence – the wall may be made of glass) In: Magyar Jog (Hungarian law review), 1989/3, pp. 350-355.]
- Investigation carried out by the Ombudsperson in 1996 [A kirendelt védővel rendelkező fogvatartott személyek védelemhez való jogának érvényesülése a büntetőeljárás nyomozási szakaszában. (The realization of the right to defence of detained persons with appointed defence counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudspersons, 1996]
- Research carried out in 1996-1997 by the Hungarian Helsinki Committee among pre-trial detainees held in police jails [Punished before Sentence: Detention and Police Cells in Hungary. Constitutional and Legal Policy Institute – Hungarian Helsinki Committee, Budapest, 1998.]
- Empirical study carried out by Professor Csaba Fenyvesi in 1998-1999 based on an analysis of 1,273 case files as well as interviews with judges, prosecutors, attorneys, police officers, pre-trial detainees and persons convicted of a criminal offence [Csaba Fenyvesi: A védőügyvéd: a védő büntetőeljárás szerepéről és jogállásáról (The defence counsel: about the defence counsel's role and status in the criminal procedure) Dialóg Campus Kiadó, 2002, Budapest–Pécs.]
- Questionnaire-based study with 500 pre-trial detainees, carried out in 2003 by the Hungarian Helsinki Committee [András Kádár: Presumption of Guilt: Injurious Treatment and the Activity of Defence Counsels in Criminal Proceedings against Pre-trial Detainees. Hungarian Helsinki Committee, 2004, Budapest (hereafter: Presumption of Guilt)]

National Investigation Office, the Highway Police and the Airport Security Service) and was based on targeted data collection carried out during June and July 2006 (hereafter: NPH survey).⁷

According to the NPH survey, in relation to ex officio appointments performed due to the detention of the defendant, “on a national level, the number of cases when the appointed counsel does not attend the interrogation of his/her client significantly exceeds the number of those when the counsel is present. The percentages vary between 4.54% (Komárom County) and 77 % (Csongrád County), so it is not possible to trace tendencies. However, it can be stated that in 14 [out of the 23] regional investigation units, the percentage is below 50%, and only in 9 does it reach or exceed 50%.”⁸ The national average for attendance was 34.9, meaning that almost two thirds of indigent defendants face their first interrogation without professional legal assistance.⁹

According to the NPH survey, with regard to the quality of the lawyers’ work, “the general experience [of the police] is [...] that the level of efficiency of appointed counsels is generally below that of retained counsels, and the work they perform is of poorer quality. Retained lawyers appear at procedural acts and put forth motions more frequently than their appointed colleagues.”¹⁰

These conclusions were confirmed by the 2009 research of the Hungarian Helsinki Committee (HHC) into 150 closed files of severe criminal offences (homicide, manslaughter, bodily harm leading to death or risk of death).¹¹ The questionnaire based processing of the files showed that the appointed counsels were present at the first interrogation of their clients in only 16% of the cases, as opposed to retained lawyers who attended their clients’ first encounter with the police in 63% of the cases. While this may be explained by the authorities’ delays in notifying the counsels, the same cannot be said about subsequent interrogations, during which the attendance rate of legal aid lawyers and retained lawyers was 46% and 93% respectively.

The differences of activity are well illustrated by the fact that while at the end of the investigation (when in the Hungarian system all the evidence is presented to the defence) only 3% of the attending appointed counsels put forth evidentiary motions as opposed to retained lawyers, among whom this proportion was 50%. If we examine this in light of the fact that 29% of appointed counsels filed motions with the first instance court, we have to conclude that close to two thirds of defendants (charged with very serious offences) go through their proceedings without their appointed lawyers trying to influence the direction of the procedure by exercising their right to put forth motions.

3. Reasons for the dysfunctions

There are a number of external factors often quoted by counsels themselves in order to explain the deficiencies of the system. Besides the very low remuneration of appointed lawyers,¹² the fact that the legal provisions allow for the payment of fees for only certain activities, while other equally important activities such as the writing of petitions or consulting with a client who is not detained, are not paid, some undeniable infrastructural problems (e.g. the difficulties of consulting with detained clients due to material conditions in Hungarian prisons) also contribute to the situation.

⁷ The results of the survey are presented by: Zsolt Szabó - Sándor Szomor: Fegyveregyenlőség (Equality of Arms). In: Rendészeti szemle (Law Enforcement Review), issue 2007/3., pp. 19-41. (hereafter: Equality of Arms)

⁸ Equality of Arms, p. 35.

⁹ Equality of Arms, p. 36.

¹⁰ Equality of Arms, p. 38.

¹¹ See: A gyanú árnyékában: Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről (In the Shadow of Suspicion: Critical Review of the Enforcement of the Right to Effective Defence), Magyar Helsinki Bizottság, Budapest, 2009.

¹² At present the hourly rate is HUF 3,000 plus VAT, i.e. approx. EUR 14.

We are however of the opinion that besides these undeniably existing problems, the incoherence and scattered nature of the functions and responsibilities related to the running of the system play an important role in the dysfunctional operation of the Hungarian ex officio appointment system.

In order to provide indigent defendants with efficient defence, four functions need to be performed efficiently: 1) the appointment of defence counsels in cases when defence is mandatory or otherwise necessary (management function); 2) the monitoring of the performance of ex officio appointed counsels (individual quality assurance); 3) the monitoring and evaluation of the system as a whole (general quality assurance), 4) the planning and implementation of the system's budget (budgetary function). The performance of these functions can only be truly satisfactory if either the same entity is responsible for all of them, or they are distributed between entities which are interested in its smooth operation.

While it can be concluded that none of the four functions are performed properly in the Hungarian system (general quality assurance being completely absent), due to the lack of space, the present paper will focus on the management function with special regard to the selection process.

Under Article 35 of Act XIX of 1998 on Attorneys (Attorneys Act), the bar association keeps a register of those attorneys who can be appointed as defense counsels. The Attorneys Act does not contain guidelines as to how the register should be put together, it simply obliges the bars to create a register that ensures the undisturbed course of the criminal proceeding. The bars apply different methods in compiling the register. The most frequently used method is that all members of the given bar association are included in the list. In larger bar associations and in the county seats – where the number of lawyers is relatively high – it is possible to compile the list of protector attorneys and ex officio appointed counsels on the basis of voluntary enrolment.

However, in terms of the CCP,¹³ from this register, the actual attorney is selected by the authority conducting the actual phase of the procedure (the investigating authority, the prosecutor or the court). This means that in the investigation phase, the defense counsel is selected by the investigating authority, i.e. an entity which – due to its procedural role – is not interested in efficient defense work.

For the investigator it is undoubtedly easier to deal with a defence counsel who is not too agile, who does not bombard him/her with questions, remarks and motions, or may not even show up. This has at certain police units led to the development of circle of frequently appointed lawyers (called "in-house" lawyers in the jargon). The police's own 2006 survey corroborated this phenomenon: "in Budapest 12 district police stations regularly appoint the same counsels, most of whom are retired lawyers not running separate offices any more." There are certain counties where "some lawyers [...] »reside« at police station and their practices are based on appointment".¹⁴

In order to quantitatively substantiate the existence of the practice and also to assess its extent, in 2009, the HHC requested statistics from 28 police headquarters in seven regions of Hungary concerning the names of appointed counsels and the number of cases in which they were appointed in 2008.

Out of the 28 police headquarters 17 provided the requested data instantly, while some headquarters decided to provide the data after a lawsuit aimed at the provision of public interest data was launched against them. Almost all county police headquarters submitted the data regarding

¹³ CCP 48. Par. (1)

¹⁴ Equality of Arms, p. 39.

the local police headquarters located in their respective regions, so the HHC has acquired data on the annual number of appointments per counsel regarding altogether 37 local police headquarters and five county police headquarters.

The preliminary data clearly demonstrate that the practice of having “in-house” lawyers at police headquarters is widespread. According to the available data, eight police headquarters appoint the ex officio defence counsels in a way that one single attorney at law is appointed in more than 50% of the annual case-load, and the percentage of all criminal cases dealt with by the most frequently appointed defence counsel ranges between 25% and 50% at 25 police organs. One of the highest percentages in this regard was 82% at one particular police unit, where 295 criminal cases were dealt with by the same appointed defence counsel out of the total of 358 cases in 2008. At another police headquarters the most frequently appointed attorney at law provided defence in 276 cases, amounting to 70% of all appointments at the police unit that year (393).

When analysing the data, the HHC has examined what percentage of the cases the three most frequently appointed attorneys take per unit, and revealed significantly disproportionate practices in this regard as well. At 34 police headquarters the three most frequently appointed defence counsels were chosen by the police in altogether more than 50% of the cases, the percentage being over 70% at 19 police headquarters, over 80% in eight cases and over 90% in four cases. As an example: at one of the Budapest District Police Headquarters the same three attorneys were appointed in 70% of the cases, meaning altogether 400 criminal cases out of a total of 568 cases in 2008 (which were distributed between altogether 43 attorneys, some of whom were appointed only once in that year).

The analysis of the data provided by the police units leaves absolutely no doubt about the fact there are in-house lawyers at police headquarters in most cases, who deal with a significant amount of cases.

The very high numbers of cases taken by the same attorneys each year show that some attorneys principally base their law practice on appointments. Such lawyers may become financially dependent on the police officer(s) who take(s) the decision on whom to appoint. Such dependence on appointments may obviously create a conflict of interest and is definitely capable of eliminating the trust of the client. It shall therefore come as no surprise that the HHC’s 2003 survey some defendants presumed that ex officio appointed defence counsels are in fact working for the investigation authorities that had appointed them, and are only interested in persuading defendants to confess their crime.¹⁵

4. The HHC’s pilot project for the reform of the system

Based on the above, it can be regarded as being of key importance that the task of selecting the defence counsel be performed independently from the investigating authority. This can be achieved either by delegating the task to an entity that is fully independent from the criminal proceeding (e.g. the Justice Office, which is responsible for managing legal aid in civil and administrative matters and which functions as a unit of the Ministry of Administration and Justice) or by making the process fully automatic (e.g. random selection by computer or a duty schedule set well in advance).

To test this latter method, with funding from the Trust for Civil Society in Central and Eastern Europe, the HHC has launched a pilot project in cooperation with the National Police Headquarters and the Budapest Police Headquarters.

¹⁵ Presumption of Guilt, p. 146.

The cooperating police units appointed the pilot sites, the Budapest 10th District Police Headquarters, the Szombathely Police Headquarters and the Szarvas Police Headquarters.

A software has been developed and installed on the police units' server that selects the defence counsel randomly in a way that in the selection process special weight is given to the expertise of the counsel and the number of the cases he/she already has. In practice this means that those lawyers enjoy priority in the otherwise randomised selection whose special field of activity is criminal defence, secondly those who have less criminal cases. The lists of attorneys and the data on their special expertise were provided by the local bar associations which have contributed in this way to the success of the project and the smooth operation of the software-based model.

During the 6-month pilot phase that ended on 30 April, the investigators at the pilot sites were required to select the lawyers to be appointed with the software and not in the usual – fully discretionary and non-transparent – manner.

Whether the attorneys selected by the computer program provide a better standard of defence will be assessed with the help of a special questionnaire that is aimed at evaluating the performance of the ex-officio defence counsels through checking easily standardized momentums of defence work (appearance at hearings, appeals filed, motions submitted regarding the pre-trial detention of the inmate etc.). The assessment will be performed in relation to cases conducted at the pilot sites both before and during the pilot period. The HHC's assumption is that the level of the defence counsels' performance will rise as a consequence of the new appointing system, as this reduces the chances for the appointment of lawyers whose professional performance may be influenced by financial considerations.

While the assessment of the actual performance of lawyers is only starting, the project has already yielded some interesting results and has shown the risks of the randomised method. Already in the first month of the pilot phase it became clear that modification of the computer program is needed to exclude the possibility of abuse. The program is designed in such a way that police officers may request a new defence counsel instead of the one designated by the computer, since in certain cases this may be necessary in order to ensure the right to effective defence (e.g. if the defence counsel is unable to attend the interrogation, if his/her contact details are out-of-date, etc.).

Using this possibility, some officers kept asking for a new counsel until the one they preferred was designated by the computer program. To tackle this problem, it was agreed with the Central IT Department of the Police that a new window will be inserted into the program where police officers have to provide reasons for requesting another defence counsel. In the analysis phase, the frequency and reasons for asking for the designation of a new counsel will also have to be looked into and a method for screening abusive use (e.g. the regular controlling of appointment statistics) will have to be devised.