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LEGAL POSITION OF THE DEFENDER IN THE VIEW OF EMPIRICAL ANALYSIS

In 1998-1999, I made an empirical research in the topic in question, analysing in one part document of courts and on the other part there was a questionnaire. The aim of the research was to revise the practical use of rights and obligations of the defenders and finally to get feed-back on the reinforcement or weakness of the theory, to control my hypothesis and to receive significant data from the law-users and suspects as well, for the development and suggestions.

Summarising research - data on documents and questionnaire originated from the cases of the years 1997 – 1998 (and finalised legally) are shown in the enclosed papers.

Earlier professional works

On the basis of the research¹ of Szabóné Nagy Teréz in 1982, in 34,4% of the analysed 800 cases - in 274 cases defenders took part in the period of judgement, while in the period of investigation only 80, which meant 10%. In the hearing of the suspects, in 23 cases defenders took part, which meant 2.9%.

That time, national figures were not better. In 1982, the proportion of defenders taking part in the investigation period was 28.7%² in the percentage of the accused persons.

According to Mihály Tóth who made a research³ in 1988, in the 130 „defender” cases, chosen at random, 4/5 of suspects defended by assigned defenders remained without defence in reality, because the defenders did not take part during the procedure acts.

On the basis of national data, between 1985 – 1988 the proportion of the presence of defenders could be considered as permanent: from 100 suspects, in the cases of about

¹ Szabóné Nagy Teréz: *The investigation of offences in the practice*, Belügyi Szemle, 1983/10, page 10;

² *Information on criminal investigation*, The publication of Data Processing Group-leadership of Ministry of Interior and the Chief Prosecutor Secretariat, Budapest, 1982, page 46;

³ Mihály Tóth: *Investigation and Defence*, Hungarian Law, 1989/4, page 350;

18 appeared the need for defence. That proportion was a little bit higher than in the capital, where it was about 15%..

In the analysis⁴ of Anna Kiss in 1991 she found out that the formal defence was not realised even in 20% of criminal cases. The biggest part of the assigned defenders did not take part in the criminal procedure before the judgement.

The result of my own document-research

In 38.6% of the 1273 cases in total chosen at random there were acting defenders but it has to be said that in 165 cases, being in county's competence in first instance, the defence was an obligation. In city's competence-cases, defenders took only part in 30% of them. Nowadays, in about every third case defender takes part in Hungary and in two-third of the cases, the right to have a defender is not realised, which is guaranteed by the Constitution. It turned also out that more than half of the one-third of defenders are assigned ones. In the county's competence – cases, in general because of serious crimes - against life and health -, out of 165 defenders 158 appeared as assigned defenders.

Summarising data on empirical analysis related to defenders

Creating opinion by question form	
Requested in total: 878 persons	
Out of them:	
Judge:	66
Attorney	117
Lawyer	34
Policeman	285
Prisoner	326
Pre-arrested persons in correctional institutions	50

⁴ Anna Kiss: *The role of the defender in criminal procedure*, Kriminológia és Kriminálisztikai Tanulmányok XXVIII. Budapest, 1991. page 177 – 306;

<i>ANALYSED DOCUMENT</i>			
In total: 1273			
Out of them:			
Of city	1108	Of county	165
Without de- fender 70.5% into city's	781	With defender 38.6% out of total	492
		Out of which	
		city's	county's
<i>Competence</i>			
		327 29.5% in city's	165

The hypothesis was reinforced by documents (list of participants, activity) and also by the requested law-users and prisoners according to that most of the assigned defenders could not reach the expected professional (legal-knowledge) and ethic level. That way, the persons defended by them, could not get a European standard-like effective defence, their eventual - restricted only to the courts process and really passive activity is not enough to meet the real content of defender's function. Their presence is only formal.

During the last decades, the situation has not been changed significantly, the political and legal reform could not realise the effective role of the defenders, which is a constitutional and criminal law procedure basis.

As a defender, lawyers took action exceptionally. Only one legal representative was among the defenders, acting in the 372 city's competence-cases but his/her role was also formal one. That way, the practice could not prove the necessity of the enlargement of the defenders' circle and the involvement of other persons beyond the lawyers. In our days, it is certain that a real defender's quality, with serious professional education and sense of responsibility, can only be reached by a professionally suitable circle – nowadays by the member of the Chamber of Lawyers. Further opportunities, given by Law, are unnecessary, inefficient and undesirable. I agree totally with the regulation of the new Criminal Law Procedure Act of 2003, in which it allows only to meet the post of defender by exclusive lawyers.

I met with candidates, replacing lawyers, at the stage of investigation and judicial procedure, which means that a lawyer-candidate could also take action during the investigation period against the fact that the effective law permitted it only at the judicial stage. The participation in investigation was well put into use by the practice, which was fixed by the law amendment of 1999: the lawyer-candidate is authorised to participate in the investigation process.

The two-third defender's hiatus is reinforced by the fact that suspects do not want to enjoy the possibility of asking defenders, ensured by Law, not even during the lighter-type criminal cases, falling into city's competency. Only two of suspects took that possibility. A little bit better, but unsatisfactory the 15 requests arising in the cases, falling into

county's competency in the first instance. That kind of modesty can arise from different reasons.

The reasons of suspects:

- consider the case to be unimportant;
- are absolutely convinced that there will be no need for it, can defend him/herself;
- consider it means plus costs and charges;
- don't trust in the official defenders;
- don't know this right;

The reasons of authorities:

- the valuable and understandable judicial-invitation, with regard to it, is generally missing, even if the minute was signed by the suspect;
- a member of the authority makes the suspect uncertain about that possibility and describe it unreasonable the role of the defender;

Summarising the questionnaire

The questionnaire-analysis, made in the circle of volunteer law-users in different part of the country, the judges (with 10 year-experience in general), attorneys (7 year experience in general), lawyers, policemen described the defenders' participation and the proportion of assigned defenders near to the result of the research while, especially policemen, met more not-lawyers in the practice as defenders than my research showed. The same characterise the questionnaire on number of defenders requested by suspects. Here also the policemen's experience is striking. The reason can be the fact that the last two questions targeted primary at the number of appearing and not at the frequency or proportion.

From the frequency of repeated investigations, made because of the non-use of defender's rights, and *cassations*, we can draw the conclusion towards two directions: on one hand it is a chance that this violation of law has its own consequence and on the other hand, it is not advantageous to meet nowadays also in the Hungarian criminal law-use practice that number of violation of defender's rights.

Most of the law-users consider the assigned defender's institution unsuitable, it is formal and low-supported by financial means. (According to an extreme-policeman's opinion: "An assigned defender is a disadvantage for the suspect.")

Most of the persons giving answer to the questionnaire would be pleased to get information about the reform of the institution. According to them, there is a need to raise the fee of the assigned defender and the participants should be specialised in the role of the assigned defenders. That could be realised in state-supported offices specialised in criminal procedure, together with lawyers-candidates. They should be supervised by professional chambers.

Many requested persons raised up the obligation of participation in procedure for the assigned defenders, the 'obligation of presence', its control should be also referred to the chambers.

Only in one attorney's answer can be found the suggestion that an entire and free of charge – document should be ensured for the assigned defenders and their salary should be defined according to the judges and attorneys' salaries.

According to an other questionnaire filled in by volunteer pre-arrested persons in (Kaposvár) Correctional Institution and lawfully-sentenced prisoners in other correctional institutions all over the country (Budapest, Kalocsa, Pálhalma, Pécs, Szeged), they were more who asked defenders than as to my own research. But in the meantime, because of unknown reasons, requests of one-tenth of them were not met.

The proportion of assigned and commissioned defenders was equal as in the documents.

The pre-arrested persons were not as satisfied with their assigned defenders as the prisoners. In total, there were more unsatisfied (243 persons = 65%) than satisfied persons. It means that many of them were not satisfied even with their commissioned defenders.

The raise of the importance of correctional stage is shown by the fact that 17-34% of convicted persons had some kind of contact with their defenders at that stage.

Summarising

Most of the defender's rights means obligations also for the defender because he/she is obliged to implement the defence of charged person using his/her rights. These rights are the following: participation in criminal procedure, his/her presence, without all of them, we cannot realise effective defence activity. This is true also for the preparatory procedure, especially in the actual structure. Taking into consideration the fact that in our days, the effective Hungarian criminal procedure regulation concentrates the essential work of fact-findings on the investigation period, the judicial stage repeats it only on the basis of the obligatory indirect-principle. So the preparatory procedure-stage requests the most essential defender's work. Against this finding, the empirical research shows that with regard to several decades, the number of presence of defenders during the preparatory procedure-stage remains far away from the requested level.

Table 1

Summarizing report on defenders, acted in courts of the city of Pécs and county of Baranya (on the basis of documents)

	City's court	County's court	In total
Number of cases	327	165	492
Procedure			
criminal	142	165	307
misdemeanours	177	-	177
special	8	-	8
Number of charged persons	441	198	639
Number of defenders	372	219	591
Lawyers	371	219	590
Legal representatives	1	-	1
Commissioned	198	61	259
Assigned	182	158	340
Who authorised the defender			
charged	176	52	228
relatives	13	9	22
In which period lawyer took action			
investigation	20	31	51
First instance	44	5	49
Revising, suit-renewal	3	-	3
Separated procedure	1	-	1
Special procedure	1	-	1
The charged person asked for defender against the fact that it was not obligatory	2	15	17
Withdrawal of defender's commission			
Whether after his/her assignment	1	3	4
Assigned defender: yes	5	22	27
Asking for exemption from assignment	3	12	15
Otherwise engaged	2	-	2
Charged person released	1	-	1

Fig. 1

Repartition of defenders in city's court
(Right – up) commissioned defender – 51%
(left – down) assigned defender – 49%
(right – down) legal representative – 0%

Fig. 2

Repartition of defenders in county's court
 (219 defenders in 165 cases)
 (left) assigned defender – 72%
 (right) commissioned defender – 28%

Table 2

About the activity of defenders taking part in the cases analysed in city's and county's courts (on the basis of documents)

Number of cases / total number of cases	Was present a defender?		Motion		Remark	
	City's	County's	City's	County's	City's	County's
	courts					
survey	no	1	-	-	-	-
Attempt for proving	no	2	-	-	-	-
For recognition						
Presenting	No	No	-	-	-	-
Investigation on the spot	No	No	-	-	-	-
Questioning of witness	yes 40/327 (12.2%)	yes 36/165 (21.8%)	2	-	2	2
Questioning of charged person	yes 94/327 (28.7%)	yes 44/165 (27%)	5	-	10	-
bringing face to face	yes 94/327 (28.7%)	yes 32/165 (20%)	1	-	2	-
giving information on expert's report	yes 11/327 (3.36%)	yes 18/165 (19%)	2	-	3	-
document-releasing	yes 88/327 (26.9%)	yes 74/165 (45%)	4	-	6	-

Table 3

	City's Court	County's court	In total
Motion during hearing before pre-arrest	1	23	24
Asking information during house-searching, seizure and custody	-	2	2
Procedure of motion on making document-recognition			
- implementation	-	5	5
- refusal	2	1	3
- no reaction	2	5	7
Defender's complaint during investigation	3	1	4
- against 2 suspicions	denied	1	3
- against 1 seizure	accepted	-	1
repeated investigation because of no-use of defender's right	no	no	no
court-preparatory session with participation of defender			
postponing of court session because of defender's obstacle	-	1	1
Questions put to the heard person during court session	2	1	3
- in an active way			
- a few			

	10	84	94
forbidden questions from the defender	28	64	92
Judge warning calling attention to law's order			
Postponing court session because of no-showing on his/her charge	1	-	1
Defender's motion before court session	1	-	1
- referring			
- unification	1	-	1
- separating			
- exclusion	-	-	-
- hindering	-	-	-
proving taken during court session in defender's presence	1	-	1
modification of charge, defender's hearing because of its enlargement	-	-	-
defender's declaration taking into minute			
defender's reply	5	2	7
success of defender's declaration, does it hit its target?	2	-	2
- yes			
- no	27	65	92
- partly	4	5	9
assigned defender applied for his/her salary (219§)	19	22	41
	7	no data	no data

Attorney's participation in pronouncing	3	5	8
Individual defender's appeal	15	24	39
- on guilty			
- on qualifying			
- on punishment	135/327 (41.28%)	165/165 (100%)	-
withdrawal of defender's appeal	30	10	40
handing in defender's appeal remark	16(53.30%)	no data	-
defender's asking for presentation-completing in second instance	2 (6.66%)	no data	-
set aside the proceedings because of non-use of defender's right	12 (40%)	no data	-
efficiency of defender's speech	1	2	3
- totally	-	1	1
- partly			
- at all	-	2	2
defender's motion for suit-renewal	-	-	-
defender's motion for revising	5	1	6
juvenile's defender	2	8	10
- commissioned defender	23	26	49
- assigned defender			
- legal representative	1	2	3
- adult relative	-	-	

- person authorised by law			
defender's motion for changing the place of pre-arrest of juvenile	2	no data	-
	36	no data	-
defender put motion on deferring accusation in juvenile-case	1	no data	-
whether the defender took part in investigation during the bringing-to-the court process	-	no data	-
	-	no data	-
defender's request for taking court session in case of neglecting the court session resolution	1		
defender's participation in special process	1	no data	
- on parole			
- revising force-curing method	-	-	-
- ordering afterwards protector's control			
- procedure for seizure			
- ordering afterwards the completion of suspended punishment	-	1	1
- taking them into one resolution			
- refunding			
- indemnification			
	-	-	-
participation of defender during hearing before pre-arrest	-	-	-
	-	-	-
notice was made on notification of defender			

defender spoke	1	-	1
appealed against the court's resolution	-	-	-
	6	4	10
	-	-	-
	-	-	-
	4	no data	-
	9	56	65
	3	16	19
	1	17	18

Table 4

Data from the analysis of questionnaire filled in by judges, attorneys and policemen

questions	judge	attorney	lawyer	policeman
Defender's participation in criminal cases according their opinion	42	40	45	26
Proportion of assigned defenders (%)	49	52	46	48
Commissioned defenders' proportion (%)	39	37	40	26
Not lawyer in defender's role (giving answer/number of cases)	62/19	117/6	34/11	285/125
Request from the charged person when presence of defenders not an obligation (giving answer/number of cases)	66/61	117/59	34/21	285/154
Repeated investigation because of violation of defender's right or cassation (giving answer/number of cases)	66/16	112/51	34/15	285/21
Defender's motion for postponing the accusation (giving answer/number of cases)	43/1	107/14	34/19	285/29

Table 5

Arrested persons' answers in connection with defenders

	Pre-arrested persons (number) (in % of total)	Convinced (number) (in % of total)	In total
Number of questioned	50	326	376
His/her possibility for calling defender: yes no	9 (18%) 37 (74%)	54 (21%) 199 (77%)	* **
His/her defender was present during the order for pre-arrest in court	23 (46%)	140 (54.4%)	163 (43%)
Those who asked for defenders	18 (36%)	151 (41%)	169 (45%)
Accomplished	13 (72%)	140 (92%)	153 (90%)
He/she had defender during investigation	42 (84%)	265 (73%)	307 (81%)
From which:			
- assigned	28 (66%)	123 (46%)	151 (49%)
- commissioned	14 (34%)	142 (54%)	156 (51%)
Defender took part during presentation of investigation-documents	23 (46%)	167 (48%)	190 (51%)
Criminal documents were at disposal of charged person or his/her defender	34 (68%)	222 (61%)	256 (68%)
Contact with defender was controlled by authority	8 (16%)	31 (8%)	*
He/she met with defender after effective resolution	-	90 (25%)	-
Being convicted, he/she addressed to defender	-	123 (34%)	-
After his/her conviction, defender took sg. in his/her interest	-	62 (17%)	-
Those who know the correctional procedure - regulations relating to defenders	-	76 (21%)	-
He / she could call defender from the correctional institution by phone *			
Yes	32 (64%)	206 (57%)	238 (63%)
No	13 (26%)	118 (32%)	131 (35%)
From persons saying yes, authority controlled communication	19 (59%)	157 (76%)	176 (74%)
Is he/she satisfied with defender's activity *			
Yes	14 (28%)	114 (32%)	128 (34%)
No	36 (27%)	207 (58%)	243 (65%)

* Where there are differences, someone did not give answer for every question;

** No sense for unification or count percentage, because these data can not be unified;