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QUESTIONS OF THE INTERPRETATION OF THE DEFENCE ROLE – WITH ESPECIAL REGARD TO PROCEDDINGS BEFORE THE CRIMINAL COURT

Doctoral Dissertation

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I. Summary of the Research Task

In the Hungarian system of criminal procedure, several participants of the proceeding may provide activities aiming at the defence of the defendant (e.g. the prosecutor or even the defendant himself). My dissertation, however, shall focus on the activities of the defender based on delegation or recorded Power of Attorneys given, in consideration of the fact that almost without exception this personal group act as advocates in criminal procedures, furthermore, solely lawyers have the expertise necessary for the defence, and the "equality of arms" principle may only succeed completely through them.

When I mentioned my publication plans related to the above described topic to my colleagues, some of them smiled, others nodded approvingly. "Those who can, do, those who can't, teach!" – says the well-known proverb, which – related to the given profession – may prove to be exponentially true. In this case, one may only experiment with setting theoretical principles; but at the same time, I do not consider getting engaged in the present topic absolutely superfluous – if only because the number of the relevant scientific works in our country is fairly small. I would also like to note that I do not intend to create a self-sufficient theoretical system determined on the requirements of exclusivity neither in relation to ethics nor to tactical aspects. The latter factors, due to their intended purposes, are inadequate to provide the framework for any paradigm; furthermore, I do believe that neither science nor legislature has the "empowerment" to define the basic rules of practicing as a defender.

II. Research Methodology

Most of the chapters of my dissertation aim at the investigation of the activities of the defender from legal, ethical and tactical aspects. The research on the legal aspect includes i) the historical overview of the regulation of legal profession and basic dogmatic questions related to the definition of a defence attorney; ii) the most important regulations of the base principles of rules of law at both communal and national levels with regards to practicing as a defender; iii) general questions on the establishment and termination of the defender's legal status; as well as iv) the overview of the regulation of the defender's function in different judicial proceedings at both national and international levels.

The references of my thesis related to defence ethics i) generally touch upon questions of

written and unwritten behavioural rules; ii) pay special attention to the analysis of the defender's behaviour during trial, furthermore, the interpretation of the interrelation system of judgement, accusation and defence; as well as iii) the elaboration of theoretical viewpoints related to the above mentioned questions.

Finally, in the parts of my dissertation dedicated to defence tactics I attempt to provide a rather subjective but hopefully justifiably system based primarily on my personal experience, as well as my assumptions in order to establish what could be the criteria of fair defence activities, and what could be understood under the notion "fairness" with regards to practicing as a defender. These hypotheses shall also be primarily defined in relation to different proceedings before court.

III. Summary of the Research Results

1) With regards to defence activities and their legal theoretic definition, I first and foremost believe that the defender shall not be considered neither the representative of the defendant, nor the assister of either the defendant or the court, but should be defined as an autonomous subject independent from all other participants of the proceedings. My main reason to believe so is that persons (see lawyers) acting as defenders i) based on their legal expertise provide the same type of work that can be evaluated as law enforcement activities similar to those of other enacting authorities, and at the same time ii) may not be ordered while doing so, as the determination of the defence strategy is executed exclusively by their own discretion.

2) I consider the current form of the scope of activities as well as the training system of being a lawyer rather disquieting. In my view, an unambiguous system of specialist examination differentiated by branches of law would be necessary, particularly with regard to the actual sphere of activities of lawyers freely chosen by the candidate. Should somebody desire to work as a criminal defender, he should enter examinations in criminal law, criminal procedure law, penal law, criminology, forensic science, psychology, law ethics as well as lawyer's procedures related to criminal matters, and should do so before an examination board consisting of defence attorneys exclusively.

3) I also have some critical remarks in relation to the legal regulation of the legal status of the defender:

a) The first major problem is linked to the prosecution and its presence in proceedings.

According to the basic rule, the law in the act of the latter procedure solely requires the presence of the representative of the prosecuting magistrate, whereas no such general requirement with regards to defence has been defined. This question raises concerns at the level of the rule of law in particular, when – contrary to the defender – the prosecutor is present at the proceeding. I find this such a serious legislative mistake that should be remedied within reasonable time – if not for other reason, that to comply with the international requirement of the defendant's "right to fair proceedings".

b) I also consider it necessary that the criminal procedure should "evaluate" the sphere of activities of the defendant as well as the representative of the prosecuting magistrate in the hearing for evidence before court. The first step towards this would be the regulation of the "cross-examining" system as legal baseline. Based on not only practical but theoretical grounds as well, I believe that the fact-finding and pragmatic work at the judicial stage should be the task of the prosecutor as well as the defendant. Bias towards prosecution or defence, as well as the previous knowledge on the subject of the case allows a more adequate and targeted questioning, and thus it may be easier for the judge as "outsider" to evaluate the material of the evidence, and therefore the oft-mentioned "prejudicial risks" could be decreased.

c) In respect of the procedural rights of the defendant I would also like to highlight my concerns with regards to the regulation of the examination of the witnesses. Although this thesis does not examine the branch of investigation, the defender nevertheless should be granted the right to be present at the examination of not only the witnesses summoned by him but also the ones summoned by the prosecution magistrates, and should be able to interrogate these witnesses directly. The right to defence includes the right to effective defence, and as such, it cannot be subordinated to the criminal investigation interests of the law enforcement authorities.

d) The next problem in relation to the procedural rights of the defender is linked to expert evidencing. First of all, I consider it extremely perilous from the requirement aspect related to "fair procedures" that the delegation of experts suggested by the defender is solely incidental, whereas expert opinions gained within their own powers by the investigating authority or the prosecutors – prior to the judicial proceedings – inevitably land on the "judge's table". I believe that it should be stipulated at the investigation or accusation stage that „if an expert opinion related to the case is already available to the investigating authority or the prosecutor and the defendant or the defender also suggests the delegation of an expert, then the

investigating authority or the prosecutor should {mandatorily} approve the defender's suggestion on the delegation of an expert".

e) With regards to pleas, I consider it necessary for the criminal procedure to stipulate their fundamental elements – especially because, in the case of the prosecution, certain fundamental criteria are determined with utmost precision but at the same time respecting rhetoric freedom. For this reason, I believe that amongst the relevant regulation related to pleas it should be at least imposed that „if the defender submits an alternative suggestion beside his submission for exoneration, then he should be obliged to submit a suggestion for the applied penalty or relevant measures".

f) With regards to the defender's procedural rights, I would also mention experienced regulation problems related to revisions or review procedures, namely, that in the case of the present procedures, practicing the right of defence procedure initiation may be dependent on the will-decision of the defendant. In the case of both constructions, I find this legislative decision erroneous, since the reasons for the initiation of the above mentioned procedures i) are of a nature the recognition of which may almost exclusively be possible for a person experienced in legal matters; ii) ever since their existence, they refer to such unfavourable situations before the remedy of which should not be potentially prevented by the prohibiting statement of the defendant.

g) Finally, in relation to the interpretation of the sphere of action of the defender, I would like to mention the tendency that is nowadays more and more illustrative of the criminal law enforcement mechanisms of the different states, namely, the different simplifying or diversionary models. What kind of consequences would the possible proliferation of these imply with regards to the future of the activities (or possibly the justification for the existence) of the defender? First of all, I believe that the elimination of judicial work as a contradicting form of procedure may not appear as a long-term legislative goal neither in Hungary, nor at international level. Criminal procedures should not be shifted towards civil rights; it should ultima ratio always maintain its decision-making mechanism, in which the decision in the question of criminal responsibility is made as a result of the joint efforts of the judge, the prosecutor and the defender. In other words: does the defender's profession have a future? Yes, absolutely. But whether we shall meet lawyers as defenders or another new agent under a special denomination as participants of the judicial proceedings is another question.

IV. List of Publications

Perspectives of Mediation Applied in Criminal Cases. Bűnügyi Szemle, 2009/2.

The Possibilities of the Realisation of Restorative Jurisdictional Concept in Criminal Cases – with Especial Regard to Mediation and its National Regulation. Iustum, Aequum, Salutare, 2009/3.

Legislative Questions Related to the Reform of the Hungarian System of Penalties. Iustum, Aequum, Salutare, 2010/2.

The History and Characteristics of the Activities of the Defender. Magyar Jog, 2012/8.

Questions Related to the Right of Observation and Submission Initiation of the Defender in Trial. Jogtudományi Közlöny, 2012/10.

The Significance of Differences between Proceeding Systems from the Aspect of Practicing as a Defender. Working Methods of the Defender in Court Proceedings. Ügyészek Lapja, 2012/19/2.

The Appearance of the Defender as an Autonomous and Independent Participant of the Criminal Procedure in the Universal and Hungarian History of Law. Criticism of the Procedural Rules in Effect Related to the Activities of the Defender. Iustum, aequum, salutare. 2012/8/2.