THE LEGAL AID REFORM IN HUNGARY
(Outline of the reform, the impact of EU accession and the role of research)

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1. The structure of the Hungarian legal aid system before the reform

Before the legal aid reform in Hungary, separate legal aid schemes existed for civil and criminal law, whereas no legal aid was available for administrative procedures. Below we provide a brief description of the situation before the reform of 2002-2003.

Legal aid in administrative matters

Before the reform, no legal aid at all was available in administrative matters. In terms of Act IV of 1957 on the Code of Administrative Procedure (CAP), administrative authorities were under the obligation to inform the clients about their rights and duties, this however may not of course be regarded as legal aid.

Legal aid in civil matters

The situation described below was characteristic of the pre-reform status of legal aid in civil matters. The legal aid reform led to the adopting of extensive legislation aimed at reforming this system. However, the new provisions will only come into force on 1 January 2008 (as opposed to the originally set January 2006 date), so at the time of writing this paper, still the rules described below prevail with certain exceptions (e.g. pre-litigation legal aid). For reasons of the delay, see Section 3.

In the Hungarian legal system a complex framework concerning (objective and subjective) cost exemptions is in place. Litigants in civil cases are entitled to a number of benefits promoting their access to court in civil cases. First, in certain types of civil cases (e.g. the establishment of fatherhood) litigants are exempt from paying the costs of the administration of justice regardless of their financial situation (objective exemption of costs or duties). Second, individuals may be granted exemption of costs if they lack adequate financial means irrespective of the type of the case (subjective exemption of costs).

Under Act III of 1952 on the Civil Procedure Code (CPC), if someone is granted full cost exemption, at the request of the party and only if the court deems it necessary, a law firm operating in the jurisdiction of the court shall be appointed for him/her by the court as protector attorney to proceed in the case.

Therefore, the party benefiting from exemption of costs does not have an automatic right to be appointed a protector attorney. The court will take into consideration in all cases the nature of the lawsuit, its complexity, the party's personal circumstances, etc. However, according to established judicial practice, the court will appoint a protector attorney to the party who benefits from exemption of costs and is not familiar with the law.[1] The Supreme Court has established that it is not necessary

[1] Judicial Decisions BH 1977. 12/552

to appoint a protector attorney to the party who represented his own interests clearly and appropriately in both his written and oral submissions, sometimes even making reference to legal provisions.[2]

Protector attorneys are selected by the court from the register compiled and maintained by the county bar association. The party is not able to choose the attorney. In terms of Act XI of 1998 on Attorneys (Attorneys Act), the defendant or the represented person may request the release of the appointed attorney on justified grounds. There is no uniform judicial practice concerning what grounds presented by the parties may be deemed as justified (the obvious and continuous passivity of the protector attorney should qualify as such). The court will also release the protector attorney if the party states that he/she no longer needs representation in further stages of the procedure.

As to the practice, protector attorneys are appointed in only a fraction of the cases in which litigants are afforded financial benefits. The lack of governmental or academic evaluation of the role and performance of protector attorneys as along with the lack of any registration system for cases where legal aid attorneys are appointed, illustrates that this area of access to justice was a peripheral issue in Hungary.

Furthermore, before the legal aid reform, no legal aid was available in the pre-judicial phase of civil law disputes. Indigent parties were entitled to legal aid only after the commencement of the lawsuit, so they could not avail themselves of legal assistance in deciding whether or not to initiate a lawsuit or formulating claims.

Legal aid in criminal matters

Before 2003, the Hungarian criminal legal aid system was fully based on the "interests of justice" principle, indigence played only a very limited role in the system. Under Act I of 1973 on the Code of Criminal Procedure (hereafter: Old CCP), defence was mandatory in the following cases:

- if the defendant[3] is detained, with the exception of the initial 72-hour detention;
- if he/she is blind, mute, deaf or mentally handicapped;
- if the accused/defendant does not understand Hungarian;
- if he/she is suspected of having committed a criminal offence for which a prison sentence exceeding five years may be imposed;
- if the defendant is a juvenile;
- if the court conducts the procedure against an absent defendant;
- if trial is waived by the defendant;
- if an accelerated procedure is conducted.

In such cases, if the defendant failed to retain a lawyer of his/her choice, the authority before which the proceeding was conducted (the investigating authority, the prosecutor or the judge) was obliged to ex officio appoint a defence counsel from a list prepared by the Bar Association, irrespective of the defendant's financial situation.

Although appointment was thus not based on indigence, practically, there was a certain overlap between legal aid and ex officio appointment, since usually those defendants chose not to retain a lawyer (and were therefore defended by an ex officio appointed lawyer) who could not afford to do so.

Under the Old CCP, there was an optional possibility for appointment, where this overlap was even stronger: the competent authority was authorized to appoint a defence counsel, ex officio or upon the request of the accused/defendant, if it found it necessary in the interest of the defendant. According to court practice, the authorities did so if the case was complicated, evidentiary problems arose, or if

[2] Supreme Court decision Pf. III. 20657/1992

[3] The term "defendant" (in Hungarian: *terhelt*) will be used to refer to the subject of the criminal procedure irrespective of the actual phase of the procedure: i.e. to both the suspect, the accused and the convict.

the accused/defendant had difficulties in defending himself effectively in person.[4] Problems with this possibility included the following.

- No means test (and no procedure) was devised for deciding whose request is to be accepted by the proceeding authority. However, if the accused/defendant put forth such a request, the authorities usually did appoint a counsel.[5]
- In practice, defendants rarely made use of this opportunity.[6]
- The proceeding authority was not bound in any way by the request of the accused/defendant.

The biggest deficiency of the system was that in contradiction to the relevant international norms (e.g. Article 14 of the International Covenant on Civil and Political Rights according to which legal assistance shall be provided free of charge to all those who do not have sufficient means to pay for it), the state only advanced and did not pay the fees of appointed defense counsels, irrespective of whether the defendant could have paid for a lawyer or not.

In the pre-reform system, there was no legal aid for crime victims, persons wishing to assert a civilian claim in the criminal procedure or private prosecutors (private individuals performing the functions of prosecutors in certain cases, such as libel and defamation cases).

In addition to the shortcomings of the legal framework, the practical operation of the system showed severe dysfunctions. Partly due to the very low hourly fees of ex officio appointed lawyers, partly due to structural problems (lawyers were appointed by the investigator, there was no quality control in the system, etc.), the performance of the lawyers left much to be desired. According to empirical studies, a high proportion of ex officio appointed lawyers failed to even contact their clients during the lengthy investigation phase or appear at investigative activities (such as interrogations), which are of crucial importance in the Hungarian system from the point of view of establishing the defendant's responsibility at the end of the procedure.[7]

2. The reform process

Access to justice was a rather neglected issue in Hungary for a long time. As it may be clear from what is set forth above, the institutional and legal framework was incomplete and incoherent, and practical implementation left much to be desired as well. The right to the access to justice was often only formally guaranteed.

This was so in spite of the fact that the inevitable necessity to improve the system was derivable from a lot of sources.

Domestic norms: Act XX of 1949 on the Constitution of the Republic of Hungary (the Constitution), Hungary is a democratic state governed by the rule of law. According to the consistent practice of the Hungarian Constitutional Court, this implies that the State is obliged to establish the legal and institutional framework that enables the citizens to assert their fundamental rights.[8] In an early decision, the Constitutional Court also established that the development of a legal aid system is a state obligation stemming from the above principle (although the Court added that legislators enjoy

[4] Károly Bárd: Country Report: Hungary. In: Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe. Parker School Journal of East European Law Vol. 5 1998 Nos. 1-2.

[5] Fenyvesi, Cs. *A védőügyvéd: a védő büntetőeljárási szerepéről és jogállásáról* (The defense counsel: about the defense counsel's role and status in the criminal procedure) Dialóg Campus Kiadó, 2002, Budapest–Pécs, p.160., and interview with Zsuzsa Sándor, judge and spokesperson of the Metropolitan Court. 9 September 2002.

[6] Károly Bárd: op. cit.

[7] E.g. A kirendelt védővel rendelkező fogvatartott személyek védelemhez való jogának érvényesülése a büntetőeljárás nyomozási szakaszában. (The realization of the right to defense of detained persons with appointed defense counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudspersons, 1996; Punished before Sentence: Detention and Police Cells is Hungary. Constitutional and Legal Policy Institute – Hungarian Helsinki Committee, Budapest, 1998.

[8] See for instance Decision no. 48/1993. (XI. 23.) of the Constitutional Court

wide discretion in deciding about the facts to be taken into consideration when determining the criteria of eligibility).[9]

International norms: Article 6 of the European Convention on Human Rights (Convention) as interpreted by the European Court of Human Rights clearly sets out the state obligation to provide free and effective legal assistance in both civil and criminal cases under certain conditions. In the case of Airey v. Ireland (1979), the Court established that the provision of free legal aid is mandatory in civil cases when such assistance proves indispensable for effective access to courts (either because of mandatory legal representation or due to the complexity of the particular case. In the criminal field, the necessity of running a legal aid system is expressly set out in the Convention (provided that the defendant is indigent and the interests of justice require so). In this regard, emphasis is put by the Court on the fact that the appointment of a defence counsel does not in itself satisfy the requirement: the State has a positive obligation to make certain that the defence is truly effective.[10]

International soft law: The most obvious examples of international soft law promoting the setting up of an efficient legal aid system are the relevant recommendations of the Council of Europe Committee of Ministers.[11]

As it can be seen, a lot of binding norms and non-binding recommendations had been in place for a long time that could have set the Hungarian political machinery into motion with a view to creating a coherent and efficient legal aid system. However, it was the country's approaching accession to the European Union that gave a real impetus leading to changes in all the concerned fields (i.e. penal law, civil law and administrative procedures).

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (Directive) prescribes that natural persons involved in a cross-border dispute shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice provided that they are partly or totally unable to meet the costs of proceedings as a result of their economic situation. In terms of the Directive, legal aid shall include pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance and representation in court.[12]

In the Hungarian system however, pre-litigation advice was not in place at all, and indigence did not guarantee access to legal aid in civil lawsuits, as the appointment of a protector attorney was dependent on the assessment of the judge.

The Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (Framework Decision) also set out requirements that were not met by the Hungarian legal framework. In terms of the Framework Decision,[13] each Member State shall ensure that victims have access to advice, provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid when it is possible for them to have the status of parties to criminal proceedings.

In spite this clearly stated requirement, before the reform, no legal aid was accessible for crime victims in the criminal procedure.

It was therefore obvious that the Hungarian system did not even formally meet the requirements set by the *acquis communitaire*. This was repeatedly pointed out by the European Commission in its regular monitoring reports on Hungary. In 2003 for instance, the report stated: "Legal aid is currently rather restricted. In criminal cases, the state is obliged to provide defence counsel only in limited

[9] Decision no. 1283/B/1993. of the Constitutional Court
[10] See for instance the case of Artico v Italy (1980) or the case of Czekalla v. Portugal (2002)
[11] See for instance Recommendation No R (81) 7 of the Committee of Ministers on measures facilitating access to justice and Recommendation No R (93) 1 of the Committee of Ministers on effective access to the law and justice for the very poor.
[12] Articles 3 and 5 of the Directive
[13] Article 6

cases (e.g. if the offence is punishable with more than 5 years' imprisonment), and a defence counsel may be provided as a matter of discretion in other cases. In general, if the defendant is convicted, he must pay all costs. In civil cases, legal aid tends to be restricted to the very poor and to pensioners. Although there is a network of offices offering free legal information, these offices do not represent citizens in trials."[14]

Therefore, with Hungary's coming accession, the political pressure to reform the legal aid system significantly increased, and his political pressure proved instrumental in setting into motion a process that may gradually lead to the development of a legal aid system meeting all the relevant criteria. This fact is clearly shown by the quoted country report, which states that "the [Hungarian] government has undertaken to submit a bill to Parliament to significantly improve the legal aid system before the end of 2003."[15]

The government fulfilled this undertaking. The Ministry of Justice drafted the concept paper for the legal aid reform in early 2003, sharing it and the subsequent draft bills with a large group of stakeholders. Many recommendations from NGOs were also taken into consideration and accepted by the Ministry in the drafting process.

The Act LXXX of 2003 on Legal Aid[16] (LAL) was adopted by Parliament on 20 October 2003. The Government and the Minister of Justice issued several decrees to implement the LAL.[17]

3. Changes in the Hungarian legal aid system

Instead of creating a single legal aid system, Hungarian legislators opted for trying to improve its branches separately. Below we summarise the most important changes.

Changes in the administrative field

The biggest change took place in the field of administrative proceedings, where no legal aid existed before. The new system is set up as follows.

The LAL's personal scope covers indigent

- Hungarian citizens
- Citizens and residents of EFTA countries
- Foreigners residing in Hungary
- Asylum seekers and – in the naturalisation and alien policing procedure – persons whose antecedents were Hungarian citizens
- Foreign citizens based on reciprocity.[18]

In most of these cases, indigence is a pre-condition of eligibility. There are three basic categories of indigence, with one additional group:

- If someone's income does not exceed the minimum pension rate (approx. EUR 100) and he/she has no assets beyond what is necessary for normal life, the client can be granted full cost exemption.
- For persons whose earnings exceed the amount of the minimum pension but are still below the amount of the minimum wage (approx. EUR 250), the LAL provides for exemption from having to advance the costs of procedures: costs are advanced by the state and shall be paid back within one year.

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[14] See: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_hu_final_en.pdf
[15] Ibid.
[16] Full text of the Legal Aid Law in Hungarian is available at: http://www.kih.gov.hu/alaptev/nepugyvedje/jogszabalyok/2003eviLXXXtv.html.
[17] Government Decree no. 144/2005 (VII. 27.) on the Justice Office, Decree no. 10/24 (III. 30.) of the Minister of Justice on the detailed rules of benefiting from legal aid, Decree no. 11/2004 (III. 30.) of the Minister of Justice on the fees of legal aid providers, Decree no. 42/2003 (XII.19.) of the Minister of Justice on the detailed rules of the register of legal aid providers
[18] Article 4, LAL

- Certain categories of persons are automatically deemed indigent, such as homeless persons, beneficiaries of social welfare assistance, and asylum seekers.[19]
- The LAL also makes it possible for the authorities to qualify as indigent a person if his/her income exceeds the threshold but other circumstances (e.g. disability, illness, debated salary) make it impossible for his/her to get legal aid on the market.[20]

Legal aid in administrative matters may be granted if:
- the party's information on legal matters in issues directly concerning his/her everyday subsistence (in particular, issues related with dwelling, labour law, or the use of public utility services) is necessary;
- the party takes part in an administrative procedure that originates an obligation, and he/she is in need of legal advice in order to become aware of his/her procedural rights and liabilities, or a petition has to be prepared for a legal statement to be made;
- the party requires legal advice on what type of proceedings should be instituted in order to protect his/her rights, and at which authority, or if a petition has to be prepared for such a proceedings to be commenced.[21]

The most profound change introduced by the LAL was the setting up of a legal aid infrastructure independent from the courts and other authorities involved in different capacities in different legal proceedings (such as the prosecution or the investigating authority). A Legal Aid Service was set up under the Central Justice Office (also performing tasks related to victim protection and probation). The Legal Aid Service is organized with offices at the central and regional levels. Legal aid offices are charged with examining applications for and allowing legal aid to those who are eligible, and for providing basic legal information and assistance to any person.

Legal aid providers include:
- 255 private attorneys
- 92 law firms (there are altogether approximately 10,000 attorneys in Hungary)
- 12 notaries public
- 2 law school legal clinics
- 10 NGO's

As opposed to the traditional legal aid system in civil and criminal matters, registration is not compulsory for attorneys. Legal aid providers are contracted on a voluntary basis with the Ministry of Justice. The contract is concluded for three years and specifies the provider's field of expertise (civil-administrative and/or criminal justice) and the number of clients per month the provider is willing to take on.[22] A searchable online register of legal aid providers is also available on the Justice Office's website.[23]

For clients, there are two ways of contacting a legal aid provider. The first method ("preliminary decision") is to submit an application for legal aid to the legal aid office, where a decision is taken on eligibility and the number of hours the legal aid provider is allowed to invoice after the services delivered.[24] If the application is refused, regular legal remedies are available for appeal.[25] If legal aid is granted, the client can select and approach a legal aid provider from the register. The legal aid provider may only refuse to provide legal aid to the client if the case does not fall within his/her competence, or the number of clients taken on by him/her exceeds the limit set in the contract.

The second method of contacting a legal aid provider ("subsequent decision") is to contact him/her directly, if the need for legal aid is urgent (e.g. a deadline is about to expire) and requires not more than four hours of service, or if the assistance can be provided in not more than two hours. In these

[19] Artcile 6, LAL
[20] Article 8, LAL
[21] Article 3, LAL
[22] Article 67, LAL
[23] http://www.kih.gov.hu/alaptev/nepugyvedje/nevjegyzek
[24] Articles 22-28, LAL
[25] Articles 29-33, LAL

cases, the legal aid provider will assess the eligibility of the client, help him/her in completing the application form for legal aid, and then will provide the legal assistance. It is the legal aid provider's duty to forward the completed application to the legal aid office.[26] (Although the legal aid provider cannot charge for hours spent on assistance in completing the application form for legal aid, in practice this may take several hours and requires legal aid providers to take on a significant amount of administrative tasks.)

Changes in the civil field

The civil legal aid system is reformed in two stages. The first stage (which commenced on 1 April 2004) introduced pre- and extra-judicial legal aid, whereas the second stage is aimed at the reform of legal aid in court procedures. The second stage was originally foreseen to start on 1 January 2006, but was postponed until 1 January 2008 due to financial restrictions.

Pre- and extra-judicial legal aid in civil matters

As it was outlined above, this element was completely lacking from the pre-reform civil legal aid system. The changes in this area are identical with the ones that took place in the administrative field: indigent persons are eligible for legal aid from the provider of their choice and in the number of hours established by the legal aid office.

Legal aid is available with regard to civil matters if:

- the party is involved in a legal debate, in relation to which an action may follow, and he/she is in need of legal advice in order to become aware of his/her procedural rights and liabilities, or a petition has to be prepared for a subsequent contentious legal statement to be made;
- the party is involved in a legal debate that can be settled out of court, and it is appropriate to provide the Party with information as to the opportunities of an extrajudicial settlement, or prepare for him/her a paper that serves for the purposes of such a settlement;
- the party takes part in extrajudicial mediation procedure aimed at the settlement of a legal debate out of court, and he/she is in need of legal advice prior to signing the agreement terminating the mediation;
- the party's information on legal matters in issues directly concerning his/her everyday subsistence (in particular, issues related with dwelling, labour law, or the use of public utility services) is necessary;
- the party requires legal advice on what type of proceedings should be instituted in order to protect his/her rights, and at which authority, or if a petition has to be prepared for such a proceedings to be commenced;
- a crime victim is in need of legal advice or a petition has to be prepared in order to institute an action for compensation for the damage caused by the offence;
- the party asks for help in the preparation of an application for extraordinary legal remedies in a civil procedure.

Legal aid in civil lawsuits

The LAL envisaged the reform of legal aid in the litigation phase of civil matters as well. As it was outlined above, the coming into force of the provisions realising this goal was postponed from January 2006 to January 2008.

The reasons for this are outlined in an impact assessment study prepared by the Ministry of Justice in 2005 based on the experiences of the legal aid service's first year (hereafter: Ministerial Study). The study points out that between April 2004 and April 2005, 21,304 clients turned to the regional legal aid offices, out of whom 5,329 submitted an application for and 5,223 were granted legal aid.[27] As

[26] Articles 42-47, LAL

[27] Előterjesztés a Kormány részére a jogi segítségnyújtás működésének tapasztalatairól és a jogintézmény továbbfejlesztésére vonatkozó javaslatokról (Analysis addressed to the Government on the experiences of the operation of the legal aid system and recommendations for the further development of the institution), IM/IGKOD/2005/JOGS/1996. (hereafter: Ministerial Study) p. 21.

opposed to this, only in 2004, the courts allowed some form of cost exemption to litigants in approximately 40,000 cases. Based on this data, the authors conclude that the number of clients applying for legal aid in civil litigation may be expected 80-120,000 owing to the wider circle of eligibility and the "more accurate eligibility criteria".[28]

The Ministerial Study points out that legal aid in litigation will require many more hours than extra- and pre-litigation aid, and due to the higher amounts paid, the intensity of the monitoring of spending and eligibility will need to be increased, which will require a significant increase in the staff numbers and the office space of the legal aid offices, as well as more intensive training of the legal aid service personnel and an extension and upgrading of the IT support system. This requires more time for preparation and – also taking into account the increase of the number of hours to be paid to providers – means a substantive rise in the legal aid budget.[29] Due to all these factors, the study recommends that the coming into force of the LAL provisions on legal aid in civil law litigation (as well as legal representation of victims in criminal proceedings in the framework of the legal aid system) be postponed until 1 January 2008. In line with the recommendation, Act CXXXV of 2005 (adopted by Parliament in November 2006) postponed the coming into force of the provisions on civil legal aid before the courts.

This means that at present pre- and extra-judicial legal aid is available in accordance with what is set out above. However, once the lawsuit starts, the old rules apply, according to which the courts – if they deem it necessary – may appoint a protector attorney to those litigants who are provided full personal cost exemption. Hence, the lawyer providing assistance in drafting a petition initiating a lawsuit may not be the protector attorney appointed by the judge (provided that a protector attorney is appointed at all). There are no statistics showing in what percentages of the cases courts are willing to appoint as protector attorneys those lawyers who provided legal aid in the pre-judicial phase in the framework of the legal aid system regulated by the LAL.

If no new postponement is made, the civil legal aid system will be fully integrated as of 1 January 2008. Persons eligible for legal aid under the rules set out above in the Section of the post-reform administrative legal aid, will be entitled to a protector attorney if

- they would not be able to effectively assert their rights in person due to their lack of legal competence or the complexity of the case;
- legal representation is mandatory in the case

The rules on applying for and granting legal aid are the same as the ones described under the section of legal aid in administrative cases. Hence, it will not be the court's task to make a decision on eligibility and appoint an attorney. The client will approach the regional legal aid office, submit his/her application, and if the office's decision is favourable, he/she will be able to choose the provider from the register. The only difference is that in cases involving litigation, there will be no possibility for "subsequent decision".

Changes in the criminal field

In July 2003 Act XIX of 1998 on the Code of Criminal Procedure (hereafter: New CCP) came into force addressing a longstanding point of contention in the Hungarian criminal procedure system, namely that the fee of the defence counsel appointed for indigent defendants was only advanced and not borne by the state. The CCP now provides an exemption from legal aid costs for defendants of limited means. This so-called "personal exemption of costs" guarantees the following rights:

- upon request of the defendant granted personal exemption of costs, the court, the prosecutor or the investigating authority is obliged to appoint a defence counsel for the defendant,
- the defendant and his/her defence counsel may copy the case files free of charge (on one occasion),
- the fee and the expenses of the appointed defence counsel are born by the state.[30]

[28] Ibid., p. 10.
[29] Ibid.
[30] Article 74 (3)

In terms of Decree no. 9/2003 (V. 6.) of the Minister of Justice on the Application of Personal Exemption of Costs in the Criminal Procedure, personal exemption of costs shall be granted to the defendant if (i) he/she lives alone and his/her monthly income does not exceed the double of the legally required minimum sum of old age pension (approx. EUR 200); (ii) 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 100), provided that he/she does not possess properties other than (i) assets necessary for everyday life; (ii) objects, instruments, equipment used for work (e.g. for a taxi driver the car shall be regarded as such); and (iii) the real estate he/she lives in.[31]

Some changes were also introduced by Decree 7/2002 (III. 30.) in an attempt to remedy the problems arising in the practical implementation of the system (i.e. the poor performance of appointed counsels):

- the hourly fee of ex officio appointed counsels was raised (from EUR 2 to EUR 8), but still remained way below market prices;
- consultation with detained defendants also became payable.

In the years to follow, this process has continued. The New CCP was amended to guarantee that the investigating authority appoints the counsel at a time and in a way that it is still possible for him/her to contact the detained defendant before the first interrogation.[32] Furthermore, the amendment made the hours spent by the appointed counsel studying the case files also payable.[33]

The hourly fee was raised again in 2007 to EUR 14.

As of 1 April 2004, the Legal Aid Act created the possibility for indigent crime victims to seek legal aid in reporting a crime, and receive legal advice on his/her rights in the criminal procedure and on the way to seek damages. Furthermore, the Act makes legal assistance available for filing requests for extraordinary legal remedies in criminal procedures.[34]

Originally, it was envisaged that from 1 January 2006 on, in the framework of the Legal Aid Service, a protector attorney will be provided for crime victims throughout the whole criminal procedure (and not only in the initial phase when a report needs to be filed with the investigation authority).

However, similar to what happened with regard to legal aid in civil litigation, provisions providing a protector attorney for

- crime victims wishing to participate in the criminal procedure;
- persons asserting a damage claim in a criminal procedure;
- private prosecutors (crime victims performing the prosecutorial tasks in certain types of cases, such as defamation and libel offences); and
- and supplementary private prosecutors (crime victims performing – under certain conditions – the prosecutorial tasks in cases when the prosecution rejects to investigate a crime or press charges)

will also only come into force in 2008.

The rules on applying for and granting legal aid are the same as the ones described under the section on legal aid in administrative cases.

4. Remaining issues of concern

The new legal aid system (once it is fully operational in civil cases and in the criminal field) will address and remedy two key structural problems that have been identified as main deficiencies of access to justice in Hungary. The management of the legal aid budget, as well as data collection (as

[31] Article 2
[32] Articles 48 and 179
[33] Article 48
[34] Article 3(3)(g)-(h)

far as legal aid in civil law issues and pre-procedural administrative matters, and legal aid provided for crime victims are concerned) will be carried out in a unified manner by the Legal Aid Service. Eligibility criteria have become more precise and also broader, and a differentiated means-test is applied which will also extend benefits to person who live somewhat above the poverty level.

However, some fundamental problems of the system remain unsolved.

1. Criminal defence is not integrated into the legal aid system

The fact that criminal defence is not integrated into the system, and defence counsels remain to be appointed by the acting authority, causes problems on a number of levels.

First, the legal aid budget remains fragmented (even within the criminal system itself), as the fees to be paid to defence counsels are included in the budget of the investigating authority, the prosecution and the judiciary, so it is close to impossible to estimate the exact amount spent on legal aid as a whole per year, which is a severe obstacle to well-grounded planning.

Second, as a result of the reform, in the civil and administrative field, the provision of legal has (and after January 2008 will) come closer to the market-based system, where clients can select lawyers. This provides a form of quality control both on an individual and a general systemic level, which was completely missing from the system before the reform. As opposed to this, in criminal matters, defence counsels are still appointed by the acting authorities, selection by the client is not possible.

Individual quality assurance could – theoretically – be provided by the bar associations indirectly, through their disciplinary authorisations (if a dissatisfied client files a complaint against the negligent lawyer). However, in a blatant contradiction to the results of the empirical studies proving the poor performance of ex officio appointed counsels, the number of complaints against them is very low.

As to general quality assurance, it has to be said that this function completely lacking from the criminal legal aid system. Neither the bar associations, nor the Ministry of Justice monitors whether the system as whole fulfils its role. Not even statistics are available regarding the number and outcome of cases where ex officio appointed lawyers provide defence.

2. Low hourly fees

In the criminal legal aid system and also in the system that operates in civil lawsuits at present, the participation of lawyers is mandatory. As it was outlined above, in the new system, legal aid providers participate on a voluntary basis.

At the same time, the hourly fees for legal aid providers are very low, around EUR 10. The restricted number of providers that can satisfy the needs of clients in pre- and extra-judicial proceedings, may not be sufficient once the new system is extended to legal aid in litigation.

Another problem arising from this is that the very low indigence threshold is unlikely to be changed due to budgetary reasons, as by keeping the means limits in effect at present, the need for providers can still be kept within a manageable scope. This however severely limits the outreach of the system's benefits.

3. The exclusion of representation in administrative cases

As it was outlined above, legal aid is available in the administrative field in the form of advice and the preparation of legal documents triggering an administrative procedure, however, once the procedure has started, the lawyer is not able to provide assistance in the framework of the legal aid system, so the indigent client will remain without qualified assistance (since obviously he/she is not able to pay for the lawyer, otherwise he/she would not be eligible for legal aid).

Despite this fact, according to the Ministerial Study,[35] due to the potential volume of cases, and the budgetary consequences thereof, legal aid will not be extended to representation in administrative proceedings, although in a lot of cases such proceedings severely impact the indigent client's subsistence (e.g. cases concerning social allowances and housing, the use of public utility services, and so on).

5. The role of research in overcoming problems

Reforming the criminal legal aid system

Since the legal aid reform did not concern the criminal field, in early 2004 the Hungarian Helsinki Committee (HHC) launched its Model Legal Aid Board project. The project is supported by the MATRA program of the Dutch Ministry of Foreign Affairs and is carried out in partnership with the Netherlands Helsinki Committee. The project's key goal was to create an input for future legislation aiming at the comprehensive reform of the existing and highly dysfunctional system of legal aid in criminal matters and its replacement with a well-devised and efficient structure, tested in practice, guaranteeing effective legal assistance for indigent defendants. The main elements of the project are described below.

Legal defence provided for 120 indigent defendants: Between September 2004 and June 2007, based on a contract concluded with the HHC, private attorneys have provided free legal aid in 120 cases where ex officio appointment of a defence counsel would have otherwise been mandatory. The selection of the cases was based on an agreement concluded with the Budapest Police Headquarters. According to this agreement, the police organs designated therein, during a definite period, turned to the round-the-clock duty service of the HHC when otherwise they would have been obliged to appoint a lawyer ex officio. After being notified, the duty service approached one of the lawyers in the list of counsels in order to let her/him know about the fact of the assignment and the time of the interrogation. The lawyer thus could be present at the first interrogation of the suspect and could provide legal assistance from the very beginning of the procedure.

Model Legal Aid Board: The program is governed by a so-called Model Legal Aid Board. The Board consists of representatives of the Ministry of Justice, the Budapest Bar Association, the Hungarian Helsinki Committee and the academia. The main task of the Board is to monitor the lawyers' performance and approve their remuneration, based on the monthly report to be submitted by the attorneys. The Board also decides on questions of principal significance arising during the project's implementation.

Cooperation with the Dutch legal aid system: The HHC co-operates closely with the actors of the Dutch legal aid system. At the beginning of the first period of the project, the members of the Board paid a visit to the Netherlands in order to become familiar with the Dutch system, which was envisaged to facilitate the elaboration of the project's rules. Later on, Dutch experts paid two visits to Hungary to provide advice with regard to matters arising in the course of the project.

Consultations: Participation of representatives of the Ministry of Justice and the Budapest Bar Association in the Board as well as the close cooperation with the police, guarantee that the key stakeholders of the system are involved in the project. Furthermore, a mid-term evaluation seminar and a closing conference was organized for representatives of all relevant stakeholders, where participants had the opportunity to share experience and opinions related to individual cases as well as the project as a whole.

Closing of the project: The project will be concluded in the summer of 2007. A comprehensive report has been prepared, detailing experience concerning cases that had been dealt with and the operation of the Model Legal Aid Board. Based on the report, recommendations for legislation are in the progress of being formulated concerning possible reform and amendments of the mechanism of legal aid in criminal cases.

[35] p. 12.

Outcome of the project: Based on the experiences of the project, the HHC provided an analysis of the structural deficiencies of the present system and came up with possible solutions for the problems. The main recommendation was that to the extent possible, criminal legal aid should be integrated in the legal aid service system set up by the LAL. This means that the function of appointing ex officio counsels ought to be performed by the legal aid offices, and the fees should also be paid by the offices. This way integrated statistics could be produced containing all legal aid costs, the number of all the cases where legal aid was provided and also the outcome of the cases.

The HHC also came up with a scheme for general quality control, in which the monitoring of the quality of the work of ex officio appointed lawyers could be performed by a two-level system.

The first level would be a more formal type of control, which does not require extensive knowledge of the field. This would be based on monitoring whether the ex officio appointed counsel participated in all (or most) of the procedural acts (interrogations, confrontations, presentation of the case files, court hearings) where his/her presence was possible. This type of control could be performed by the employees of the legal aid service.

The second level of control would be performed by a professional board operated by the Bar Association and consisting of attorneys. It would be possible that regular (e.g. annual) inspections could be performed in the following manner: both the attorney and the monitoring board could choose a set number of cases, where the attorney acted as an ex officio appointed defense counsel. The evaluation of the given lawyer's performance would be based on the inspection of the files of these cases. If the board regards the performance unsatisfactory, the attorney would be removed from the list of lawyers who can be appointed.

The disciplinary function of the Bar Association would remain as a third (extraordinary) level for cases of outstanding negligence.

This solution, which respects the principle of the independence of lawyers, could also be applied for civil and administrative cases, where at present only a kind of "informal" quality control is performed (namely that employees of the legal aid offices recommend certain legal aid providers, about whom they know that they would provide quality services to the indigent client).

The reaction of the most important stakeholders to the proposals was quite positive. In a study published in the legal journal *Fundamentum*, János Bánáti (President of the Hungarian Bar Association) summarized his thoughts on how the ex officio appointment system ought to be reformed. In doing so, he greatly relied on the main concept of the MLAB Program, namely that the appointment of defence counsels should be performed by an organ which is independent from the investigating authority, and that all functions related to the operation of the legal aid system should be handled centrally by a single organization. Also in harmony with HHC's ideas, he proposed that the Legal Aid Service of the Ministry of Justice should be vested with this task.[36]

The plan is supported by the Ministry of Justice as well. In the Ministerial Study, the following is put forth: "The Ministry – as well as the majority of the legal profession – agrees that the services provided by ex officio appointed defence counsels should in the long run be integrated into the general legal aid system, since this institution provides a sufficient basis for organizing defence related tasks in a more modern and efficient manner."[37]

<u>Overcoming problems of the civil and administrative system</u>

The problem of low hourly fees, the restricted scope of legal aid resulting from the very low indigence threshold, and the reluctance of legislators to extend legal aid to representation in administrative cases could be solved if the system of own contribution was introduced into the Hungarian scheme.

[36] Fórum az előzetes letartóztatásról és a kirendelt védői rendszerről (Forum on pre-trial detention and the system of ex officio appointment in criminal cases) In: *Fundamentum* 2/2005.
[37] p. 13.

Similar to the Dutch model, a scale could be set up on the basis of the amount of own contribution a legal aid client ought to pay when using the system's services. This would increase the amounts that could be paid to legal aid providers and would therefore solve the problem stemming from the insufficient number of providers. Furthermore, it would increase the circle of eligible clients extending the beneficial effects of legal aid to a wider audience.

The additional financial resources channelled into the system through own contributions could also raise the financial barrier that is the biggest obstacle for extending the legal aid scheme to representation in administrative proceedings.

In order to devise an appropriate contribution-scale, it seems inevitable to carry out a thorough impact assessment based on a large-scale statistical analysis of the number of cases falling in and out of the scope of legal aid at present, actual and potential clients and their financial capacity as well as of the demands of legal aid providers and whether these can be balanced with the available resources.

Since due to different reasons – such as an enormous workload and insufficient staff numbers – the Ministry of Justice is unlikely to carry out such a research in the near future, this task may also have to be undertaken by civil organisations committed to the idea of efficient legal aid to a wide circle of people.