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THE RIGHT TO DEFENCE: CONCEPTUAL ISSUES WITH REGARDS TO THE NEW HUNGARIAN CRIMINAL PROCEDURE ACT UNDER DEVELOPMENT

According to the actual Hungarian Code of Criminal Procedure (Act XIX of 1998 – A büntetőeljárásról szóló törvйny, hereinafter referred to as the "Be."), the *principle of shared functions* applies to criminal proceedings, i.e. prosecution, defence and sentencing shall be separate functions [Article 1 Be.]. In this three-pole scheme, the subjects acting in the capacity of prosecution and the subjects acting in the capacity of defence are equal in terms of fulfilling their assignments. However, there is a restraint: when the proceeding comes to the stage of investigation and indictment, the prosecution becomes predominant and the defence is left exposed and vulnerable. With consideration of the latter (amongst other factors), the *right to defence* is a *core principle applicable across the entire proceeding* not only in Hungarian criminal proceedings but in almost all criminal proceedings worldwide to be conducted by rule of law. In Hungary, the right to defence is declared in the *Fundamental Law* ["The defendant shall have the right to defence across all stages of the criminal proceeding." – first sentence in Article XXVIII (3) of the Fundamental Law] and elaborated in somewhat more details in the *Be*. Provisions of the Be. show the *two sides of the right to defence.* What this two-sidedness means is that while the right to defence is an entitlement for the defendant, the provision of such defence to the defendant represents an obligation for the authorities acting in the criminal proceeding [25/1991. (V.18.) Decision of the Constitutional Court]. From the defendant's perspective: normally, the defendant is given the possibility to decide if they prefer *personal defence* (also called defence as to the merits) or, to make the defence more efficient, *hire defence counsel* (called formal defence) [first sentence in Article 5 (3) Be.]. However, in some criminal proceedings, the mandatory presence of defence counsel in the proceeding is set forth in the law (i.e. proceedings subject to mandatory defence) [Article 5 (4), 46 Be.]. For the latter, though, the law allows some "freedom" to the defendant by letting them choose between giving a power of attorney to a defence counsel of their choice or accepting the appointed defence counsel.

Even though the *concept of the new Hungarian Criminal Procedure Act* [1, p. 9, 32] under development follows the principle of equality of arms and thus intends, noticeably, to enhance the efficiency of defence counsel in the investigation stage, let us not forget that, given the current scheme and current legal regulatory framework, the aforementioned issue is not the only issue to be considered for the matter of right of defence. The following issues need further consideration:

(1) In Hungary, there have been multiple researches made on the *operation and efficiency of appointed defence counsels as an institution.* These researches concluded that the *institution of appointed defence counsel has lost its intended purpose* – most of the defence counsels merely attend the trials and do no more than just exercising their right to remedy. It is something that definitely *needs to be changed* by the legislator *upon codification of the new Criminal Procedure Act.* One of the potential ways to accomplish this goal is to introduce a new institution of appointed defence counsel completely independent of the current appointing party (i.e. the criminal authority). It is called *public defender*. It has been used in numerous countries [2, p. 176] and could potentially rectify several currently known dysfunctionalities. Alternatively, the following options could be used based on the discussions across various professional conferences: (a) the defendant is given the freedom of choosing the appointed defence counsel for themselves; or (b) the appointment of defence counsel is made by means of draws [3, p. 23]. However, I believe that these alternatives involve some risks (at least from the perspective of lawyers available for selection/draw as defence counsel) as certain defence counsels could be selected by the defendants or the machine disproportionately more frequently than others.

(2) As far as *hired defence counsels* are concerned, it is obvious and unambiguous that the hired defence counsel is obligated to attend the trial in criminal proceedings subject to mandatory defence [Article 242 (1) (b) Be.]. However, there is an important question: if the proceeding is *not subject to mandatory defence* (thus the defence counsel is not obligated to attend the trial), can the defence counsel *just be notified or also summoned to attend the trial or public session*? According to the current regulatory framework, the defence counsel can be notified (but not summoned) to attend the trial or public session [Article 279 (1), 362 (1), 364 (1) Be.]. Nevertheless, the *defence counsel might fail to attend the trial despite of the notification sent to them*. In such cases, the defence counsel may not be "obligated" (even by disciplinary penalty) to attend the trial or public session [Article 69 (1a), 161 (1) Be.; 3, p. 34]. The *codification of the new Criminal Procedure Act could use the legal position as follows:* if the defence counsel must be summoned to attend a public session at third instance in all cases (i.e. whether or not the proceeding is subject to mandatory defence) [Article 393 (3) Be.], then why could this practice of mandatory summoning not be extended to all court proceedings as a general rule, including proceedings at first and second instance? This question now leads us to the next relevant issue:

(3) Except for two cases, *Hungarian criminal trials have become "live prosecution" trials* [Article 542 (1), 362 (2) Be.; 3, p. 15-16]. In light of the principle of equality of arms and the principle of shared functions, it would be reasonable to make them "*live defence counsel*" trials as well (i.e. defence counsel representation and attendance shall be made mandatory in at least such court proceeding types where the presence of prosecution is mandatory). It could improve the efficiency of defence provided to defendants [3, p. 17].

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THE REGULATION OF JUSTIFIABLE DEFENCE IN HUNGARY

Civilians are not allowed to take the law into their own hands, only public officials have the right of law enforcement. Nevertheless, protection by authorities is not possible in all circumstances, the state has therefore to ensure the legal possibility for individuals to protect their own person and property. This is the main reason why justifiable defence has to be provided by law [1, p. 76]. Thus, this law institute is ruled in the Hungarian Criminal Code (hereinafter called: CC), too.

In the criminal law doctrine, the questions of justifiable defence as a ground of justification is subjected to substantive criminal law. A ground of justification presumes a concrete circumstance that makes an act or omission lawful and justifies the conduct, which however fulfils the statutory elements of a certain criminal offence. In this case the violation of the norm is merely formal and a crime, lacking unlawfulness, is not realized. In the CC only three grounds of justification are provided for: justifiable defence (Article 22), necessity (Article 23) and permission by law (Article 24). This paper has the aim to present only the main characteristics of the regulation of justifiable defence.

I. Legal Background

The new Hungarian Fundamental Law (has been in force since January 2012) recognizes the right of self-defense as a basic right. The Article V is as follows:

Everyone shall have the right to repel any unlawful attack against his or her person and/or property, or one that poses a direct threat to the same, as provided for by an act.

It has to be stressed that, according to this regulation, only the interests related to the person of the defender are protected by the constitution (self-defence). The CC provides wider protection – e. g. public interests and another