

# IMPACT OF THE EUROPEAN LAW ON THE CHANGING CORRELATION BETWEEN ATTORNEY'S INDEPENDENCE AND THE RIGHT TO FAIR PROCESS

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## 1. Functional Independence of Attorneys<sup>1</sup>

The function of fundamental legal protection of attorneyship is only realized according to the requirements of fair process – similarly to public trust realized in attorney's contribution to jurisdiction – when the attorney taking part in jurisdictional procedure is independent. This requirement about functional independence referring to the jurisdictional activity and proceedings of the attorney settles the constitutional frames for legislation. While structural independence can mainly be interpreted as independence from the state and its bodies, within the scope of functional independence we can distinguish independence from the state and from any other undue influence.

The requirement to be independent from the state was formulated during the political debates of the 19<sup>th</sup> century, and was about the protection against the intervention and its possibilities of authorities. This means independence from all the bodies of the states including the authoritative bodies of the municipalities. Except for the laws and the norms of general scope of attorneys' self-governments (chamber, etc.), any other type of intervention that can threaten the independence of the attorney is prohibited<sup>2</sup>. For practicing the rights of fair process, being independent from the state and its administrative authorities is a basic condition for the attorney who takes part in jurisdictional procedure. Defence by an attorney does not meet the requirements of the right to fair process if the proceeding attorney is not independent from the state or any of its bodies. The Constitutional Court handles the independence of attorneys from the state as a historical axiom when it talks consequently about the traditionally formulated independence.<sup>3</sup>

Unlike structural independence, the requirements of functional independence not only involves the requirement of being independent from the state but during his contribution the attorney has to be independent from every influence that is suitable for distracting the attorney from his activities related to his oath and his professional convictions.

On the one hand, this means that the attorney taking part in jurisdictional procedure must be exempted from „any relationship of subordination or influence exercised by a third party for achieving its own interests”<sup>4</sup>, on the other hand, the result of the procedure cannot affect the attorney in person either directly or indirectly, moreover, he cannot be directly interested in the result of the procedure, in default whereof the attorney's

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<sup>1</sup> See further, Sulyok Tamás: Az ügyvédi függetlenség és a tisztességes eljáráshoz való jog viszonyának néhány kérdése [Some Issues of the Relation between the Attorney's Independence and the Right to Fair Process]. *Bírák Lapja* [Bulletin of Judges], Vol. XXII (2012) No. 1-2.

<sup>2</sup> Cf., Redeker, Konrad: Vereinheitlichung der öffentlichen-rechtlichen Gerichtsbarkeit. *Neue Juristische Wochenschrift*, 2004. Issue 13.

<sup>3</sup> 428/B/1998 ABH (428/B/1998 Resolution of the Hungarian Constitutional Court), III.4, and 907/B/2004 ABH (907/B/2004 Resolution of the Hungarian Constitutional Court), III.1.

<sup>4</sup> Schiller, Kaspar: Ein Gesetz mit 125 Jahrgige Verspatung. *Zeitschrift für Schweizerisches Recht*, 1998/1, 71.



contribution cannot be regarded as respectable. In the scope of functional independence of the attorney, the aspect of independence was also historically formulated which presented the attorney the exemption of the right to command labour laws as a constitutional requirement.

The Hungarian legal thinking regards attorneys' existential independence as well as they are and shall be functioning as a freelancer as a constitutional requirement. The Constitutional Court highlighted the following points: „the distinctive characteristic feature of an attorney's profession is that it is such a private activity as an intellectual freelancer, which in the scope of the operation of public authorities on the score of guarantee separates from public authorities as a definite private activity.”<sup>5</sup>

In the Hungarian law, this principle is ceaselessly realized, perhaps in a bit exaggerated way. By exaggerated realization we mean that there is no constitutional obstacle to prohibit the attorney to have an employment relationship with his own office and to utilize the specific social advantages of employment relationship. The present law generally prohibits attorneys to create an employment relationship, while these extremely strict regulations cannot be justified by constitutional reasons.<sup>6</sup>

In Switzerland or in Germany the question of the relations of the so-called *Syndicusanwalt*<sup>7</sup> to attorneyship was the focal point of technical debates.

Not only the existential vulnerability incorporated within the scope of the right of labour law commands or directs business interest, e.g. operating as a managing director of an Ltd. infringes the independence of the attorney and as a consequence the right to fair process, but such a tariff agreement with the client that makes the attorney interested in the result of the case.

According to the statement of the German Constitutional Court: „the attorney, as an authority of jurisdiction, cannot lower his own dignity to a level so that the clients handle him as a business partner.”<sup>8</sup>

The independence is restricted, more precisely excluded if the attorney is directly and personally affected in the result of the case represented by him, consequently, an objective approach to the case cannot be expected from him.

According to the viewpoint of *Sulyok Tamás*,<sup>9</sup> the requirements of functional independence are basically violated by the following circumstances:

- ❖ The attorney's dependence from the state, municipality or any other similar authority.
- ❖ The existence of employment relationship or relationships result in direct business dependency.
- ❖ Direct or indirect interest of the attorney regarding the result of the case.

The attorney can fulfil the function of fundamental legal protection suitable to the requirements of fair process in jurisdiction if the whole process of the attorney is objective and deserves the trust of public and the client, thus, the attorney's legal situation can only

<sup>5</sup> 22/1994 ABH (22/1994 Resolution of the Hungarian Constitutional Court), II.2

<sup>6</sup> Sulyok: *op. cit.*

<sup>7</sup> It refers to an attorney employed by companies with employment relationship.

<sup>8</sup> BverfG, 1 BvR 2576/04 vom 12.12.2006.

<sup>9</sup> Cf. Sulyok: *op. cit.*

meet the requirements of fair process if there are no facts excluding or restricting the attorney's independence which threaten public security and its maintenance.

To filter the aforementioned facts, measures of incompatibility are needed, which are regulated in detail by the attorney law of Hungary (Act XI of 1998 on attorneys).<sup>10</sup> As for the reasons of incompatibility, it is typical to distinguish absolute and relative reasons for incompatibility.

The Constitutional Court summarizes the situations in which the attorney's representation is incompatible with the principle of fair process in the concept of the so-called unprincipled representation. The scope of the concept of unprincipled representation seemingly crosses the borders defined by the itemized regulations of the attorney's incompatibility. The representation is unprincipled if the attorney is not independent.

The right to fair process is a requirement viewed as an absolute right.<sup>11</sup> Relative incompatibility rights defined in the Act of Prosecution Authority are non-exhaustive, but they are exclusively listed in the Act besides the definite relative incompatibility rights.

We have to examine how the regulation in effect meets the defence requirements of the attorney's functional independence which has been settled by the practice of the Constitutional Court.

## 2. The Problem of the Correlations of the Legal Regulations Referring to the Appointment of Defence Attorney

The Hungarian Code of Criminal Procedure declares that the right to appoint the defence attorney is the task of the proceeding authority or court. The main findings of the

<sup>10</sup> The Act XI of 1998 on attorneys:

Art. 6.

(1) The attorney

*a)* shall not have labour relation, service relation or any other type of relation that mean work obligation; shall not be a civil servant, public-sector employee, notary and full-time mayor

*b)* shall not perform entrepreneurial activities with personal contribution or with unlimited financial liability.

(2) The following activities do not belong to the application of the ban in Art (1)

*a)* scientific, artistic and sport activities,

*b)* tutorial activities,

*c)* activities as experts except for justice,

*d)* arbitration activities,

*e)* relation as a Member of Parliament, Member of European Parliament, representative of a municipality,

*f)* membership of management board and supervisory committee without labour relation,

*g)* membership and office holder of board of trustees,

*h)* service relation of voluntary reserve officer.

(3) The attorney is obliged to report the cause of incompatibility to the bar within 15 days of its appearance.

Art 7. The attorney shall not act for 2 years before the court, the prosecutor's office or the investigatory authority of which s/he was the member as a judge, prosecutor or investigatory power before the membership of the Bar Association.

<sup>11</sup> According to the practice of the Constitutional Court 'fair trial' is not simply one of the requirements of features demanded by a court or the procedure for instance: fair trial, beyond the constitutional requirements includes the fulfilment of other guarantees concerning especially the criminal and the procedural law. The articles on procedural guarantees of the European Convention on Human Rights also professes the principle of 'fair trial'.

researches about appointed defence attorneys' activities justify that the appointed defence attorneys perform far less work as regards quantity and less effective work than their authorized colleagues, furthermore, in many cases the appointments by the police affects a limited group of attorneys.<sup>12</sup> Generally speaking, the regulation about appointing a defence attorney does not favour the realization of the right to fair process and violates the constitutional requirements of the attorney's independence. It is worth noting that the Constitutional Court has examined the procedure of appointing attorneys in several resolutions; however, it did not find that the appointing procedure violates the constitution.<sup>13</sup>

The Constitutional Court in its 763/B/2001 ABH (763/B/2001 Resolution of the Hungarian Constitutional Court) derived the procedure of appointing not from the right to defence or from the right to fair process, but from Art. 70/A (3) of the Constitution, according to which the attorney meets the requirements of the realization of legal equality and provides counsel via appointment. The state cannot exclusively meet these requirements of the appointment procedure accomplished by the authority. It is difficult to tone the requirements about the independence of attorneys with the fact that the defence attorney is appointed by the authority and the authority is not bound by any regulations as regards which attorney to appoint, concerning what aspects.

The circumstances are aggravated as during the investigations the function of appointment (selection) of the defence attorney is in the hand of the investigative authorities, namely, in a body which is not interested in the effective work of the attorney on the basis of its procedural situation, thus, „it is completely incomprehensible how it is possible that the prosecution body appoints the defence.”<sup>14</sup> This legal situation violates the requirements of the attorney's independence from more aspects and as a consequence, the right to fair process. In accordance with the content of the 365/B/2000 ABH (365/B/2000 Resolution of the Hungarian Constitutional Court), the attorney's representation meets the constitutional requirements of independence, even if it avoids the resemblance of the violation of independence or unprincipled advocacy.

### 3. International Overview on the Amendment of the Code of Criminal Procedure

The accession to the Council of Europe made it necessary for Hungary to apply further amendments in order to harmonize the Hungarian legal regulation and practice with the European convention on the protection of fundamental human rights and freedoms and its complementary Protocols (hereinafter: Convention).<sup>15</sup> These amendments were introduced by the Act XCII of 1994 on the amendment of the Code of Criminal Procedure.

<sup>12</sup> Cf. Fenyvesi Csaba: *A védőügyvéd: a védő büntető eljárási szerepéről és jogállási szabályairól* [The Defence Attorney: On the Rules of Role and Status in Criminal Procedure]. Budapest-Pécs, Dialóg Campus, 2002.

<sup>13</sup> 763/B/2001 ABH (763/B/2001 Resolution of the Hungarian Constitutional Court).

<sup>14</sup> Kádár András Kristóf: A tisztességes eljáráshoz és a védelemhez való jog 20 éve Magyarországon [20 Years of the Right to Fair Process and Defence in Hungary]. *Fundamentum*, Vol. 4 (2009) 84.

<sup>15</sup> The Convention entered into force in Hungary on 5 November 1992.

In accordance with Art 6.(3) c), anyone charged with a criminal offence has the right to get an officially appointed defence attorney free of charge if the interest of the justice demands that and there are no means for financing a defence attorney.

In the regulation which had been in effect prior to the amendment of the Code of Criminal Procedure in 1989, the defence attorney had to be appointed to take part in the criminal procedure by taking the interest of the justice into consideration, so generally speaking it used to be irrelevant whether the accused did not appoint an attorney because of financial reasons or because of personal choice. Naturally, in most of the cases the accused did not authorize an attorney because s/he could not afford that due to his/her financial conditions.

The necessity appeared during the creation of the new Code of Criminal Procedure according to which the court, the prosecutor or the investigatory authority has to appoint a defence attorney even if the defence is not compulsory but the accused applies for it, as on the basis of his/her financial circumstances s/he cannot provide proper defence.

The Hungarian legal framework became harmonized with the Convention, but as for *Kádár András Kristóf*, the Hungarian practice of the defence of the needy accused does not meet the expectations set forth by Art 6.(3) c) of the European Court of Human Rights. In his opinion, the *Artico v. Italy* case<sup>16</sup> can be mentioned as an example for this, in which it was noted that the state, barely with an appointment, does not fulfil the obligations prescribed in the Convention, as the activity of the defence attorney has to be effective.

On the basis of this viewpoint in the case of *Kamasinski v. Austria*,<sup>17</sup> as regards the European Court of Human Rights, the state cannot be held liable for all the shortages of the appointed defence attorney's activities, in the meantime, it became obvious that if the appointed defence attorney does not accomplish his duties properly which is obviously sensible even by the authorities, or if his failures are reported to the authorities, the liability of the state can be stated. The system of appointment mechanisms is in accordance with the requirements of the Convention if the appointed defence attorneys' level of service provided to the entitled suits the minimum level of expectations.

The appointed defence attorneys' level of professional service is not the very question of the 19<sup>th</sup> century. This fact is supported by the findings of the Prosecution Service of the Capital City of Hungary which conducted a random research with one hundred and thirty cases with a single accused person in 1988.<sup>18</sup> From the one hundred and thirty cases, seventy were performed with appointing. From the seventy appointed defence attorneys fifty-five attorneys did nothing at all during the investigation, and from the remaining fifteen attorneys, eleven only took part in the exposition of the documentation. From them six attorneys participated in the exposition of the documentation at the same time as the accused, and only one in the preceding interrogation of the accused. On the contrary, in case of the sixty cases of authorized defence attorneys nearly four-fifth of the attorneys took part in the interrogations and more than one-third also made different motions.

As far as the research conducted by the Hungarian Helsinki Committee (HHC) in 2003 is concerned, based on the questionnaires of five hundred people in pre-trial detention it

<sup>16</sup> *Artico v. Italy*, Judgment of the European Court of Human Rights, 13 May 1980, Series A, No. 37.

<sup>17</sup> *Kamasinski v. Austria*, Judgment of the European Court of Human Rights, 19 December 1989, Series A, no. 168.

<sup>18</sup> Cf. Tóth Mihály: Nyomozás és védelem, a fal is lehet üveg [Investigation and Defence. The Wall Can Be made of Glass]. *Magyar Jog*, 1989. No. 3, 350-355.

can be seen that while 40% of the authorized defence attorneys got in touch with their clients at least until the first interrogation, this proportion in case of appointed defence attorneys was merely 24%. There was a client who was not even visited by his appointed defence attorney during the one-year-long period of pre-trial detention.

Other reasons beyond the attorneys' responsibilities may cause to end up with such a ratio, for example if the notion about appointment is delivered with delay by the appointing authority.<sup>19</sup> If the appointing authority, according to the current practice, sends the notices on fax, the interrogations at nights and at the weekends will still likely be conducted without defence as it cannot be expected from a defence attorney even on their day of duty to be in their offices 24-hour long. This questionnaire highlighted other weaknesses of the operation of the system of appointed defence attorneys concerning the attorneys' activities. More participants claimed that their attorneys did not say a single word during the interrogation or the trial.

The basis of the problem is thought to derive from the fact that in accordance with the regulation in effect the fee of an appointed defence attorney is 3 000 HUF (+VAT), while for consultation with the accused in custody the attorney is entitled to get the half of this sum. No fee is provided for editing motions or for keeping contact with the paroled accused. The question of infrastructure is an additional problem. In many cases the penitentiary institution is more hundred kilometres away from the attorney's seat.<sup>20</sup> Concerning the professionals' aspect, the primary reason why the majority of the attorneys do not take considerable efforts in the investigatory phase (when the presence of the defence attorney is not compulsory) is the remuneration which is far beyond the market price, ignoring that the investigation is a key factor as regards determining criminal liability, and deficiencies during the investigatory phase are very difficult to resolve later.

Referring to Kádár András Kristóf to ensure an effective defence system for those in need, four fundamental functions must be provided.

- ❖ provision of appointed defence attorneys in such cases when it is compulsory or otherwise necessary (appointing function);
- ❖ controlling the quality of the appointed attorneys' activities (individual quality assurance);
- ❖ monitoring and assessment of the whole system (general quality assurance);
- ❖ drafting and implementation of the budget of the system (budgeting function).

The researches, which are repeatedly mentioned by technical literature as 'the problems of attorneys settled at the police', refer to the real violation of the attorney's independence. Kádár András Kristóf refers to the researches of the National Police Headquarters (ORFK), according to which in the capital city 12 regional police headquarters regularly appoint the same attorneys. The risks, which can emerge from the aforementioned practice is that these attorneys, besides police appointments, are not involved in any other activities, their financial existence is based on that, consequently they are getting more and more dependent on these police appointments. The latter dependency therefore can result in real dependency on investigative authorities and as a consequence not only the pretence of

<sup>19</sup> Kádár András Kristóf: A vétkesség védelme: sérelmes bánásmód és védői tevékenység az előzetes letartóztatásban lévő terhelték ellen folyó eljárásokban [The Defence of Culpability: Prejudicial Attitude and the Defence Attorneys' Activity in Criminal Procedures of the Accused in Custody]. Budapest, Magyar Helsinki Bizottság [Hungarian Helsinki Committee], 2004. 124-127.

<sup>20</sup> Cf. Bánáti János: Szabadságkorlátozások [Restricted Freedoms]. *Fundamentum*, 2005. No. 2, 50-51.

independence is compromised but even the independence itself can vanish. That is the reason why the law of appointing procedure needs to be re-regulated which would delegate the task of appointment for an independent body.

During the research of the National Police Headquarters, the interviewed bodies formed the general opinion that 'the investigatory bodies prefer the appointment of those attorneys on whose presence and undertaking they can always rely on under every circumstance.'<sup>21</sup> If the investigatory bodies really appointed those attorneys who appear in the majority of the cases, the figures would not be so unfavourable.

According to the research conducted by the HHC in 2003, some accused had the impression that the appointed attorneys „in reality work for the investigatory bodies which appointed them and only interested in having their clients make a confession and a plea agreement.”<sup>22</sup>

We are definitely talking about such a structural problem of which solution would need a radical reform on the whole system, namely, it requires to pass over the responsibility of appointing function to another body in order to achieve that the investigatory body and the prosecution authority could only note the necessity of appointing in cases in progress before them, while the actual appointing, to be concrete, the selection and notification of the appointed defence attorney could be conducted by such an authority which is completely uninterested in the procedure.

The international examples are quite varied: in the United Kingdom a legal service – which is completely independent from the investigative authority – registers the appointable defence attorneys; the investigative authority is obliged to inform the accused about the defence attorneys who can be appointed for him by handing over a list to choose from them. Within the frame of the aforementioned service, 24 committees and nearly 300 local appointed defence attorneys operate. The committees handle two types of registers; one of them is the so-called *service record*, on which all the appointed defence attorneys can be found, the other is the *sequence record*, which contains the available defence attorneys at different times. There is a similar situation in Canada; in more states the court decides about the appointment of the defence attorneys in the phase of investigation. This rule prevails even in (in our wider region) Czech Republic, Germany, Poland and Slovakia, where regardless the seriousness of the criminal offences the court appoints a defence attorney for the accused if the defence is compulsory, or the accused does not have an authorized defence attorney, but he would like to have one.

#### 4. The Attorney's Direct and Indirect Personal Concern during Judicial Assistance

The attorney's direct personal interest or concern in the outcome of the given case is due when the attorney as a natural person or as a legal person represented by her/him in accordance with the regulation of statutory representation is directly affected by the outcome of the case. This is the situation in such a case when the attorney himself or the legal person represented by her/him in accordance with the regulation of statutory representation is the client. Here, the question is how the right to fair process and the

<sup>21</sup> Cf. Bánáti: *op. cit.*

<sup>22</sup> Cf., Kádár: A vétkesség védelme...

requirements for the attorney to be independent can be compatible with the case if the attorney simultaneously acts in the aforementioned cases in jurisdiction as a legal person and as a client in such cases when legal counselling is obligatory.

On the basis of Hungarian civil procedures and administrative legislation, the direct personal concern of attorneys participating in their own cases does not hinder them to proceed as attorneys even in case of obligatory legal representation. With reference to this, the *Court Decree* (Bíróági Határozat – BH) 129/1995 must be emphasized which claims that in review procedures the party – even if s/he is an attorney – shall use the services of a legal representative.

The attorney's direct personal concern according to the European Law does not allow the proceedings before the European Court of Justice. Art. 19 of the Statute of that judicial body rules out the possibility for a party with direct concern in the given case to proceed as a legal representative in front of the European Court of Justice.

### **5. The Attorney's Indirect Personal Concern, Namely, the Limits of the Empowerment of the Client**

We can talk about the attorney's indirect personal concern in the outcome of a given case, when the attorney is not directly affected in the development of the case but he is not indifferent about the outcome of the case due to economic interests. This is especially the case in the case of attorneys' contingency fees, as in such cases the attorneys' work fee directly depends on whether the result of the case fulfilled the interests of the client or not. Such an attorney's commission referring to remuneration bears the features of a contracting agreement, hence, the attorney is entitled to get the fee in case of the realization of a given result. In most European states there is a law against the remuneration of attorneys concerning the results of the case (*pactum de quota litis*).

### **6. The Attorneys' Contingency Fee**

Hungary, along with the former socialist states, belongs to those states in which the law allows attorneys' contingency fees without restrictions. Western European states nearly without exception view the violation of the attorney's independence in such agreements. The German law considers it null and void due to its immorality.<sup>23</sup> The attorney practises his profession in return for compensation; consequently, the agreement between him and his client about the attorney's remuneration fundamentally affects his interest.

Generally, to main forms of tariff agreements relating to the results of the activities of attorneys are known between the attorney and the client. The aforementioned one (*pactum de quota litis*) with the expression in English speaking territories (*no win – no fee*) and the other widespread form of contingency fees (*pactum de palmario*) in English (*no win - less fee*). The two types of remuneration differ from each other on the basis whether the attorney's remuneration completely depends on the outcome of the given case, or the attorney can also claim a kind of compensation if his proceedings on the client's point of view were not successful, but in case of success he is entitled to receive a higher fee. The fundamental difference between these two types of tariff agreements is that according to the *no win – no*

<sup>23</sup> BverfG, 1 BvR 2576/04 vom 12.12.2006.

*fee* type, the attorney has a share from the result of the case achieved by the client, but in case of failure the attorney does not receive any remuneration. In case of *no win - less fee*, the attorney can obtain bonus and higher remuneration on the basis of successful proceedings, while regarding failure he is entitled to be remunerated to a limited extent.

The contingency fee agreements mean such an umbrella term within which a wide range of agreements can be made and these agreements are not judged in a similar way in close connection with the attorney's independence.<sup>24</sup>

In Germany any form of contingency charging schemes is prohibited,<sup>25</sup> the basic reasons of which are described by the principle of the attorney's independence; the detailed interpretation of the German Constitutional Court refers to remuneration based on results as a possible risk evoking conflict of interests, including the agreement on sharing the results. With such an agreement the attorney contributes to create a kind of financial interest of his own.

The *Attorneys' Code of Ethics of the European Union* directly prohibits contingency fee agreements based on *no win - no fee* form, which ultimately means that while providing legal counselling services beyond borders the application of *no win - no fee* form is prohibited.<sup>26</sup> In Hungary and generally in the Central and Eastern European countries the two principles, the two bodies of law are not separated sharply from each other and that is why it does not have any special legal importance. The laws about attorneys in the Central and Eastern European countries introduced 'a model for widely result-oriented tariff schemes for attorneys' after the political transition.<sup>27</sup> Intrinsically, the Hungarian law of attorneys does not contain any bonding procedures about the attorneys' remuneration charging. The Czech law is a bit less concessive, although, it is familiar with both legal institutions, by introducing a general clause and a threshold value; the law means a less liberal regulation than the current Hungarian regulation. As for this general clause, the agreements on the attorneys' fee have to be equitable and proportionate, namely, an agreement about a remuneration including more than 25% of the value of the subject of the case is considered null and void.

According to Sulyok Tamás, a regulation which allows attorneys to agree on receiving a financial share in case of a successful result without restrictions is contradictory to the provision of the requirements of fair process. It is also remarkable that the Hungarian legislation does not contain any regulation in case of the attorney's indirect personal concern and in case of any other concerns, namely, the Hungarian legislator has failed to elaborate besides the mere mentioning of the principle of the attorney's independence and the legal regulation of some incompatibilities the details of the attorneys' functional independence.

In contrast with the attorney's theoretical independence, in practice the attorney can proceed in his own case and can make contingency fee agreements without restrictions due to which he will become financially interested in the result of the case. This fact means a direct threat to the attorney's independence and on its basis to the right to realize fair process.

<sup>24</sup> The German terminology for attorney's organization suggests using remuneration for attorneys based on success instead of contingency charging.

<sup>25</sup> BverfG 1 BvR 2576/04 vom 12.12.2006

<sup>26</sup> Last amendment of the Attorneys' Code of Ethics of the European Union adopted in 6 December 2002.

<sup>27</sup> Cf. Ros, Mirko: *Der Erfolg und das Honorar des Anwalts*. Dike Verlag, 2007. 40-48.

## 7. Alternations of the Function of Fundamental Legal Protection of Attorneyship in the Hungarian Constitution, the Fundamental Law of Hungary

The main function of the profession of attorneys' is to enforce the protection of the fundamental rights provided by the constitution, and within this scope especially the enforcement of the right to defence. The right to fair process is an unrestricted fundamental law against the judicial power of the state.<sup>28</sup> According to Art. 2 (1) of the Constitution, the focal point of the rule of law is the distinction between the branches of sovereign authorities. An essential requirement deriving from the principles of the attorney's independence is the complete organizational and functional separation of attorneyship from the authorities of the state. The Constitutional Court has defined the relationship of judicial power and jurisdiction as follows: „judicial power separates from legislative and executive power in the Hungarian parliamentary democracy, the manifestation of state authority that decides about the debated or violated rights with bonding force via the help of an authoritative body. Judicial power is therefore connected to the judicial independence, manifests in jurisdiction”<sup>29</sup>

Justice is more than judicial power, besides the judge, other participants are also incorporated in its process, thus, participation in penitentiary justice is the constitutional obligation of the prosecutors, as well. In accordance with Art 51 (1) of the Constitution, prosecutors deal with the protection of civil rights and the prosecution of criminal offences. Owing to law enforcement and prosecution, prosecutors' office with authorized licences is an independent participant of justice system.

As regards the role of defence attorney, the conditions of procedural laws, especially concerning the peculiar status of the defence attorney and legal the representative, the Constitutional Court stated the followings: „the profession of an attorney is mainly an activity which is connected to justice and law enforcement, contributing to justice as a defence attorney or as a legal representative is a constitutional requirement and the prescription of obligatory law enforcement regulations. The law enforcement status and conditions of the attorney is regulated by law, similarly to the rights and obligations of law enforcement.”<sup>30</sup>

The judicial power in a rule of law is realized in the scope of a procedure according to fair trial. According to the Constitutional Court, attorneyship is distinguished from all the other professions by the fact that it shall proceed legal representation and defence, therefore, it can be conceived as an institutional guarantee for justifying all the constitutional rights regulated in Art 12. of the Constitution, but it also has a direct connection with the right to defence as for Art. 57 (3) of the Constitution.

„Without professional legal counselling there is no hope for a success in opening and partaking a procedure, as a consequence the deprivation from the possibility to have legal representation by an attorney in front of a court may constitute an obstacle of the constitutional law provided by the Art 57 (1).”<sup>31</sup>

<sup>28</sup> Cf. Sulyok: *op. cit.*

<sup>29</sup> 53/1991 ABH (53/1991 Resolution of the Hungarian Constitutional Court).

<sup>30</sup> 22/1994 ABH (22/1994 Resolution of the Hungarian Constitutional Court)

<sup>31</sup> 8/2004 ABH (8/2004 Resolution of the Hungarian Constitutional Court).

This guaranteed function of fundamental legal protection of attorneyship as a bond of right to fair process receives constitutional defence. On the one hand, while gaining and practising the status of an attorney, attorneyship as regards the functions of fundamental legal protection of direct constitutional laws on the basis of Art 57 (3) of the Constitution and the indirect constitutional laws enlisted in Art. 12 of the Constitution, is entitled to receive fundamental legal protection. This means that the function of fundamental legal protection of attorneyship is the right to fair process demanded by the rule of law receives the defence according to Art. 8 (1) of the Constitution as a bond of justifying unrestrictable fundamental right which can only be restricted by Art 8 (2) of the Constitution.

As regards the legal regulation of attorneyship which derives from the defence of the fundamental legal protection concerning the right to the function of fundamental legal protection of attorneyship, there is a constitutional expectation, which ensures ceaseless public trust for attorneyship. For this, it is inevitable to elaborate such a regulation about the organization and operation of attorneyship that provides an adequate basis for the principles of fair proceedings.

#### *The attorney's independence as a bond of the right to fair process*

For strengthening this principle such an attorney organization and attorney status must be created by the legislator, which is suitable for maintaining public trust in the organization of attorneyship and attorneys as procedural institution.

#### *Structural independence of attorneyship*

The requirements of the structural independence of attorneyship besides the rights to fair process are closely connected to a conceptual principle of rule of law, namely, the principle of legal certainty. The Constitutional Court in its *22/1994 Resolution* also draws attention to the connection between the defence of the institutional attorney's independence and the principle of legal certainty: „guarantee reasons and the constitutional legal certainty make it necessary and justify, that the defence attorney's representative duties fulfilled as a private person, to ensure institutional counterbalance, institutional legal protection, institutional authority against the organized public authority.” The requirement of institutional independence deriving from the function of fundamental legal protection of attorneyship, measuring by the scale of legal certainty, is constitutionally ensured in regulation if the organization concerning the separation of attorneyship from the state as a whole and in parts is clear, according to its unequivocal effects, it is predictable and the regulation as a whole or as parts is adequate for the factual realization of the structural independence of attorneyship. Thus, the function of fundamental legal protection can be justified in reality.

The aforementioned Constitution is the part of our „constitutional history” now, as on 25 April 2011, the Fundamental Law came into effect, which has amended the previously mentioned references as follows: Art. 2 of the Constitution remained unaltered, the fundamental rights and their restrictions presented in Art. 8 of the Constitution are presented in Art. 17 of the Fundamental Law. The connection of the fundamental rights and their restrictions within Hungarian circumstances could seem the remains of the fundamental rights pragmatics of socialism, but they were specified concerning the defence

of the former constitutional fundamental rights.<sup>32</sup> Former Art. 57 and former Art. 58 were amended and now they are presented in Art. 21-22 and 23. in the Fundamental Law. Former Art. 57 inserted a grammatical change into the Fundamental Law, i.e.: instead of right process, it altered the expression to fair process. The newly inserted Art. 22 got into the text taking Art. 41 of the Charter of Fundamental Rights of the European Union as an example, also highlighting the right to public administration, with rule of law guarantees. Similarly, former Art. 58 was adapted to harmonize with the regulations of the European Union.

## Conclusion

The Act on Attorneys which was declared on 16 March 1998, still shows significant deficiencies as regards the remuneration of attorneys. There are several international examples for these, which could be adequately applied in the Hungarian legal system, however, similarly to other fields of life, the field of remuneration and financing is the most awkward area; thus, the regulation of this field is still there to be defined.

<sup>32</sup> Cf. Jakab András: *Az új alaptörvény keletkezése és gyakorlati következményei* [The Elaboration of the New Fundamental Law and its Practical Consequences]. Budapest, HVG-ORAC, 2011. 112-118.