



Standby Attorney

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Abstract

The Institute of Standby Attorneys is foreseen for the first time in Kosovo by the Criminal Procedure Code. It has been installed in the tendency to ensure the enactment of some procedural actions and the proceeding of the conduct of criminal proceedings in cases when the defendant renounces his right to defense in cases of mandatory defense. Within this article we will deal with the notion of the standby attorney, the authority and conditions for appointing the standby attorney, the importance and rights and obligations of the standby attorney, the common and distinctive issues of the standby attorney with other defense attorneys, and finally to present and elaborate the data regarding the appointment of standby attorney ex officio in Kosovo for the period January 2016 - June 2018. During the preparation of this article I used the legal, comparative, analytical and statistical method.

Keywords: Attorney; Standby; Authority; Court; Prosecutor.

Introduction

The standby attorney is the aid of the defendant who advises him during the execution of the criminal proceedings. He is engaged in criminal proceedings in cases when the defendant renounces his defense with advocates in cases where the defense is mandatory. The standby attorney is appointed by the body responsible for conducting the criminal procedure (police, state prosecutor and court). It manifests some features. These characteristics refer to the manner of its appointment, limited functioning authorizations and the possibility of changing his/her status. The importance of standby attorney, although with some broad lines, it mainly refers to facilitating the implementation of concrete criminal procedural actions, but also the proceeding and conducting of the entire criminal procedure. Within this article the rights and obligations of the standby attorney will also be treated as well as presenting the data on the appointment of defense counsel ex officio and the standby attorney from the bodies that conduct the criminal procedure for the period 2006 - June 2018. Also, part of this article is the elaboration of these data and the disclosure of the problems that characterize today the process of engagement of defense counsel ex officio in Kosovo, including giving some suggestions on how to overcome them.

1. The notion of the standby attorney

The right of the defendant to be defended in criminal proceedings through a defense counsel, as in the past and as it is still today, is considered one of its fundamental rights (Ačimović, 1966). "The defense counsel is the aid of the defendant who, with his legal knowledge, assists the defendant in presenting the facts that go to his own benefit and to the truth. Accordingly, the defense counsel is considered to be subject to crucial premises in any criminal proceedings, such as when the defendant is not guilty or guilty (Hajdari, 2014)." Based on this fact, the Criminal Procedure Code of the Republic of Kosovo provides that the defendant (the suspect) has the right to a defense counsel during all stages of the criminal procedure (Criminal Procedure Code, Art. 53 par. 1) as well as it is defined in cases where defense by an attorney is mandatory (Criminal Procedure Code Art, 57 par. 1). Ensuring legal protection, namely a defense counsel as an aid for the defendant, has been a major achievement in the long and difficult efforts of progressive forces to democratize the criminal proceedings (Skulić, 2007). It was initially established in developed countries that proclaimed human rights and freedoms, and on this basis also the adoption of the basic laws of the activity of the judiciary. The role of the defense counsel in the criminal proceeding came as advancement so that he became an important factor in the fight

against violations of law and injustice. The defender became a respectable criminal procedure figure, standing opposite of the charge as an opposing party able to develop a constructive debate and to affect a fair resolution of the case (Islami, Hoxha, Panda, 2003).

The Criminal Procedure Code does not give a definition of standby attorney. A definition of standby attorney was not done either by the science of the criminal procedure law of Kosovo and beyond. Despite this fact, I consider that defining the standby attorney meaning cannot be done in any way by bypassing the defense's overall meaning. This is due to the fact that even in the case of standby attorney the same legal provisions apply to the concepts of defense in criminal proceedings in general. In this regard, the standby attorney is the aid to the defendant who advises him during the conduct of criminal proceedings. He is engaged in criminal proceedings in cases where the defendant renounces his defense by an attorney in cases where the defense is mandatory.¹ Therefore, the role of the standby attorney is only of an advisory character, until the defendant withdraws his renunciation from the defense. However, if such a withdrawal takes place then the standby attorney wins the position of the true defender of the defendant.

2. The Authority to Appoint the Standby Attorney

The issue of the standby attorney is handled by the Criminal Procedure Code under a single provision (paragraph 4 of Article 53). This provision does not specify at all the question of who is the authority to appoint such a defense. But, through a thorough analysis done to this legal solution can freely conclude that this authority manifests by being wide spread within bodies that conduct criminal proceedings. This is due to the fact that the mandatory defense, in conjunction with which the standby attorney comes into expression, manifests its scope at all stages of criminal proceedings. "Hence, the authority to appoint a standby attorney belongs to each body having legal authority to enforce criminal proceedings (Sahiti, Murati, Elshani, 2014)." That body may be the police and the state prosecutor in cases of questioning the defendant who is deaf and mute, blind or expresses signs of mental disorder or disability. In such situations these two public authorities have a legal obligation to appoint a standby attorney in every case where a defendant does not engage himself a defense council and continuously renounces his right to a defense council appointed ex officio. The standby attorney for such situations should be appointed from the first interrogation of the defendant. Of course, for similar situations the authority to appoint the standby attorney also belongs to the pre-trial judge. This obligation is mainly related to the scheduling of detention cases. Consequently, for the same situation the authority to appoint a standby attorney may belong to a single judge, e.g. in cases where the defendant enters into a plea bargaining agreement or, the trial panel for example, in cases when an indictment has been filed against the defendant for a criminal offense punishable by ten or more years of imprisonment. As noted above, the only condition to be met for appointing a standby attorney from all these criminal procedural authorities is that the defendant, in the case of mandatory defense, renounces such defense.

3. Characteristics that denote a standby attorney

We do not encounter at all the standby attorney institute in any of the criminal procedural laws of Western Balkan countries, as is the case with Albania (Criminal Procedure Code, Art. 48 – 57), Macedonia (Criminal Procedure Law, Art. 71 – 80), Montenegro (Criminal Procedure Code, Art. 72 – 74) etc. Seen in this regard, Kosovo constitutes a case of "sui generis". Consequently, as any criminal procedural mechanism, the institute of standby attorney is characterized by elements that make it of a specific type, even within the advocacy system itself. Consequently, as standby attorney features are considered:

1. The manner of appointment.- Generally speaking, in defining the appointment of defense counsel in criminal proceedings, both in the case of optional and mandatory defense, the criminal procedural legislation grants the defendant absolute priority. In cases of mandatory defense, if the defendant or other legally authorized person do not do this, then it becomes the task of the body conducting criminal proceedings, this is because in such cases, criminal proceedings cannot take place without the presence of the defender. "In practice, it may happen that the defendant can reasonably be against the defense counsel's involvement (not only does he not engage a defense counsel himself, but is also against the engagement of a defense counsel by his relatives, or against appointment of a defense counsel ex officio), respectively to waives the right to defense through by a defense counsel. In such cases, the body of the procedure in order to facilitate the development of criminal procedure assigns him a standby attorney (Sahiti, Murati, Elshani, 2014)." Thus, this type of defender is only appointed when the defendant in the cases of mandatory defense renounces his right to defense counsel who may have appointed himself, his relatives or the procedural body.

¹ The defense advocacy institute as a request to be addressed by law is related to the case "Kurti - 2012", which during the interrogation by Kosovo Police regarding the throwing of tear gas in the Kosovo Assembly, had renounced to right to each defense council engaged ex officio. The cause is to prevent the decision on the demarcation of the border with Montenegro.

2. Limited Action Authorizations. - Even though the standby attorney issue has been addressed by a Kosovo legislator with a single provision, he has clearly defined his powers within that legal solution. These authorizations are very limited in comparison to other defenders, whether they are assigned by the defendant himself or his family, or appointed by the criminal procedure body. The only authorization issued by the Criminal Procedure Code for the standby attorney is the counseling of the defendant during the criminal proceedings. His advice is expected to be reflections on his counseling of the defendant of the rights that belong to him, with the advantages that offer legal solutions that address the concrete procedural actions and functioning opportunities provided by the criminal procedure body (e.g., in cases of implementation of the mediation procedure) etc.
3. Change of status. - The Kosovar lawmaker with regard to the standby attorney has given a number of clarifications, but has left many ambiguities as far as his functionality is concerned. It would be good that many dilemmas that exist in this regard are clarified through amendments and supplements that are being made in the Code of Criminal Procedure. Of course, the ambiguities have nothing to do with the issue of the change of its status. Thus, in the framework of legal solution which addressed the issue of standby attorney, Kosovo legislator has made it clear that if the defendant withdraws the waiver, the standby attorney becomes his defense counsel. In such cases to him apply all legal solutions referring to defense lawyers, those addressing the rights and authorize obligations.

4. Conditions for appointing the standby attorney

In order to appoint a standby attorney it requires two basic conditions to be met. These conditions are:

1. When mandatory defense comes into question. - As noted above, defense is mandatory when criminal proceedings cannot take place without a defense attorney. In which cases a mandatory defense comes into effect is clearly stipulated in Article 67 paragraph 1 of the Criminal Procedure Code. "It is worth mentioning the fact that when addressing the mandatory defense issue, the legislator took into account the defendant's personal interest, but also the social interest (Sahiti, Murati, 2013)." Therefore, in order to have a better effect on the protection of these interests, the Kosovar lawmaker has rightfully foreseen the standby attorney as a mechanism enabling enforcement of the procedure of mandatory defense cases when the defendant renounces his right to have a defense counsel. On the basis of this legal and theoretical reflection it can freely be concluded that the standby attorney can only be appointed if the defense is mandatory. Thus, such a defense counsel cannot be appointed for optional defense cases, because in such situations criminal proceedings may be conducted without the defendant having a defense counsel.
2. To waive his right to a defense counsel. - With paragraph 4 of Article 53 of the Criminal Procedure Code the defendant was granted the opportunity to waive the right to have defense counsel even in cases where the defense is mandatory (Pavišić, Miloško, Velić, Aldo, 1998). This solution would have created a situation which would directly affect the de-functionalization of criminal proceedings in cases where the defense is mandatory, if the lawmaker had not established the institute of standby attorney. Consequently, in accordance with this legal provision (Article 53, paragraph 4) in situations where the defense is mandatory and the defendant renounces the right to have a defense counsel, than it is the duty of the body conducting the procedure to appoint a standby attorney to the defendant. This means that in order to be able to appoint a standby attorney it is required that the defendant renounces his right to a defense counsel in cases when the defense is mandatory.

Finally, it is worth mentioning the fact that to appoint a standby attorney it is required to meet these two conditions cumulatively. This finding is based on the relationship that exists between them.

5. The importance of appointing a standby attorney

Like any other criminal procedure institute that manifests its importance in criminal proceedings, the standby attorney is certainly not an exception to this rule. The importance of the standby attorney, although with some broad extension, it mainly refers to facilitating the implementation of concrete criminal procedural actions, as well as the continuation and development of criminal proceedings as a whole. In addition, based on the nature of this article, the importance of this institute will be elaborated in these two aspects.

1. The importance of the standby attorney to enable the implementation of concrete criminal procedural actions. - As the standby attorney is inseparably linked with the mandatory defense and the cases of waiver the right to a defense counsel when it comes to this defense, it is ordinary that its importance to be related to those procedural actions which cannot be exercised without the presence of the defense counsel. What are such procedural actions clearly it is stipulated in paragraph 1 of Article 57 of the Code of Criminal Procedure. Accordingly, the legal solution cannot be applied to the examination of the defendant, who is deaf mute, blind and who expresses signs of mental disorder or disability without the presence of the standby attorney if he has renounced his/her right to a defense counsel (engaged by him or assigned ex officio). A similar situation, among other things, refers to the case when the defendant wishes to enter into plea agreements.

2. The importance of the standby attorney to enable the proceeding and the conduct of criminal proceedings in general.
 - As in the first case, the standby attorney now also relates to cases that cannot be prosecuted or to proceed with criminal proceedings without the presence of a defender. Even in these cases, the answer must be based on paragraph 1 of Article 57 of the Code of Criminal Procedure. According to this legal solution, no detention hearing can be held without the presence of the standby attorney if the defendant has renounced his or her right to a defense counsel. A similar situation, among other things, refers to the proceedings of the case after the indictment has been filed for criminal offense punishable by at least ten years.

From what was stressed above, it turns out that the importance of the standby attorney is great and multidimensional. "This importance refers to the tendency for procedural criminal efficiency and for the consideration of human rights in criminal proceedings (Hajdari, 2010)."

6. The rights and obligations of the standby attorney

The features that characterize the standby attorney have more or less reflected their influence in terms of their rights and obligations. Therefore, except for obligations related to keeping the information confidential and other obligations that apply to all defenders (T. Markus, 2006), one of the most basic duties of the standby attorneys is counseling the defendant during the course of the procedure. He has to fulfill this obligation on a continuous basis, until the defendant agrees to have a defense counsel as provided by the Code of Criminal Procedure and to be able to participate in the procedure as a defense counsel. In fact, this obligation the standby attorney must fulfill regardless of whether or not the defendant shows readiness to be served with the advice provided.

Consequently, in addition to the abovementioned obligations, the standby attorney enjoys almost all the rights that belong to the other defenders. In this regard, mainly it is assumed in the right to renounce the position of standby attorney, and the right to compensation in accordance with the prescribed fees. Obviously, in the cases of the standby attorneys' engagement the compensation for his work is made from the budgetary line of the institution which appoints him.

7. Some data on the assignment of defense counsel ex officio in Kosovo

Deriving of concrete conclusions and giving consistent recommendations regarding the assignment of defense counsel ex officio (including the standby attorneys) from the bodies that apply the criminal procedure (police, prosecution and courts), other relevant institutions and society as a whole requires that their activity be explored and studied for a certain period of time. In this case, the activity of these bodies has been researched for a period of two and a half years (January 2016 - June 2018). I consider that the treatment of the issue of engaging the defense counsel's ex officio to derive to the conclusions on the advantages and defects of such an engagement over a two and a half year period, offers chances that can be considered sufficient for the successful realization of such a goal. Presentation of the work of the police, prosecution and courts of Kosovo regarding the level, progress and circumstances of the defense counsel's engagement ex officio, including the standby attorney, was not an easy matter. This is due to the fact that with regard to the work of these bodies, regarding these data during the research period there are no published statistics that can serve by the end of this article. Despite this fact, in the following treatment, based on the data of the Agency for Free Legal Aid will present the general data on the cases of defense counsel engagement ex officio for the period January 2016 - June 2018, and then elaboration will be made as well as it will highlight the problems that characterize this issue today in Kosovo.

Region / Years	Pristina	Mitrovica	Peja	Gjakova	Prizren	Ferizaj	Gjilan	Total
2016	2383	1290	717	739	1595	513	2330	9567
2017	2730	1386	900	992	1719	777	2767	11274
June 2018	1082	599	420	372	781	326	1100	4680
Total	6195	3275	2037	2103	4095	1616	6197	25521

Table 1. Number of cases for which the defense counsel was engaged ex officio

According to these data for the police, prosecution and courts of Kosovo's needs during January 2016 - June 2018 by the Free Legal Aid Agency, defense counsel were appointed ex officio in 25521 cases (Report on the engagement,..., 2018). These data prove the fact that in 2016, defense counsel that were appointed ex officio in 9567 cases, in 2017 in 11274 cases and in the first semester of 2018 in 4680 cases. As it turns out, in 2017, the defense counsels were assigned ex officio to 1707 cases more than in 2016. While, the trends of the first half of 2018 show a decline on appointing defenders ex officio compared with the year 2017, but also a slight increase compared to 2018.

By law, the issue of appointment of a defense counsel ex officio is left to the authority that applies the criminal procedure. But since the legislation in force has not regulated the procedure of appointing such defense counsel, in practice there have been evident problems which have directly affected the quality of defendants' defense. This is due to the fact that the bodies conducting the proceedings (police, prosecution and courts) have engaged a very limited number of lawyers, so that they have been almost completely non-functional in protecting the interests of their clients. Respectively, in most cases they have not succeeded to ensure efficient and professional protection of defendants who they represented, based on legal requirements and international standards and practices. This is because their backlog of cases was beyond the capacity they possessed. Therefore, it is a necessity that the issue of the procedure and manner of appointment of counsel ex officio be regulated by a special legal act. In this regard, a first step appears to be marked with the Agreement signed between the Kosovo Chamber of Advocates, the Kosovo Judicial Council, Prosecutorial Council of Kosovo and the Kosovo Police to create a functional mechanism of coordinating character for legal protection with public expenditure regarding criminal matters (Agreement on the Establishment of a Functional Coordination,..., 2016).

Additionally, in the separate table in addition to the general data regarding the engagement of defense counsel ex officio will be presented also the data regarding the appointment of standby attorneys for the period January 2016 - June 2018.

Appointment of the standby attorney "ex officio" Time period	Number of cases in general	Number of cases when a standby attorney was appointed
January 2016 - June 2018	25521	5

Table 2. Number of cases for which the defense counsel was engaged ex officio in general and the standby attorney

According to these data during the period January 2016 - June 2018 the police, prosecution and courts assigned ex officio standby attorneys to 25521 cases. In the context of these cases, the standby attorney was appointed in only five cases. In these five cases the prosecution is represented by two cases, and courts in three cases. As it turns out, police during the research period did not assign any standby attorneys. In all cases, appointing a standby attorney is due to the renouncement by the defendant to counsel during his interrogation. The data used prove that out of these five cases in only one case the defendant renounced his right to a defense council, which resulted in the standby attorney alteration to a functional defensive counsel for the defendant. Since in practice there are problems in defining and functioning of the standby attorney, which is the result of the lack of legal solutions that would completely regulate this institute, it is necessary to complete legal solutions with regard to this institute.

Conclusion

The modest results achieved during the preparation of this article have led me to the following conclusions:

1. The standby attorney is the aid of the defendant who advises him during the execution of the criminal procedure, he engages in criminal proceedings in cases when the defendant renounces his defense with advocates in cases when the defense is mandatory.
2. The authority to appoint a standby attorney belongs to each body that has legal powers to enforce criminal proceedings. That body may be the police, the state prosecutor, and the courts having legal authority to enforce the criminal procedural action of the interrogation of the defendant.
3. In relation to the standby attorney some features are manifested. These refer to the manner of its appointment, limited operational authorizations and the possibility of changing its status.
4. Like any other criminal procedure institute that manifests its importance in criminal proceedings, surely the standby attorney is certainly not an exception to this rule. The importance of standby attorney, although with some extension, it mainly refers to facilitating the implementation of concrete criminal procedural actions, but also the proceeding and development of the entire criminal procedure.
5. According to these data for the police, prosecution and courts of Kosovo's needs during January 2016 - June 2018 by the Free Legal Aid Agency standby attorneys were appointed ex officio in 25521 cases. This data prove the fact that in 2016 standby attorneys were appointed ex officio in 9567 cases, in 2017 in 11274 cases and in the first six months of 2018 in 4680 cases. As it turns out, in 2017, the standby attorneys ex officio were assigned to 1707 cases more than in 2016. Meanwhile, the trends of the six months of 2018 show a decrease in the assignment of standby attorneys ex officio compared to the year 2017, but also a slight increase compared to 2018.
6. According to the data used in the framework of 25521 cases of mandatory defense, the standby attorney was appointed in only five cases. In these five cases the prosecution is represented with two cases, and the courts with three cases. As it turns out, police during the research period did not assign any standby attorneys. Since in practice

there are problems in appointing the standby attorney, which is the result of the lack of legal solutions that would completely regulate this institute, it is necessary to complete legal solutions for this institute.

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