

Problems and continuity of defence provided by state in criminal procedure

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Abstract. The development of state provided defence and the institute of the senior advocate regarding the implementation of state provided defence qualitatively changed on 1 January 2009 when several legislations came into force providing that only senior advocates could and can appoint specific advocates for providing defence in a criminal procedure or, limiting the free will of the person conducting the procedure, specific procedure activities for providing defence are specified in the law, allowing the person conducting the procedure to invite an advocate only according to the advocate duty schedule composed by the senior advocate.

The most topical issue of the year 2014 – continuity of defence concerning the appointments of the senior of sworn advocates (at the police, at the investigating magistrate, at the regional court when investigating magistrate examines the legitimacy of decision, at the prosecutor's office, at the court at three tiers of authority).

On the one hand, the continuity enables to provide better legal assistance, because one advocate is able to manage the criminal procedure better both in its entirety and separate stages, but, on the other hand, it has to be taken into account that due to the work load of the courts and advocates, in most cases several advocates will be provided (not at the same time) for the person within the framework of one legal procedure.

Key words: defence provided by state, continuity of defence in criminal

Defence provided by the state is promotion of the person's rights to equitable judicial protection, providing financial supply necessary for the access to the legal aid.

Continuity of defence in the criminal procedure is participation of one and the same advocate-defender throughout the criminal procedure – at the pre-trial investigating authorities, at the prosecutor's office and at the court at the three tiers of authority.

The above stated is related to human rights, more specifically, with the right to defence. The right to equitable judicial protection is one of the most important human rights, which also includes a person's right to legal aid [1]. Not only the availability of defence is essential, but also the quality of defence and objective opportunities for quality defence. The opportunity to promote the quality of defence is an important and current question in a judicial state [2].

Section 95 of the Constitution of the Republic of Latvia [3] states that each person has the right to the assistance of an advocate. The legal regulation about the right to legal aid is specified in Sect. 14 (3) (d) of the International Covenant on Civil and Political Rights [4], in Sect. 6 Clause 3c of the European Convention for the Protection of Human Rights and Fundamental Freedoms [5], in Sect. 47 Paragraph 2 and 3, Sect. 48 Paragraph 2 of the Charter of Fundamental Rights of the European Union [6], and in the United Nations Basic Principles on the Role of Lawyers adopted in Havana, Cuba in 1990 [7].

The guarantee of state paid high quality legal aid is a prerequisite for the availability of equitable judicial protection [8]. Unfortunately, the reality in Latvia and in other states

is different. Advocates are usually appointed not for the whole procedure but for separate stages of the procedure; but in such conditions it is difficult to fully defend the client's rights even for the fairest defender [9].

Major and thorough work has been done in Latvia in order to create the system of state provided legal aid, which of course, also includes implementation of rights and defence. On 1 January 2009, a new procedure for inviting advocates to the criminal procedure in the implementation of the state provided legal aid came into force. The role of the practicing senior sworn advocates (hereinafter also senior advocates) at the court operation districts has been significantly increased in the implementation of state provided defence. In five years after the implementation of this new model, the main aim was achieved – defence was provided for all persons. Such a conclusion is based on the fact that no complaints or criticism that a person was not provided with defence were received by the Latvian Council of Sworn Advocates (hereinafter LCSA) [10].

The model of defence provided by the state in Latvia: since 2009 only the senior advocates from the corresponding court's operation district appoint certain advocates to defend the persons in criminal procedures.

The situation until 2009 with regard to attempts to implement the model of state provided aid was concisely described by the former long-term president of the Latvian Council of Sworn Advocates Aivars Niedre: "It must be added that the 2005 State Ensured Legal Aid Law was significant for the legal profession. The law provides that a person that has the right to receive legal aid in a criminal procedure is, if necessary, ensured by the Legal Aid Administration created under the government of the Ministry of Justice that has concluded agreements with advocates. The same conditions are reflected in the Criminal Procedure Law which came into force on 1 October 2005. Unfortunately, the Legal Aid Administration was unable to fulfil the provisions of the Law. The main reasons can be considered the inability to promptly ensure the participation of an advocate in the pre-trial investigation and the fact that due to the attitude of bureaucracy only a few advocates agreed to conclude an agreement with the Legal Aid Administration. This is a likely reason for the provision of the 19 June 2008 law "Amendments to the Advocacy Law of the Republic of Latvia" that the operation is organized by advocates themselves (senior sworn advocates). Therefore one can state that these amendments to the Law are dedicated to the tasks of the legal profession in order to ensure the state provided legal aid" [11].

Section 80 of the current revision of the Criminal Procedure Law that came into force on 1 January 2009 regulates the following procedure for inviting a defender:

- 1) the defence agreement with the advocate is concluded by the person themselves or by other persons for the benefit of that person;
- 2) the person conducting the procedure does not conclude defence agreements and cannot invite a specific advocate as a defender but provides the privy with the necessary information and an opportunity to use means of communication to invite a defender;
- 3) if the person who has the right to defence has not concluded a defence agreement, but defender's participation is mandatory, or the person wishes for participation of a defender, the person conducting the procedure notifies the senior sworn advocate of the corresponding court's operation district about the necessity to ensure the participation of a defender in the criminal procedure;
- 4) the senior sworn advocate no later than three working days after receiving the request of the person conducting the procedure notifies the person conducting the procedure about the participation of a specific advocate in the criminal procedure.

Taking into account that the person conducting the procedure does not always have three days available for requesting from the senior sworn advocate to appoint a defender, the legislator in addition to the planned procedure, i.e. as an exception, has passed separate procedures that are approved in Sect. 81 of the Criminal Procedure Law.

In situations, when defence agreement is not concluded or the defender with whom the agreement is concluded cannot arrive, for the purpose of criminal proceedings the person who conducts the criminal procedure invites the advocate for providing the defence in separate criminal proceedings. The list of separate criminal proceedings is complete: first of all, these are investigation activities in which the detainee is involved. The legislator has defined that a person can be detained for 48 hours, which is less than three working days provided for the senior advocate for appointing a defender in case of a request from the person conducting the procedure. This is why the procedure for inviting a defender is fundamentally different from the model defined in Sect. 80 and the exceptions approved in Sect. 81 Paragraph 2 of the Criminal Procedure Law [12].

According to Sect. 81 of the Criminal Law, the persons who conduct the criminal procedure may invite the advocate on duty themselves (in strict accordance with the work schedule of the advocates, prepared by the senior advocate) in cases when the agreement on defence is not concluded or the defender, with whom the agreement is concluded cannot arrive, for the purpose of criminal proceedings the person, who conducts the criminal procedure, invites the advocate for providing the defence in separate criminal proceedings: investigation activities in which the detainee is involved; announcement of the decision on being suspect and the first examination of suspect; consideration of the matters concerning the application of security measure at the investigating magistrate.

Only in the separate procedure activities specified in this law the person conducting the procedure invites an advocate according to the advocate duty schedule composed by the senior sworn advocate of the corresponding court's operation district; in all other cases, the person, conducting the procedure, must write a timely request to the senior sworn advocate of the corresponding court's operation district asking to ensure a defender in a criminal procedure, specifying the time and place at least for the first procedure activity [13].

It must be noted that the current regulation of the Advocacy Law of the Republic of Latvia essentially coincides with the regulation included in the Criminal Procedure Law and is found in Sect. 54¹: The senior sworn advocate shall: organise the work of advocates practising in the court operation territory, as well as shall draw up the duty schedules for advocates for the performance of the State ensured defence and representation in the criminal proceedings upon the request of a performer of proceedings or upon being commissioned by the Latvian Council of Sworn Advocates – also in other matters; immediately but not later than within three working days after receipt of the request from a performer of the proceedings, notify him or her regarding participation of the advocate in the criminal proceedings; assign the performance of the State ensured defence and representation to the advocates practising in the relevant court operation territory; provide the support to other senior sworn advocates of the court operation territory for the provision of the State ensured defence and representation.

With time, questions appeared regarding the effectiveness and development prospects of the model of providing defence in a criminal procedure, which are still current from the perspective of the implementation of human rights. It was determined that the model of providing defence in a criminal procedure functions effectively enough. However, sometimes persons conducting the procedures continued asking advocates for ensuring state provided defence without regard for the duty schedule; sometimes advocates in cases of state ensured defence wrote the advocate's warrant for the whole pre-trial investigation and all the tiers

of court. The above mentioned are problem questions of factual rather than legal nature and can be remedied in cooperation with LCSA, Legal Aid Administration and the governors of the persons conducting the procedures with the corresponding means of influence. Another problem question must be mentioned, namely that prosecutors have expressed a wish that the provisions of Sect. 81 of the Criminal Procedure Law where the person conducting the procedure for ensuring defence in a separate procedure activity invites an advocate according to the advocate duty schedule composed by the senior sworn advocate of the corresponding court's operation district are also applicable to the prosecutors (if during the issue of a copy of the statement of charges the defendant requests a defender). The problem appears when defendants either do not arrive voluntarily and are brought by force escorted by police, or are arrested and convoyed to the prosecutors' office. The above mentioned can be remedied through legislation by supplementing Sect. 81 of the Criminal Procedure Law. In some cases it would allow decreasing the expenses for repeated convoying of persons to the prosecutor or bringing to the prosecutor by force.

The most topical issue of the year 2014 – continuity of defence concerning the appointments of the senior of sworn advocates (at the police, at the investigating magistrate, at the regional court when investigating magistrate examines the legitimacy of decision, at the prosecutor's office, at the court at three tiers of authority) [14].

When approaching seniors of advocates concerning organizational issues, Legal Aid Administration of Ministry of Justice of the Republic of Latvia announced in June 2014 that within the framework of one legal procedure several sworn advocates provide legal aid; it contradicts Paragraph 4 Sect. 79 of the Criminal Law, to wit, defender provided by the state is engaged in particular case from the moment of initiation of the criminal procedure till conclusion of the criminal procedure, with the exception of cases when one is appointed to provide defence in separate legal proceedings; thereby disregard of the mentioned requirement does not enable quality legal assistance for the persons who are eligible for defence and representation.

The quality of legal assistance in cases when the change of advocates occurs is a disputable issue. The legislator has defined in Sect. 81 of the Criminal Law that in cases when the agreement on defence is not concluded or the defender with whom the agreement is concluded cannot arrive for the purpose of criminal proceedings the person who conducts the criminal procedure invites the advocate for providing the defence in separate criminal proceedings: investigation activities in which the detainee is involved; announcement of the decision on being suspect and the first examination of the suspect; consideration of the matters concerning the application of a security measure at the investigating magistrate. The above mentioned implies that the legislator has allowed the exceptions of continuity of defence already at the level of legislation, regardless of the fact that the quality of legal assistance will deteriorate essentially if another advocate takes part in particular activities.

It has to be taken into account that the person who is eligible for defence must be aware of their rights and must choose the position of defence and, respectively, also the tactic of defence exactly at the beginning of the criminal procedure. The continuity of defence provides better legal aid because one advocate will better know the criminal case overall and at each separate stage. Example includes the right not to give evidence because everything that is said may be later turned against the provider of evidence. Giving or not giving evidence is already a tactic of defence; however it is difficult to implement without knowing the position of defence. For this reason, the main problem concerning the continuity of defence when it is provided by the state lies in the fact that due to the change of defenders at the beginning of the criminal procedure, the choice of the position of defence is made difficult for the person who is eligible for defence; it affects significantly the quality of legal assistance.

The conditions need to be taken into account, which, while staying essentially identical, differ in that one case involves participation of one defender and the other involves participation of several defenders can have completely opposite effects on the quality of defence. For instance, appealing against the decision of applying arrest as a security measure, the advocate who was defending the suspect in front of the investigating magistrate has no obligation to describe everything in detail in the appeal, regardless of whether the defender is composing the appeal on their own behalf as an advocate or is helping a client to compose it on the client's behalf. Therefore the claim can be essentially very short, practically a request to cancel the arrest. The legal force of the appeal does not change regardless of whether it contains argumentation, the consequences are the same – there will be a meeting in which the lawfulness of the investigating magistrate's decision will be assessed. Arguments can be expressed during the meeting; however the advocate appointed by Regional Courts may be uninformed of what happened before and thus will not be able to state the arguments that were known to the first advocate and are unknown to him or her. A situation is created where the legislator has provided for the opportunity to invite another advocate to a specific procedure activity but has not developed the normative regulation so that human rights would not be violated [15].

It must be taken into account that continuity of defence is not an absolute human right and it can be limited. Speaking about priorities, several essential factual conditions need to be objectively mentioned.

Taking into account the conclusion of the criminal procedure within a reasonable period of time, and the work load of courts and advocates, it must be concluded that in most cases it is faster and easier for the court to appoint the case for trial not by agreement on the date with the advocate who performed the defence provided by the state at the pre-trial stage but by appointing the nearest date most convenient for the court and sending a demand to the senior advocate from the corresponding court's operation district with a requirement to provide a defender who is available on the particular date.

Taking into consideration the geographical location of institutions and the distance between them, the rights of the person who conducts the criminal procedure to choose a district of court's operation to whose senior advocate to appeal with the request to provide a defender, as well as the rights of advocates not to provide legal assistance outside the district of one's operation, sometimes the only possibility to provide the defence paid by the state is to appoint another defender.

The location of places of temporary custody, prisons, investigating authorities, General Courts, Regional Courts (where legal proceedings within the framework of one criminal procedure may take place) in different cities also needs to be taken into account. For instance, the persons detained in the territory under the supervision of Rēzekne, Ludza or Balvi Court will be placed in temporary custody in Rēzekne because such facilities are not available in Ludza or Balvi. The same principle applies to the persons detained in the territory under the supervision of Daugavpils, Preiļi or Krāslava Court – they will be placed in temporary custody in Daugavpils because these facilities are not available in Preiļi or Krāslava. Moreover, renovation of the place of temporary custody in Rēzekne is planned for 2015 and 2016, and the only place of temporary custody will be available in Daugavpils (distance Daugavpils – Balvi is 173 km; Daugavpils – Rēzekne 93 km). For instance, the person who conducts the criminal procedure in Balvi town and chooses to request the security measure of arrest of the suspect, needs to take into consideration that the nearest investigating magistrate is located in Rēzekne. With regard to the appeal against a security measure, it must be mentioned that the appeal will be reviewed at the corresponding Regional Court, which is often located far from the person who conducts the criminal procedure.

The person who conducts the criminal procedure does not change, regardless the location of the place of temporary custody or court; whereas the advocate for defence provided by the state is appointed by the corresponding senior advocate from their own district of operation. As a result, the advocate who is appointed by the state is not obliged to take part in criminal proceedings outside the district of one's operation if they cannot or do not want to. In this case, the only possibility for the person who conducts the criminal procedure is to address the senior advocate in whose district of operation the criminal proceedings are taking place with the request to provide an advocate for the particular criminal proceedings.

Conclusions

The development of state provided defence and the institute of the senior advocate regarding the implementation of state provided defence qualitatively changed on 1 January 2009 when several legislations came into force providing that only senior advocates could and can appoint specific advocates for providing defence in a criminal procedure or, limiting the free will of the person conducting the procedure, specific procedure activities for providing defence are specified in the law, allowing the person conducting the procedure to invite an advocate only according to the advocate duty schedule composed by the senior advocate.

It can be presently concluded that several questions related to state provided defence are essentially resolved or will soon be resolved; however in time, new questions appear that need to be resolved, for instance, continuity of defence in relation to the appointments by the senior of the sworn advocates and the necessity to widen the range of separate procedure activities.

The continuity of defence concerning the appointments of the senior of sworn advocates has become topical issue this year, and this matter is not studied much, although the base of research is sufficient.

Continuity of state provided defence has essential significance because it is related with human rights – the right to defence.

The continuity of defence enables to provide better legal assistance, since one advocate is able to manage the criminal procedure better in both its entirety and separate stages, especially taking into account the fact that within the framework of particular criminal procedures the change of defenders at the beginning of the criminal procedure bothers the choice of the position of defence for the person who is eligible for defence; it affects the quality of legal assistance essentially.

The legislator in Sect. 81 of the Criminal Law has provided for the opportunity to invite a different advocate for a specific procedure activity but has not developed the normative regulation so that a person's human rights would not be violated.

However, there are also objective criteria that do not allow for the permanent priority of defence continuity, namely: the work load of courts and advocates, the location of several institutions in different cities (facilities of temporary custody, investigation magistrate, police, prosecutors, the General Court, the Regional Court). It is hoped that the above mentioned will be resolved in the framework of the initiated judicial reform.

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