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The defense attorney in Ukraine: challenges and opportunities in the framework of international standards

Адвокат в Україні: виклики та можливості в рамках міжнародних стандартів

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Abstract


The right of a person to protection is one of the fundamental human rights. The governments of many countries are taking measures to bring national legislation in line with international standards in the field of human rights protection. Despite this, many issues remain debatable and uncertain, and national law enforcement agencies sometimes continue to resort to violating these rights.

This comparative legal study was carried out by studying primary legal materials, as well as secondary legal materials related to the researched legal issues. The theoretical and empirical basis of the research is represented by legislative acts, theoretical research and judicial practice analyzed using a qualitative approach.


Анотація

Право людини на захист є одним із фундаментальних прав людини в сучасному світі. Уряди багатьох країн вживають заходи для приведення національного законодавства у відповідність до міжнародних стандартів у сфері захисту прав людини. Незважаючи на це, багато питань залишаються дискусійними та невизначеними, а національні правоохоронні органи подекуди продовжують вдаватися до посягання цих прав.


Це порівняльно-правове дослідження здійснювалося шляхом вивчення первинних правових матеріалів, а також вторинних правових матеріалів, що стосуються досліджуваної правової проблематики. Теоретична та емпірична основа дослідження представлена законодавчими актами,


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It is substantiated that the lawyer's monopoly on representing a person in criminal proceedings is justified and meets international standards of professionalism in the provision of legal assistance, because, unlike a person who is a lawyer by profession, lawyers pass qualification exams, have practical experience, undergo internships and constantly improve their professional level. It was determined that the rights of the defense counsel in criminal proceedings are derived from the rights of the person he is defending. Typical violations of the right of a person to defense, allowed by the national law enforcement agencies of European countries, have been established. It is argued that the improvement of the legal status of a lawyer should be carried out at the national level. This should be done taking into account international legal principles and judicial practice.

Keywords: lawyer, defender, suspect, criminal process, criminal proceedings, right to defense.

теоретичними дослідженнями і з використанням якісного підходу проаналізовано судову практику.

Обґрунтовано, що монополія адвоката на представництво особи в кримінальному процесі є виправданою та відповідає міжнародним стандартам професійності в наданні правової допомоги, оскільки, на відміну від особи, яка є правником, адвокати складають кваліфікаційні іспити, мають практичний досвід, проходять стажування та постійно підвищують свій професійний рівень. Визначено, що права захисника у кримінальному судочинстві є похідними від прав особи, яку він захищає. Встановлено типові порушення права особи на захист, що допускаються національними правоохоронними органами європейських держав. Аргументовано, що вдосконалення правового статусу адвоката має здійснюватися на національному рівні. Це має відбуватися з урахуванням міжнародно-правових принципів і судової практики.

Ключові слова: адвокат, захисник, кримінальний процес, кримінальне провадження, право на захист, безоплатна правова допомога, законодавство, підозрюваний.

Introduction

The entire judicial system aims to protect human rights, restore violated rights, and compensate for the damage caused by offenses and crimes. Every person is guaranteed the right to protection by international standards in human rights protection. The state is responsible for ensuring the protection of human rights. However, in judicial practice, there are quite a few cases when this international principle is still violated.

The African Court of Human Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights operate to protect human rights in the world. The African Union and the African Commission on Human and Peoples' Rights to monitor human rights violations in Africa established the African Court on Human Rights in 2004. 31 out of 54 independent states have ratified the protocol on legitimizing the activity of this court as an alternative judicial way of protecting human rights. The court consists of 11 judges who are citizens of member states.

The European Court of Human Rights (ECHR) is located in Strasbourg, France, and interprets the European Convention on Human Rights. This convention was signed in 1950 by 47 European states (United Nations, 1950). The International Criminal Court also operates. Its jurisdiction extends to war crimes, genocide, and crimes against humanity and aggression. Persons convicted by the International Criminal Court are prosecuted at the international level. It is an intergovernmental organization based in The Hague, Netherlands. When national governments cannot prosecute criminals, the International Criminal Court fills this role. It comprises 123 member states and can only conduct investigations in these countries. 42 countries have not signed the Rome Statute, so the International Criminal Court cannot prosecute persons from these countries.

Today, the work to ensure human rights is carried out more and more actively and at all possible levels: international and national. Under such conditions, the main guidelines in the direction of the initiated process of improving the system of protection of human rights and freedoms should be:

- Use of positive experiences in other states;

- Implementation of positive experience in strengthening human rights guarantees into national legal systems;
- Taking into account the norms of precedent law in the activities of law enforcement and judicial bodies;
- Improve the system of legal provisions to determine the legal status of a defense attorney in criminal proceedings, etc.

The principle of ensuring the right to protection is enshrined in the legislation of all democratic countries. This became a natural consequence of the criminal process democratization and strengthening its participants' guarantees. However, the analysis of judicial practice and theoretical developments shows that the level of trust citizens in lawyers is lower than in employees of pre-trial investigation bodies or judges (Pryce & Wilson, 2020).

At the same time, it is a valid observation that defendants with a lawyer have better results than those who do not have a lawyer. Research data confirm these theses. Thus, nonviolent defendants who were assigned counsel at bail hearings were 2.5 times more likely to be released on recognizance and 2.5 times more likely to have their bail reduced than those not represented by a lawyer (Colbert, Paternoster & Bushway, 2002).

Such a situation requires an analysis of the legal status of lawyers in different states and the determination of prospects for improvement. In our opinion, to guarantee the effectiveness of protection in modern conditions, it is important to apply the method of comparative legal research and systematic analysis of the experience of foreign countries, including its interpretation and practical examples of the application provisions of international legal acts in the decisions of judicial institutions.

To solve the problem raised in the article, in the first point of the section "Results and discussion", the grounds for attracting a defense attorney are determined by the legal status of the defense lawyer is determined by the legislation of Ukraine. The second section of the main part is devoted to analyzing the legal status of a lawyer in Germany, Bulgaria, France, Poland, the Czech Republic, Estonia, and the USA. It was possible to do this based on an analysis of the laws of foreign countries. A separate analysis within this subsection defines the characteristics that a person must meet to obtain a lawyer's status under the national legislation of these countries. The third section of the main part of the article is aimed at defining international standards in the field of personal protection from criminal prosecution. In addition, based on the analysis of the decisions of international judicial institutions, typical examples of violations of a person's right to protection have been identified. The conclusions summarize that the lawyer's monopoly is a justified step toward the professional protection of a person. It is summarized that the defender's rights are derived from the rights of the person he is protecting, and the prospects for improving the legal status of the defender are outlined.

Literature Review

In jurisprudence and literature, it is rightly noted that one of the demands of Ukraine on the path of integration into the European Union is the reform of the legal profession and the establishment of legislation on its activities. It should reproduce the model of the democratic legal institution of advocacy (Inshyn et al., 2024). It is important that the proper functioning of the advocacy system ensures the rule of law in a democratic state (Oliinyk et al., 2021). Such directions of state development determine the need to find ways to improve the functioning of the Institute of Advocacy.

The principle of a fair trial requires that suspects and accused persons have access to an effective defense. Effective defense in criminal proceedings involves several interrelated procedural rights. All international conventions and other legal instruments relating to criminal proceedings recognize the right to legal aid. To be effective, the right to legal aid requires professional, dedicated, properly trained, and experienced lawyers. The effectiveness of the right to legal aid also requires suspects and accused persons to be informed of this right, understand its importance, and be prepared to exercise it. Therefore, mechanisms should be introduced to ensure that suspects and accused persons are informed about their right to legal aid and how to get it, including those who cannot pay for it (Cape & Namoradze, 2012).

Scientists constantly pay attention to the study of these issues. I. V. Dubivka (2017) analyzed the provisions of the legislation of certain foreign countries, namely, Germany, France, and Great Britain, in terms of regulating the participation of a defender (lawyer) in a criminal trial. OHM. O. Skryabin conducted a

comparative legal characterization of the norms of domestic criminal procedural legislation, which regulate the participation of a defense attorney in criminal proceedings in Ukraine, with the norms of the legislation of developed countries of the world (in particular, Lithuania and Germany) (2015).

I. M. Bihunets (2020) outlined the state of scientific development of such a participant in the criminal process as a lawyer. He defined the rights and obligations of the defense attorney during the pre-trial investigation and guaranteed his professional activity. This author also characterized the powers of the defense attorney as a subject of proof.

K. S. Stoyanov (2024) investigated the theoretical and legal provisions of the procedural status of the defender in criminal proceedings and his procedural order in the investigation, the provision of professional legal assistance to the victim, the applicant, and the witness in the context of European standards in the pre-trial investigation.

Yednak, V., Vitiuk, D., Krut, K., & Grokholskyi, V. (2020) consider features of the implementation of the principle of ensuring the right to protection in Ukraine. Research on criminal liability issues for obstructing the legal activity of a defense attorney in court proceedings has also been the subject of study by Ukrainian and foreign scholars on several occasions (Akimov et al., 2022; Ruzmetov & Ablamsky, 2021).

Indonesian scientists also point out the problems of protecting individual rights by the norms of international law. After all, the national government still uses a military approach to conflict resolution. In this regard, scholars state that the role of the government is 80%, and the role of the security forces is 20%, so the use of violence continues, which continues to take the lives of many citizens (Nugroho, 2024).

Despite the large number of scientific works and judicial practice, the practical activity of protecting a person from criminal prosecution in many countries is not perfect. The issue of the government's responsibility to comply with the norms of international law, such as the Declaration of Human Rights, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights is extremely relevant. Therefore, the issues of regulatory regulation of this activity need to be reviewed and appropriate changes made. It is recommended to reach such conclusions by conducting a comparative legal analysis of the status of the defenders in Ukraine and foreign countries. The study of foreign experience and its implementation is the key to the effective improvement of the legal system of each state.

Methodology

The purpose of the article is defined as conducting a comparative study of the norms of criminal procedural legislation of Ukraine with the legislation of other countries of the world, which regulate the legal status of a lawyer in criminal proceedings. This study focuses on identifying legislative gaps and formulating appropriate proposals for their elimination.

The method of research is normative legal research. It is carried out by studying primary legal materials, as well as secondary legal materials related to the researched legal issues. Data were collected through document study and library research and analyzed using a qualitative approach. To solve this goal, the authors solved the following tasks:

1. This paper analyzes legislative norms regarding regulating the activities of a defense attorney in criminal proceedings.
2. Subjects authorized to protect the rights of a suspect accused in criminal proceedings have been identified.
3. The courts recognize typical errors as violations of a person's right to legal aid and define them.

The research used several research techniques and methods. First, with the help of a conceptual analysis, the current state of the legal profession in Ukraine was determined. For this, several research techniques and content analysis methods were used to study legislation as a basis for research. This made it possible to define normative acts that regulate the activities of the bar and the legal status of defenders in criminal cases.

In the future, to determine the legal status of a lawyer in foreign countries, a complex of general scientific methods was used, such as analysis and synthesis, generalization, logical-structural analysis, and control.

Structural and functional analyses were applied to analyze the European Court of Human Rights case law. This made it possible to identify decisions in which the person's right to defense was violated. Out of 110 court decisions, 17 were selected. Information processing methods were used to analyze these court decisions. This made it possible to determine typical violations of a person's right to protection, which were allowed by law enforcement agencies in European countries during the criminal prosecution of a person.

Sociological methods and quantitative-statistical methods were used to collect empirical data, as well as to survey practicing lawyers to determine trends in the further development of the legal profession in Ukraine.

Results and discussion

I. The legal status of a lawyer and the peculiarities of ensuring the right to defense according to the legislation of Ukraine

In Ukraine, everyone arrested or detained must have his or her rights explained immediately. One of these rights is the right to protection. Every person is guaranteed the opportunity to defend himself personally from the moment of detention and to use the legal assistance of a defender (Law of Ukraine No. 254k/96-VR, 1996).

A person suspected of committing a criminal offense at various stages of criminal procedural activity may acquire the status of suspect, accused, acquitted, or convicted. At all stages, every person is guaranteed the right to protection. It means the possibility of providing oral or written explanations regarding the suspicion or accusation (Husieva et al., 2024). It also includes the right to collect and submit evidence, to take personal part in criminal proceedings, to use the legal assistance of a defense attorney, as well as to exercise other procedural rights provided for by the Criminal Procedure Code of Ukraine (Law of Ukraine No. 4651-VI, 2012).

The international standard regarding the professionalism of legal assistance is embodied in the provisions of the current legislation of Ukraine. In Ukraine, a defense attorney is a lawyer whose information is entered in the Unified Register of Lawyers of Ukraine and whose activity has not been suspended or terminated by the Bar Council of the relevant region.

The right to legal assistance in criminal proceedings has:

- The suspect;
- A person in respect of whom sufficient evidence has been collected to report the suspicion of committing a criminal offense, but no suspicion has been reported in connection with his death;
- The accused;
- Convicted;
- Justified;
- A person in respect of whom the use of coercive measures of a medical or educational nature is expected or the issue of their use has been decided;
- A person in respect of whom the consideration of extradition to a foreign state (extradition) is envisaged (Law of Ukraine No. 4651-VI, 2012).

The legal status of a defender in criminal proceedings is derived because he uses the rights of the person he protects. The defense attorney acts on behalf of the client and enjoys the status of an attorney, and therefore, the rights and obligations specified in the Law of Ukraine "On Advocacy and Advocacy." Realizing these rights also provides an opportunity to ensure the legal protection of the individual.

In addition, during the performance of advocacy activities, the advocate has the right to perform any actions. By their nature and meaning, such actions must not be prohibited by law and comply with the rules of lawyer ethics and the contract on providing legal assistance. These include the following actions:

- The right to address legal requests to state authorities, local self-government bodies, their officials and employees, legal entities, as well as to natural persons, with the consent of these persons;
- The right to get acquainted at enterprises, institutions, and organizations with information necessary for the activity of a lawyer, except for those containing information with limited access;

- Draw up statements, complaints, and petitions and submit them by the procedure established by law;
- To be present during consideration of your petitions and complaints and to give explanations on the essence of the petitions and complaints;
- To collect information about facts that can be used as evidence, to seize and receive things and documents in the manner prescribed by law, to interview persons with their consent (Law of Ukraine No. 5076-VI, 2012);
- To use technical means, in particular, to copy materials of criminal proceedings, to record procedural actions and the course of the court session in which he participates as a defense attorney, etc. (Sibirna, & Gapyak, 2021).

II. Implementation of the right to legal protection of a person in the world

In Germany, the Federal Regulation on the Legal Profession, adopted in 1959, determines the legal status of the legal profession. It defines that a lawyer must defend or act as an assistant if he is appointed as a defender or an assistant by the provisions of the Criminal Procedure Code, the Law on Administrative Offenses, the Law on International Legal Assistance in criminal cases, or the Act on cooperation with the International Criminal Court (Federal Ministry of Justice, 1959).

In German criminal proceedings, lawyers and law professors who hold relevant positions in German higher education institutions and who, according to the Framework Law on Higher Education Institutions, are qualified and entitled to hold the position of a judge can perform the role of a defense attorney. Other persons can be defenders only if the court approves their candidacy. Suppose the selected person does not belong to those who can be appointed as defense counsel. In that case, he can only be allowed to be a defense counsel of choice and a person with the right to do so (Service provided by the Federal Ministry of Justice, 1987).

According to the Republic of Bulgaria legislation, anyone practicing law can be a person's defender. Separate norms determine the grounds for disqualification of the defense counsel. These grounds include:

- The defender is or was the defender of another defendant, and the defense of one contradicts the defense of the other;
- The defender represented or advised another defendant, and the defense entrusted to him contradicts the defense of another defendant;
- The person represented or advised another party;
- The defender has already participated in the process in another procedural status;
- Who is a spouse, a direct heir without restrictions, a collateral line up to the fourth degree, or a relative by law up to the third degree to a judge, jury, prosecutor, or investigative body in the case (Law of the Republic of Bulgaria No. 502-01-11/10.08.2005, 2005).

The National Bureau of Legal Aid of Bulgaria deals with issues of legal aid organizations. The specified changes were due to the processes of European integration and the existing judicial practice of the European Court of Human Rights. Despite using European Union practices and taking measures to improve Bulgarian legislation, there are still certain questions regarding timely access to quality legal aid and representation. Violations are most often guaranteed access to a lawyer within 24 hours of police arrest. Suspects detained by the police for 24 hours are not informed of their right to free legal aid, and lawyers visit only 4% of such detainees on the first day. The legal right of a suspect being questioned as a witness to a lawyer is also too limited. In addition, there are noticeable problems with the financing centers that provide free assistance, the involvement of lawyers to provide it, and the quality control of relevant services. In addition, the remuneration of lawyers does not correspond to the actual work performed. The system of selecting lawyers to provide free legal aid does not function properly and needs to be revised (Cape, & Namoradze, 2012, p. 155-156).

France has a National Bar Association and 164 bar associations. At the same time, the legal profession's access conditions are quite strict. They are defined by the Decree of 1972, as well as requirements provided for defense lawyers in France and criminal liability for non-compliance.

In the Criminal Procedure Code of the Republic of Poland, Chapter 9 is devoted to the activities of a defender and a lawyer. The Law "On Advocacy" was also adopted. There are two legal professions in Poland, the implementation of which is related to providing legal aid. He is a lawyer and legal adviser. A

lawyer engaged in advocacy is subject to mandatory civil liability insurance for damage caused by his activities. A person can become a lawyer's assistant (applicant) only after passing the applicant qualification exam (Law of the Republic of Poland, 1997).

In Poland, no institution provides free legal assistance by a lawyer as a type of state guarantee. The state and local self-government bodies jointly maintain the network of more than 1,500 BPD offices. These offices provide only primary legal assistance - legal advice and clarification. Unrelated state and non-state institutions and organizations provide secondary legal assistance. Therefore, due to the lack of an effective unified system of free legal aid, the institution of an independent provider is extremely widespread in the country (Onishchik, 2022, p. 277-278).

In the Czech Republic, the Law of the Czech Republic on Advocacy dated 13.03.96 No. 85/1996 is in force (Law of Czech Republic No. 85/1996, 1996). The Criminal Procedure Code determines issues of the status of a defense attorney in criminal proceedings. According to the current provisions, a defense attorney in a criminal case is a person who has the right to protect the interests of a person based on the Law on Advocacy and the Law on Legal Consuls (Law of the Czech Republic No. 141/1961, 1961).

In Poland, in contrast to France and Ukraine, the public prosecutor can control the defense counsel's correspondence with the accused (Law of the Republic of Poland, 1997). We believe that this contradicts the principle of confidentiality.

In Estonia, the defender in criminal proceedings is a lawyer, and with the permission of the person conducting the proceedings, other persons whose powers derive from the agreement signed with the client (contractual defense counsel) or other persons who have completed a state-accredited educational program for obtaining an academic legal education, whose powers derive from the agreement signed with the client, and the lawyer whose powers derive from his appointment by the investigative body, the prosecutor's office and the court (Law of the Republic of Estonia, 2003).

The practice of Great Britain is significantly different from the experience of the listed countries. Historically, this state has formed a division of practicing human rights defenders into two groups - solicitors and barristers. These entities have the right to perform the function of defense in criminal proceedings, but the authority to exercise defense differs between them. Solicitors have a limited right to make public appearances in court; they mainly meet with clients, suspects, or accused, act on their behalf, and help gather evidence in their favor. In turn, barristers are lawyers with the right to appear in courts of various instances, and the General Council of the Bar controls their work. The powers of barristers include: drawing up procedural documents (detailed claims or withdrawal of a claim); consulting on legal issues; and representing interests in court. Lawyers are not authorized to receive instructions from clients, engage in the disclosure process, communicate with witnesses, conduct and manage investigations, or engage in pre-trial/out-of-court settlement of disputes (Lisna, 2021, p. 125).

It should be noted that subject to the participation of lawyers in certain categories of cases, several additional requirements may be put forward for the defense counsel. The rules of the International Criminal Court can be cited as an example of such a requirement. It stipulates that the defense counsel must have established competence in international or criminal matters and relevant experience, whether as a judge, prosecutor, lawyer or in another similar role in criminal proceedings. The counsel for the defense must have excellent knowledge and fluency in at least one of the working languages of the Court, and the defender may be assisted by other persons, including law professors, with relevant experience (International Criminal Court, 2002).

In addition to the requirements regarding the competence of the representatives of the defense side, several moral and ethical requirements are also put forward. For example, US Institute of Diplomacy and Human Rights scientists consider a defender "the one who listens, the one who has special knowledge" (The US Institute of Diplomacy and Human Rights, 2021). Thus, the main criterion of the defender is the ability to listen and hear both his client and the employees of pre-trial investigation bodies. They then consider the received information and special knowledge for personal protection.

III. International standards of personal protection in criminal proceedings

International standards determine that all persons have the right to seek the assistance of a lawyer. In addition, all citizens can choose their defenders and legal means of protection. Governments of many states undertake to ensure access to effective procedures and mechanisms for effective and equal access to lawyers for all persons within their territory and under their jurisdiction. This happens regardless of race, color, ethnic origin, sex, language, religion, political or other beliefs, national or social origin, property status, etc.

International standards in human rights protection provide that one of the rights of every person is the right to legal assistance (protection). In this regard, the law enforcement agencies of each state must ensure that a person is informed about his right to seek the help of lawyers:

- 1) During arrest or detention;
- 2) When charged with a criminal offense (Akimov et al., 2022).

It is one of the fundamental principles of a fair trial. This right includes three separate elements:

- 1) The right to defend oneself personally;
- 2) The right to the legal assistance of a defender, and in the event of a lack of funds to pay for legal assistance and when the interests of justice require it, the right to free legal assistance,
- 3) The right to choose the lawyer.

The analysis of court practice shows that the following situations should be considered as a typical infringement or restriction of a person's right to protection:

1. Limitation of access to the defender. Access to a lawyer at the early stages of the proceedings is an important safeguard, as national law may foresee the consequences of the accused's conduct in the initial stages of police questioning, which will play a decisive role in the prospects of the defense at any later stages of the criminal proceedings.
2. Giving a person the status of a witness under the conditions when there were real grounds to believe that the person was involved in the commission of a crime. That is, de facto, the person was a suspect.
3. Not informing the person of his right not to testify against himself or the use of torture or ill-treatment.
4. Violation of the principle of equality of the parties.

Conclusions

Each country responds appropriately to regulate the procedure for protecting human rights and implements appropriate mechanisms to create procedures for their practical implementation. However, many issues remain debatable and/or uncertain. The lawyer's monopoly on representing a person in criminal proceedings is well founded. It meets international standards for professionalism in the legal assistance provision. After all, unlike a person who is a lawyer by profession, lawyers pass qualification exams, undergo internships, and improve their professional level. Regarding them, it is possible to apply measures of disciplinary responsibility; they are the object of criminal law protection.

Based on the analysis of the peculiarities of regulating a person's legal status, we believe that the defender's rights are derived from the rights of the person he is protecting. A lawyer must perform his duties regarding the protection of a person at a professional level.

We constants that a typical infringement or limitation of a person's right to defense is:

- 1) Limiting access to a defense attorney;
- 2) Granting a person the status of a witness under the conditions when there were real grounds that he was involved in the commission of a crime;
- 3) Not informing the person of his right not to testify against himself or the use of torture or ill-treatment;
- 4) Violation of the principle of equality of the parties.

We believe that work on improving the status of a lawyer should continue at the state level. This should be done by considering international legal principles and judicial practice.

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