

Experience of European Countries in Developing Institutions of Legal Aid and Defense in Criminal Proceedings

Mykola Kolomoitsev *

* PhD in Law, Doctoral student at NSC «Hon. Prof. M. S. Bokarius FSI», Kharkiv, Ukraine,
ORCID: <https://orcid.org/0009-0005-8957-5509>, e-mail: kolomoitsev.mykola@ukr.net

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The Article Purpose is to clarify peculiarities of shaping the European Countries' experience in developing such criminal procedure institutions as defense and provision of legal aid within criminal proceedings. The author applies general scientific methods (analysis and synthesis, generalization, logical and structural, etc.), methods of comparative legal research and system analysis. It has been established that in most European countries the system of criminal procedure legislation is more generally accepted, in contrast to the criminal procedure legislation of Ukraine. Bar as a non-governmental institution in France, Germany, Poland, Estonia, etc. also functions in compliance with generally accepted traditions that arose as early as the 17th-18th centuries. However, such situation does not guarantee conformity of human rights activities with established international standards in the field of personal protection from criminal prosecution. It has been observed that activities related to protecting a person in the criminal justice field do not differ fundamentally in various countries. What is more, requirements for defense counsels provided by the current legislation of Ukraine are, in certain aspects, more stringent than, for example, in France and Germany. At present it is important to identify typical mistakes that occur in the activities of law enforcement agencies and defense counsels at

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the pre-trial investigation stage and significantly impact the violation of international principles regarding protection from criminal prosecution.

Keywords: *criminal proceedings; defense; legal aid; lawyer; defense counsel; international standards; experience of European states.*

Research Problem Formulation

One of the criminal procedure functions is criminal prosecution, which is understood as a purposeful activity aimed at exposing those guilty of committing a socially dangerous act ¹. This function is multi-component, as it also comprises the following individual tasks: 1) filing an accusation and proving it during a criminal trial; 2) construction of versions; 3) identification of a person who has committed a criminal offense; 4) searching for the suspect if his/her whereabouts are unknown; 5) conducting investigative (search) actions and covert investigative (search) actions, etc. ².

Protection of a person who has become a participant in criminal proceedings is one of the strategic tasks not only of criminal proceedings and its leading participants, but also of the entire state mechanism entrusted with the performance of law enforcement and human rights protection functions in general, as well as with fulfilment of other tasks involving affirmation and provision of rights and freedoms of a person.

For a long time, our country has been making efforts towards European integration. It develops following the chosen European course. This means that activities of all governmental and non-governmental institutions should be aligned with European values, and their protection and compliance with European standards should be ensured. In the context of the political and socio-economic transformation that has recently taken place in Ukraine, the need for further reform of the criminal justice system, criminal procedure legislation, etc. has become more urgent. In this regard, the experience of European countries in the development and reform of institutions of legal aid and defense in criminal proceedings is emphasized.

Moreover, we hold the view that one of the demands of Ukraine on its path to integration into the European Union is the reform of bar and legislation forming the legal basis of its activity. It should reproduce the model of the democratic legal bar institution ³. These tasks are relevant because the proper functioning of the bar system ensures the rule of law in a demo-

- 1 Корж В. П. Кримінальне переслідування особи, яка вчинила злочин. *Вісник прокуратури*. 2009. № 8. С. 85—90 ; Кожевніков Г. К. Державне обвинувачення як елемент кримінального переслідування. *Вісник Академії прокуратури України*. 2006. № 1. С. 46—48.
- 2 Горбачевський В. Я. Кримінальне переслідування як функція кримінального процесу. *Науковий вісник Національної академії внутрішніх справ*. 2014. № 4. С. 46—59. URL: <https://elar.naiu.kiev.ua/server/api/core/bitstreams/906d1c52-b1b6-4737-81e0-559c39eb1cb1/content> (date accessed: 28.06.2024).
- 3 Inshyn M., Shchokin R., Semenets-Orlova I., Kravchenko O., Barsuk M. The Role of Attorney's Request as a Communication Instrument in Advocacy. *Journal of Forensic Science and Medicine*. 2024. № 10 (1). Pp. 34—41. DOI: 10.4103/jfsm.jfsm_114_22 (date accessed: 28.06.2024).

cratic state ⁴, therefore there is a need to improve the functioning of the bar institution, in particular such areas of its activity as defense, representation and provision of other types of legal aid on a professional basis ⁵.

We believe that integrating European experience in legal regulation of legal aid for participants in criminal proceedings and protection of individuals from criminal prosecution will ensure the protection of rights and interests of criminal proceedings' participants, enhance the performance of criminal justice agencies, improve the legal framework for national law enforcement, and embed European values both in the practical activities of governmental and non-governmental organizations as well as in people's self-awareness.

Article Purpose

To clarify peculiarities involving development of national experience of European countries during the development of such institutions of criminal procedure as defense and legal aid in criminal proceedings.

Research Methods

A set of general scientific methods (analysis and synthesis, generalization, logical and structural, etc.) had been applied. This enabled to conceptually analyze the current state of the Bar in European countries and in Ukraine, identify the regulations governing the Bar and define boundaries of the defense counsel's legal status, and the basic principles of defense counsel's activities in protecting a person from criminal prosecution. At the same time, the author applied the methods of comparative legal research and systematic analysis, delving into the experience of criminal proceedings in foreign countries and specifying its definition, and used them for interpretation of international legal acts in the judgments of the European Court of Human Rights (hereinafter — the ECtHR).

Analysis of Essential Research and Publications

Monographs by O. Skriabin ⁶, R. Yemelianova ⁷, K. Stoianov ⁸ at el. analyzed the international legal framework outlining

- 4 Oliinyk O., Bilan Y., Mishchuk H., Akimov O., Vasa L. The impact of migration of highly skilled workers on the country's competitiveness and economic growth. *Montenegrin Journal of Economics*. 2021. № 17 (3). Pp. 7–19. URL: <https://ep3.nuwm.edu.ua/20736/> (date accessed: 28.06.2024).
- 5 Про адвокатуру та адвокатську діяльність : Закон України від 05.07.2012 р. № 5076-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/5076-17#Text> (date accessed: 28.06.2024).
- 6 Скрябін О. М. Захисник в кримінальному процесі: нормативно-правове дослідження : автореф. дис. ... д-ра юрид. наук. Запоріжжя, 2017. 39 с. URL: http://virtuni.edu.ua/info_cpu/sites/default/files/AREF_skryabin_0.pdf (date accessed: 05.06.2024).
- 7 Ємельянов Р. О. Адвокат-представник потерпілого у кримінальному процесі : дис. ... д-ра філос. в галузі права. Кропивницький, 2023. 233 с. URL: https://dnuvs.ukr.education/wp-content/uploads/2023/05/yemelyanov-r._dys_1.pdf (date accessed: 05.06.2024).
- 8 Стоянов К. С. Захисник та представник як учасники кримінального провадження у судовому розслідуванні : дис. ... д-ра філос. в галузі права. Одеса, 2024. 337 с. URL: <https://dspace.oduvs.edu.ua/items/188f95e3-ef3f-415d-85c4-e974f0187d41> (date accessed: 05.06.2024).

the participation of a defense counsel in criminal proceedings, as well as foreign experience of his/her activities in various countries.

I. Odyntsova considerably aided in clarifying efficiency of the defense institution in criminal proceedings, taking into account the national experience of criminal justice reform with a focus on European standards. The researcher supported a number of legal positions on improving the provisions of criminal procedure legislation. Specifically, relying on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted on July 26, 2012 by UN Resolution 2012/15, the researcher suggested that participants in criminal proceedings should include pre-trial attorneys and trial attorneys, etc.⁹.

I. Dubivka¹⁰, I. Lisna¹¹, T. Babchynska¹², and others studied foreign experience with regard to normative regulation of the defense counsel's participation. It is important to note research papers by A. Shovkun¹³, K. Pudkaliuk and O. Habrys, et al.¹⁴ outlining specific features of providing free legal aid and covering related issues, in particular from the experience of foreign countries.

O. Korovaiko¹⁵, M. Motoryhina¹⁶ et al. devoted their research to a comprehensive analysis of international legal standards for providing efficient defense.

Scholars made particular emphasis on the issues of defense and provision of legal aid in criminal proceedings demonstrating the relevance of these issues and even a certain controversy of certain provisions. In our view, they will remain at the

- 9 Одинцова І. М. Ефективність інституту захисту в кримінальному процесі (вітчизняний досвід реформ та європейські стандарти) : дис. ... канд. юрид. наук. Дніпро, 2017. 227 с.
- 10 Дубівка І. В. Правова регламентація участі захисника в кримінальному процесі за законодавством зарубіжних країн. *Юридичний часопис Національної академії внутрішніх справ*. 2017. № 1. С. 350—359. URL: <https://elar.naiu.kiev.ua/server/api/core/bitstreams/4d8ccdb9-cb89-4e9f-8e84-d11040ffe754/content> (date accessed: 01.06.2024).
- 11 Лісна І. С. Зарубіжний досвід правового регулювання участі адвоката у судовому процесі. *Актуальні проблеми права: теорія і практика*. 2021. № 42. С. 120—129. DOI: [10.33216/2218-5461-2021-42-2-120-129](https://doi.org/10.33216/2218-5461-2021-42-2-120-129) (date accessed: 01.06.2024).
- 12 Бабчинська Т. В. Розвиток та етапи становлення інституту захисту у кримінальному судочинстві. *Нове українське право*. 2021. № 3. С. 204—213. DOI: [10.51989/NUL.2021.3.30](https://doi.org/10.51989/NUL.2021.3.30) (date accessed: 01.06.2024).
- 13 Шовкун А. А. Зарубіжний досвід управління системою надання безоплатної правничої допомоги. *Аналітично-порівняльне правознавство*. 2023. № 5. С. 443—448. DOI: [10.24144/2788-6018.2023.05.79](https://doi.org/10.24144/2788-6018.2023.05.79) (date accessed: 01.06.2024).
- 14 Пудкалюк К. О., Габрись О. М. Недоліки системи надання безоплатної вторинної допомоги та аналіз зарубіжного досвіду при усуненні визначених помилок. *Правове регулювання економіки*. 2018. № 17. С. 268—278. URI: <https://ir.kneu.edu.ua:443/handle/2010/27583> (date accessed: 01.06.2024).
- 15 Коровайко О. І. Реалізація міжнародних стандартів кримінального судочинства в судовому провадженні України : автореф. дис. ... д-ра юрид. наук. Харків, 2017. 42 с. URL: <https://dspace.univd.edu.ua/server/api/core/bitstreams/19d992ae-5ceb-4995-8471-f016a0ee2204/content> (date accessed: 01.06.2024).
- 16 Моторигіна М. Г. Сторона захисту в судовому провадженні у першій інстанції : монографія / за наук. ред. д-ра юрид. наук, проф. О. В. Капліної. Харків, 2018. 306 с. URL: https://dspace.nlu.edu.ua/bitstream/123456789/14750/1/Motorugina_2018_mon.pdf (date accessed: 01.06.2024).

forefront in scientific research, given the development of international standards in the field of human rights protection and their implementation in the national practice of law enforcement agencies, as well as socio-political changes taking place in society and its continuous development, etc.

Main Content Presentation

Constitutional provisions guarantee the right of every person to defend himself/herself personally and, if needed, to seek legal assistance from a defense counsel¹⁷. Such provisions are correlated with the modern national doctrine of criminal procedure (according to which a person suspected of committing a crime may acquire the status of suspect, accused, acquitted or convicted, depending on the stage of criminal proceedings).

Throughout all stages of criminal procedural activity, a person who has acquired any of the above-mentioned statuses has the right to defense, which should be understood as the opportunity to provide oral or written explanations regarding the served suspicion or accusation, collect and submit evidence, participate in criminal proceedings, use the legal assistance of the defense counsel, defend one's legal position during pre-trial investigation, court proceedings and oral arguments, exercise other procedural rights stipulated by law.

A person may be defended independently or by a defense counsel of his/her choice or appointment. In Ukraine, a defense counsel is a lawyer whose information is contained in the Unified Register of Lawyers of Ukraine and whose activity has not been suspended or terminated by the Bar Council in his/her region.

In line with the current doctrine of criminal procedure, a lawyer may participate in criminal proceedings as a defense counsel, a person's representative and as a legal assistant to a witness (Article 66 of the Criminal Procedure Code of Ukraine)¹⁸.

A defense counsel in criminal proceedings has a derivative status, which means he/she possesses the rights of the person he/she defends, except for those that the person can exercise personally. The current Criminal Procedure Code of Ukraine does not define the rights of a defense counsel, which poses a major challenge in law enforcement and human rights activities. However, given that this participant in criminal proceedings is outlined in the Law of Ukraine *On the Bar and Legal Practice*¹⁹, it is noteworthy that all the rights can be exercised in the context of legal protection of a person against criminal prosecution.

The bar as an independent non-state actor of legal relations in Ukraine has been functioning for more than two centuries, but the conditions under which it has carried out its activities have varied considerably at different times. From our

17 Конституція України : Закон України від 28.06.1996 р. № 254к/96-ВР (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> (date accessed: 02.06.2024).

18 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 01.06.2024) ; Тертишник В., Одинцова І. Правнича допомога та захист в кримінальному процесі: концепти та колізії правових реформ. *Наше право*. 2017. № 4. С. 164–171. URL: <http://nashe-pravo.unesco-socio.in.ua/wp-content/uploads/archive/NP-2017-4/NP-2017-4.pdf> (date accessed: 15.06.2024).

19 Про адвокатуру та адвокатську діяльність URL: <https://zakon.rada.gov.ua/laws/card/5076-17> (date accessed: 01.06.2024).

point of view, this is due to the fact that the legal status and guarantees of lawyers' activity have been repeatedly reviewed by the legislature.

It is also important to mention that the system of free legal aid, as a form of state guarantee for obtaining legal services aimed at ensuring the realization of human and civil rights and freedoms, as well as their protection and restoration in case of violation, has been recently introduced. Thus, with the adoption of the 2011 Law of Ukraine *On Free Legal Aid* (in the current version: *On Free Legal Aid*)²⁰, a two-level system of providing free legal aid has been introduced in our country. Accordingly, primary legal aid involves provision by specialists of information on legal issues (procedure for restoration of violated rights, appeals against decisions; actions or inaction of state authorities, local self-government bodies, civil servants and officials, etc.). Secondary legal aid is a type of state guarantee intended to create equal opportunities for people to access justice²¹.

During criminal proceedings, the issue of secondary legal aid for suspects, defendants, and victims, gains greater relevance.

The European experience has demonstrated a more generally accepted and progressive approach of states to the development of the legal services and protection system of a person from criminal prosecution. In support of the above, the following facts are provided on the specifics of the functioning of the Bar and its activities

in the context of criminal proceedings in certain foreign countries.

In Germany, the bar legal status is defined by the Federal Provision on the Bar adopted in 1959. In conformity with it, a lawyer must defend or act as an assistant if he/ she is appointed as a defense counsel or assistant under the provisions of the Criminal Procedure Code and laws on administrative offenses, international legal aid in criminal matters, or cooperation with the International Criminal Court²².

German Code of Criminal Procedure (hereinafter referred to as *the German CCP*) came into force in 1987. It governed the procedure for proving, conducting pre-trial investigation and defense. The system of evidence law in criminal proceedings in Germany is positively characterized in the legal literature for the adequate level of harmonizing private and public interests, embodying fundamental modern doctrines of evidence law, information and other expert technologies that are equally used by both the prosecution and the defense²³.

The peculiarities of the defense institution envisaged by the German CCP are that the legal representative involved in a case, similarly to the suspect and the accused, may appoint a defense counsel. The status of a defense counsel may be acquired by a lawyer who is admitted to bar activities, as well as by professors and law lecturers of higher education institutions (universities), who, according to the Framework Law on Higher Education

20 Про безоплатну правничу допомогу : Закон України від 02.06.2011 р. № 3460-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/3460-17#Text> (date accessed: 15.06.2024).

21 Там само.

22 Federal Code for Lawyers (Bundesrechtsanwaltsordnung — BRAO) of 15 July 2022. URL: https://www.gesetze-im-internet.de/englisch_brao/ (date accessed: 08.06.2024).

23 Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987. URL: https://www.gesetze-im-internet.de/stpo/inhalts_bersicht.html (date accessed: 08.06.2024).

Institutions ²⁴ shall have the right and appropriate qualification to hold the position of a judge. Other parties may be admitted to protecting a person only with the court's permission. If this is a type of case where the presence of a defense counsel is required, and the defense counsel chosen by the accused is not authorized to perform such functions, he/she may also participate in a case, but only together with a person who is recognized as a defense counsel ²⁵, i.e., in addition to a professional defense counsel, the accused may appoint his/her trustee to participate in a case. Thus, the wife, husband or other person who share common household with the accused is admitted to trial as an assistant in the defense of the defendant.

As for the motion for recusal directed at the defense counsel, according to German law, he/she shall be excluded from participation in proceedings if there are substantial grounds to believe that he/she has directly participated in actions that may be investigation subject, abused his/her rights, which poses a serious threat to the safety of the accused in custody, or if the defense counsel has committed an act that, should the accused be convicted, will show signs of concealing or acquiring assets obtained by criminal means.

Moreover, the German CCP guarantees the right to appoint a lawyer to a witness in criminal cases. Thus, witnesses who have not utilized the legal aid of a lawyer may be assigned a lawyer at the time of interrogation with the consent of the public prosecutor's office if it is obvious that they

are unable to exercise their powers independently during interrogation and their defense interests cannot be ensured in any other way.

In line with the legislation of the Republic of Bulgaria, anyone who carries out the practice of law may act as a defense counsel. Individual provisions define grounds for recusing the defense counsel. These include the following:

- any individual who has also been or is defence counsel to another accused party, where the defence of the one is contradictory to the defence of the other;
- any individual who has represented or has given advice to another accused party, where the defence which is to be assigned to him/her stands in contradiction to the defence of the other accused party;
- any individual who has represented or has given advice to the adverse party;
- any individual who has participated in the proceedings in another procedural capacity;
- any individual who is the spouse, relative of direct descent, without limitation in degree, or of collateral descent up to the fourth degree or by marriage - up to the third degree, of a judge, court assessor, prosecutor or an investigative body involved in the case ²⁶.

In the Republic of Bulgaria, the issue of defense in criminal proceedings is governed by the Criminal Procedure Code of Bulgaria, the *Laws On Legal Aid* and *On*

24 Hochschulrahmengesetz in der Fassung der Bekanntmachung vom 19. Januar 1999. URL: <https://www.gesetze-im-internet.de/hrg/> (date accessed: 08.06.2024).

25 Strafprozeßordnung URL: https://www.gesetze-im-internet.de/stpo/inhalts_bersicht.html (date accessed: 08.06.2024).

26 Criminal Procedure Code of the Republic of Bulgaria. Act No. 502-01-11/10.08.2005. URL: <https://justice.government.bg/home/normdoc/2135512224> (date accessed: 05.06.2024).

Advocacy ²⁷. The organization of legal aid is the prerogative of the National Bureau of Legal Aid ²⁸, which was created as a result of European integration and the consideration of ECtHR case law.

Despite the use of European Union practices and the adoption of measures and improvement of Bulgarian legislation, certain issues still arise in providing citizens of this state with access to quality legal aid and legal representation. Violations most often concern the guarantee of access to a lawyer within 24 hours of arrest. A substantial drawback is that detainees are not informed of their right to free legal aid. During the first day detainees have the right to communicate privately with lawyers only in 4% of cases.

Moreover, it is not uncommon for a suspect to be interrogated as a witness first, without being allowed to exercise the right to access a lawyer. There are also challenges with funding for centers that provide free legal aid, engaging lawyers for its provision, and controlling the quality of services provided. Research shows that remuneration that does not correspond to the amount of work actually performed is a significant drawback in the provision of legal aid. Researchers also note that the system for selecting lawyers

to provide free legal aid is not working properly. It needs to be revised ²⁹.

In France, there is a National Bar Association and 164 bar associations. The conditions for accessing legal profession, stipulated by the Decree of 1972 ³⁰, are quite harsh. Apart from the requirements, rights and responsibilities of defense councils, French law stipulates both requirements for maintaining an appropriate level of professional qualification and criminal liability for failure to comply with the indicated requirements and responsibilities.

The status of defense counsel in criminal proceedings in France was substantially altered in 1993; the reforms continue to this day. In particular, the status of the suspect (accused) during the pre-trial investigation phase has been improved, his rights have been considerably extended, and the institution of the defense counsel has been given a more significant status, in particular through the legal status of the bar. It is worth noting that under French law, should a person file a statement about a criminal offense, he/she may immediately acquire the status of accused (Article 80 of the French Code of Criminal Procedure) ³¹. Let's stress that

27 Ibid ; On legal aid : Law of the Republic of Bulgaria dated January 1, 2006 (Law on legal aid). URL: <https://lex.bg/laws/ldoc/2135511185> (date accessed: 05.06.2024) ; Advocacy Law : Law of the Republic of Bulgaria dated June 25, 2004. URL: <https://lex.bg/bg/laws/ldoc/2135486731> (date accessed: 05.06.2024).

28 On legal aid URL: <https://lex.bg/laws/ldoc/2135511185> (date accessed: 05.06.2024).

29 Кейп Е., Наморадзе З. Ефективний захист у кримінальному процесі в країнах Східної Європи. Київ, 2012. С. 155—156. URL: <https://ulaf.org.ua/wp-content/uploads/2019/08/effective-criminal-defence.pdf> (date accessed: 07.06.2024).

30 Code Penal : Numero 1867060850 (1867). URL: <https://www.ejustice.just.fgov.be/eli/loi/1867/06/08/1867060850/justel> (date accessed: 07.06.2024) ; Décret n°72-669 du 13 juillet 1972 pris pour l'application à la profession d'avocat de la loi n°66-879 du 29 novembre 1966 relative aux sociétés civiles professionnelles. URL: <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000005618469/> (date accessed: 07.06.2024).

31 Law of the France Code of Criminal Procedure. 1958. 278 p. URL: https://sherloc.unodc.org/cld/uploads/res/document/fra/1958/code_de_procedure_penale_html/Code_de_procedure_penale_incorporant_les_amendements_jusqua_2005_ENGLISH-OLDER_VERSION.pdf (date accessed: 10.06.2024).

in compliance with the practice of the ECtHR, the right to legal aid arises at the moment when a person is in a vulnerable position, even if he/she is not officially detained as a suspect (Case of *Shabelnyk v. Ukraine* ³²).

Regarding peculiarities of the defense counsel's participation in criminal proceedings in France, it is necessary to emphasize, first of all, substantial involvement of the investigating judge at the stage of pre-trial investigation. This is the only first instance investigative authority that the lawyer is obliged to cooperate with.

The French Code of Criminal Procedure also enshrines that the lawyer is authorized to take part in all the investigative acts carried out with participation of his/her client, in particular during the first interrogation. In the course of court session, the defense counsel is a participant with equal rights in proceedings, therefore, he/she possesses the right to ask questions of the person being interrogated. After the trial is over, the defense counsel participates in oral arguments ³³.

Polish law thoroughly regulates the activities of defense counsel and lawyers. The Criminal Procedure Code of the Republic of Poland has a separate section

devoted to it ³⁴. What is more, the Law *On the Advocates' Profession* operates there ³⁵. In Poland, in conformity with the provisions of the above-mentioned legislative acts, there are two independent legal professions whose activities are related to the provision of legal aid: lawyers and legal advisors. A lawyer who performs his/her work at a professional level is subject to mandatory civil liability insurance for damage that could have resulted from his/her activities. In addition, he/she is granted extensive powers.

Another peculiarity of the legal system of modern Poland is the absence of the institution of free legal aid by a lawyer as a type of state guarantee. More than 1.5 thousand legal aid offices maintained by the state and local governments provide only primary legal aid, i.e., legal consultations and explanations. As for secondary legal aid, it is provided by unrelated governmental and non-governmental institutions and organizations ³⁶.

The issue of the defense counsel's status in criminal proceedings in the Czech Republic is governed by the Law on the Bar and the Criminal Procedure Code of the state. In compliance with current provisions, a defense counsel in a criminal

32 Справа «Шабельник проти України» (заява № 16404/03) : рішення ЄСПЛ. Страсбург, 19.02.2009 р. URL: http://zakon2.rada.gov.ua/laws/show/974_457 (date accessed: 10.06.2024).

33 Law of the France Code URL: https://sherloc.unodc.org/cld/uploads/res/document/1958/code_de_procedure_penale_html/Code_de_procedure_penale_incorporant_les_amendements_jusqua_2005_ENGLISH-OLDER_VERSION.pdf (date accessed: 10.06.2024).

34 Kodeks postępowania karnego : Ustawa z 06.06.1997 r. Dziennik Ustaw. 2017. Poz. 1904 I 2405 oraz z 2018 r. Poz. 5. URL: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf> (date accessed: 05.06.2024).

35 Prawo o adwokaturze : Ustawa z 26.05.1982 r. Ibid. Poz. 2368 I 2400. URL: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19820160124> (date accessed: 05.06.2024).

36 Оніщик Ю. Правові засади діяльності адвокатури: досвід Польщі та перспективи України / Multidimensionality of Ukrainian-Polish cooperation: genesis, particularities and prospects : Scientific monograph ; science eds. T. Astramovich-Leik, Ya. Turchyn, O. Horbach. Riga, Latvia, 2022. С. 267—278. DOI: [10.30525/978-9934-26-232-6-20](https://doi.org/10.30525/978-9934-26-232-6-20) (date accessed: 05.06.2024).

case is a person who has the right to protect the interests of a person on the basis of the Law On the Bar and the Law On Legal Advisors³⁷.

In Estonia, a defense counsel in criminal proceedings is an advocate whose competence in the criminal proceeding is based on an appointment by the Estonian Bar Association at the request of an investigative body, Prosecutor's Office or court (appointed counsel), or, with the permission of the body conducting the proceedings, any other person who meets the educational requirements established for contractual representatives by this Act and whose competence in the criminal proceeding is based on an agreement with the person being defended (contractual counsel)³⁸.

The practice in Great Britain differs markedly from that of the above countries. Here, human rights practitioners have historically been split into two groups: 1) solicitors and 2) barristers. They are empowered to defend during criminal proceedings, but the scope of their powers to do so varies substantially. Thus, the right to make public appearances in courts is limited for solicitors; they mainly meet with clients, suspects or accused persons, act on behalf of their clients, and assist in collecting evidence in their favor. While barristers are lawyers who are entitled to

appear in courts of various instances, and their work is under the control of the General Council of the Bar. As for the powers of barristers, they have extensive authority, in particular: drawing up procedural documents (detailed claims or withdrawal of a claim); consulting on legal issues; representation of a person's interests in court, etc. The law enshrines that lawyers are not authorized to receive instructions from clients; disclose confidential information; communicate with witnesses; conduct an independent investigation and manage it; engage in pre-trial (out-of-court) dispute resolution, etc.³⁹.

As to the protection of a person's interests in international judicial institutions, we should stress: there are a number of additional requirements that can be additionally put forward to a lawyer. The rules of the International Criminal Court can be cited as an example of such a requirement. The constituent documents of the latter stipulate that the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be

37 Law of the Czech Republic. Act No. 85/1996 of 13.03.1996 on the Legal Profession. URL: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/National_Laws_on_the_Bars/EN_Czech-Rep_ACT-No-851996-Sb-of-13th-March-1996-on-the-Legal-Profession.pdf (date accessed: 05.06.2024) ; Criminal Procedure Act (Criminal Procedure Code) Act No. 141/1961. Coll. Version 01.07—31.12.2024. URL: <https://www.zakonyprolidi.cz/translation/cs/1961-141?langid=1033> (date accessed: 05.06.2024).

38 Code of Criminal Procedure of 12.02.2003. URL: <https://www.riigiteataja.ee/en/eli/530102013093/consolide> (date accessed: 05.06.2024).

39 Лісна І. С. Зазнач. твір. DOI: 10.33216/2218-5461-2021-42-2-120-129 (date accessed: 05.06.2024) ; Шкарупа К. В. Особливості зарубіжного досвіду становлення та функціонування адвокатури (на прикладі Франції та Великобританії). *Юридична наука*. 2020. № 2 (104). С. 589—595. DOI: 10.32844/2222-5374-2020-104-2.66 (date accessed: 05.06.2024).

assisted by other persons, including professors of law with relevant expertise ⁴⁰.

Let's also look at the experience of one of the leading states in West Asia Israel. In 1995, the Israeli Ministry of Justice established the Public Defender's Office and the Public Defender's Council. Israel has a mixed model of providing free legal aid, combining elements of the model of public defenders, who are full-time civil servants, and elements of the model of private lawyers who are contracted by the Public Defender's Office to provide defense to indigent defendants. The Israeli legal aid system has two important components: 1) provision of legal services in civil cases; 2) provision of legal assistance in criminal cases by the Office of Civil Lawyers. Legal advice is also available at university legal clinics, which are staffed primarily by students who can earn academic credit for participating in practical legal aid courses ⁴¹.

Additionally, it should be highlighted that despite the existence of a number of positive aspects regarding the functioning of the bar and the protection of a person from criminal prosecution, the ECtHR has repeatedly criticized both the German, English, and Ukrainian criminal procedural systems in general and procedural legislation in particular. As an example, the court has persistently pointed out that the UK justice system violates the confidentiality of a meeting with a defense counsel, the appointment of a lawyer in the interests of justice, etc. Ger-

many undermines the presumption of innocence principle, the right to a fair trial, and the right to a hearing by an impartial tribunal.

In Ukraine, typical violations are: non-compliance with reasonable time limits for case hearing, failure to ensure access to fair justice, and encroachment on the right to defense. For Ukraine, since the ECHR has a tradition of adhering to its case law, the case law of the ECHR is essential not only in cases of Ukrainian citizens against Ukraine, but also in the case law of the ECHR on the claims of citizens of any European country. The experience of European countries in reforming their procedural legislation, especially in aspects influenced by the legal positions of the ECHR, is an invaluable source of reformist concepts today ⁴².

Conclusions

The system of criminal procedure is more sustainable in European countries. In contrast to Ukraine, it has remained largely unchanged in the last 50–60 years. The bar, as an independent non-governmental institution, also functions according to long-standing traditions that date back to the 17th and 18th centuries. Still, this situation does not mean that human rights activities in these states fully comply with international standards in the field of personal protection from criminal prosecution. This, specifically, is demonstrated by the practice of the ECHR, the

40 Rules of Procedure and Evidence. Are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court. First session. (New York, 03–10.09.2002). New York, 2002. 99 p. URL: <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf> (date accessed: 05.06.2024).

41 Бригінець О. О. Правове забезпечення діяльності адвокатури в договірних відносинах (вітчизняний і зарубіжний досвід). *Часопис Київського університету права*. 2023. № 1. С. 169–172. DOI: [10.36695/2219-5521.1.2023.35](https://doi.org/10.36695/2219-5521.1.2023.35) (date accessed: 05.07.2024).

42 Одинцова І. М. Зазнач. твір. С. 53.

decisions of national judges who repeatedly emphasized the inadmissibility of violating the principles of criminal procedural legislation, primarily in the context of such fundamental principles as the right of a person to defense and access to fair justice.

Stemming from the analysis of the criminal procedure legislation provisions in such European countries as France, Germany, Poland, the Czech Republic, Bulgaria, and Estonia, we have found that activities of defense counsels during the defense of a person in criminal proceedings in these countries are fundamentally similar. Additionally, the requirements for a defense counsel under the current legislation of Ukraine are in some aspects, in particular, those that determine their professional competence, stricter than, for example, in France and Germany, where there is no lawyer's monopoly on representation and defense of a person's interests in criminal proceedings. At the same time, we are of the opinion that this requirement arises from the necessity to ensure professionalism of the person providing protection, contributing to the improvement of the quality of legal services, since lawyers are obliged to possess practical experience, and take relevant qualification exams, and undergo internships, and continuously enhance their professional skills, as well as bear disciplinary responsibility. Their activities are subject to criminal law protection.

From our perspective, prospects for subsequent research into the issues raised should consist in clarifying typical mistakes that law enforcement agencies and defense counsels make at the stage of pre-trial investigation and which subsequently negatively affect the international principles of personal protection, including the violation of these principles.

Досвід держав Європи в розбудові інститутів правничої допомоги та захисту в кримінальному судочинстві

Микола Коломойцев

Мета статті — з'ясувати особливості формування досвіду європейських держав у розбудові таких інститутів кримінального процесу, як захист і надання правничої допомоги в межах кримінального провадження. Застосовано загальнонаукові методи (аналіз і синтез, узагальнення, логіко-структурний тощо), методи порівняльно-правового дослідження та системного аналізу. З'ясовано, що в більшості країн Європи система кримінального процесуального законодавства більш усталена, на відміну від системи кримінального процесуального законодавства України. Адвокатура як неурядовий інститут у Франції, Німеччині, Польщі, Естонії тощо також функціонує згідно з усталеними традиціями, які виникли ще в XVII—XVIII ст., проте така ситуація не гарантує відповідності правозахисної діяльності сформованим міжнародним стандартам у сфері захисту особи від кримінального переслідування. Зроблено висновок, що діяльність у межах здійснення захисту особи у сфері кримінального судочинства в різних країнах принципово не відрізняється. Навіть більше, вимоги до захисників, передбачені чинним законодавством України, у певних аспектах є більш суворими, аніж, наприклад, у Франції та Німеччині. Нині важливо з'ясувати, які типові помилки мають місце в діяльності правоохоронних органів і захисників на стадії досудового розслідування, що суттєво позначаються на порушенні міжнародних засад захисту особи від кримінального переслідування.

Ключові слова: кримінальне судочинство; захист; правнича допомога;

адвокат; захисник; міжнародні стандарти; досвід європейських держав.

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