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## USE OF THE EUROPEAN STANDARDS IN IMPROVING THE ACTIVITY OF ADVOCATESHIP IN UKRAINE

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### Аннотация

В статье рассматривается развитие адвокатуры Украины в течение последнего десятилетия, когда государство настойчиво движется путем европейской интеграции, делается попытка анализа повышения престижа роли адвоката в украинском обществе. Раскрываются особенности активного перехода на современные методы работы адвоката, расширение его профессиональных прав и развитие адвокатского самоуправления после принятия Закона Украины «Об адвокатуре и адвокатской деятельности» в 2012 г. Совершается анализ и оценка практической стороны формирования четкого осознания обществом значимости европейского уровня адвокатуры для успеха украинского государства на международной политической арене. Выясняется эффективность предыдущего совершенствования деятельности адвокатуры Украины согласно европейским стандартам, а также потребности и тенденции будущего ее развития.

**Ключевые слова:** адвокатура, европейские стандарты, принцип независимости, европейская интеграция, роль адвоката.

### Summary

The article examines the development of advocateship in Ukraine throughout the last space of ten years when the state moves persistently in the way of European integration, the attempt is being made to analyse the increase of a barrister's role in the Ukrainian society. The peculiarities of the barristers's active passage to modern methods of work, enlargement of his professional rights and development of the advocacy self-management after having adopted the Law of Ukraine «About the advocateship and advocacy activity» in 2012 are being come open. The analysis and valuation of a practical side of forming of a clear understanding by the society of the significance of European advocateship level for a success of the Ukrainian state on the international political arena is being realized. The efficiency of the preceding improvement of the advocateship's activity of Ukraine according to the European standards is being become clear, the needs and tendencies of its further development as well.

**Key words:** advocateship, European standards, principle of independence, European integration, barrister's role.

**The way a question is put:** The development of the state that has chosen the European integration course of way is not possible without a due level of functioning of the right and its institutions, creating and improving the legislation whose norms would meet the democratic institution models of advocateship according to European standards. The ensuring of equality between the defence and the prosecution is one of the most important factors of a further improvement of the legislative base that regulates the Ukrainian advocateship's activity nowadays. The change of a barrister's role from an adviser and messenger into a competent and a prosecutor equivalent subject of a judicial proceeding will be possible only by way of availability of highly qualified and independent barristers

and must contribute to the supremacy of right in Ukraine.

**The actuality of study of the theme** is being confirmed by the fact that the consideration of the European standards becomes the main demand in the process of improvement and adoption of a new legislation that regulates the activity of barristers of Ukraine and of all other right institutions of the state.

**State of study.** Nowadays the scientific analysis of the practical application of the European standards in improving the advocateship's activity of Ukraine is being realized by the researchers rather intensively. Among them there are V. Sviatotska, O. Soloviov, S. Goncharenko, Y. Glovatskiy and others whose works served as a basis for the further study of the questions under examination.



**The aim and the tasks of the article** are to study the efficiency of the process of use of the European standards in the Law of Ukraine «About the advocateship and advocacy activity» adopted in 2012 and the needs and tendencies of the further reformation of the advocateship's activity of Ukraine in the way of integration to the European Union. The novelty of this work lies in the following: it has an attempt to analyse and evaluate comprehensively the development of the Ukrainian advocateship for the last years and the significance of its European level for the success of the Ukrainian state.

#### **Exposition of the main material.**

There is no doubt that a democratic state interested in an own multiple-aspect development, needs good lawyers, barristers because their presence ensures a high legal awareness of the citizens, decrease of criminality and minimization of the displays of corruption. From the very first days of its independence Ukraine chose the way of harmonization the legal system of the state with the European course of forming the advocateship, legal system and law enforcing authorities. The aim of the reforms is a maximum approaching of the Ukrainian legislation to the European standards and the reorganization of all human rights system for a constant and implicit guaranteeing of the human rights in Ukraine. After the adoption of the Law of Ukraine «About the advocateship and advocacy activity» which significantly invigorated the procedural state of barristers, nowadays still remain actual the problems of their independence, protection of honour and dignity and due conditions of work. It is caused by numerous factors, in particular, by absence for the present time of due complex changes in the activity of the prosecuting magistracy, law courts and bodies that accomplish the law enforcing duty of the state.

One can consider as the beginning of introduction of European standards into the legislation of Ukraine the joining of our country on November 9 1995 the Council of Europe and ratification on July 17 1997 by the Verkhovna Rada (Supreme Council) of Ukraine of the European Convention about the protection of human rights and main

liberties and of eleven Protocols to it as the first act of international recognition of Ukraine to be a democratic state [1, art. 263].

The European Convention on Human Rights is one of the main international human rights documents. Truth to tell, this international document does not contain a special legal norm concerning the rights of barristers. But the rights that it guarantees to the barristers of the European Community countries have a common to mankind character. [2, p. 20]

The fact is that the European Convention on Human Rights and main liberties constituting simultaneously the minimal standards in this sphere, comes out as a guarantor, so to say, as a model for the legislation of the European Community countries. [2, p. 20].

Since the European Convention on Human Rights doesn't contain a direct norm that would consolidate the rights of barristers, we can judge about its contents and volume from the position of analyzing the judge-made law norms of the European Court of Human Rights. The decisions of the ECHR prove the fact of protectability of the barristers' professional rights of the European Community. The European Court of Human Rights, applying individual norms of the Convention and effectuating its interpretation, in fact concedes and ensures the regime of an intensified protection of barristers' rights. Just those rights that in the Ukrainian legislation we call barristers' professional rights and guarantees of advocacy activity. [2, p. 21].

Having ratified the Convention on Protection of Human Rights and Original Liberties of 1950, Ukraine committed itself to respect and follow its norms. And having recognized the jurisdiction of the European Court of Human Rights, committed itself to apply the practice of this court on the level of the national legislation. According to art. 9 of the Constitution of Ukraine, «the valid international treaties the consent to obligatoriness of which is conceded by the Verkhovna Rada of Ukraine, is a part of the national legislation» [3, art. 59]. Thanks to it a possibility appeared to fill in the gaps of the national legislation by means of using the norms and the practice of the Strasbourg legislation.

At present the precedent-related practice of the European Court of Human Rights executes the function of an important instrument in case of protection of human rights. One can watch an intensification of the prestige and influence of the judge-made law of this court on the whole which is rather important for Ukraine that moves by the European integration way.

The analysis of the organization and activity of the advocateship of the European Union has given an opportunity to reveal the defects that existed in the organization of the advocateship of Ukraine and also to trace the directions of improving the national legislation in the sphere of advocacy activity. Speaking on the normative base of regulation of the advocacy activity in the European Union, we mean the General Code of Conduct for Lawyers in the European Community adopted by the delegation of member counties in Strasbourg in October 1988. The Code is an international document regulating the activity of barristers in the countries of the Community and also determines the special role and place of a barrister in the social life of any member country of the EU [4].

First of all, the Code admits a barrister to have a special role in a lawful society and determines an entire complex of commitments of both juridical and moral character. Among such commitments there are: commitments before the client, before the court and other organs of power, before the representatives of this profession and also before the society for the members of which it's utterly important the existence of this free and independent profession, the most important guarantee of human rights [4].

On adopting in 2012 the Law of Ukraine «About the advocateship and advocacy activity», to a larger extent were taken into consideration the main European standards of functioning of the advocateship, and exactly:

– the barrister's duty to act in the interests of the right on the whole and in the interests of those whose interests he defends;

– confidentiality in the barrister's activity (following the principle of credence and personal honesty, the barrister must adhere to the principle



of confidentiality, as the special feature of the advocacy profession is that the barrister in the process of carrying out the advocacy activity receives from the client the news and information that he must keep secret. So, following this principle is an indispensable and most important premise of confidential relations between the barrister and the client without which the concession of juridical assistance is impossible) [5, p. 376];

– the spirit of corporative unity that is manifested in the credence and mutual collaboration of the barristers of different countries of collaboration (according to the legislative acts of the European Community, a barrister from another EU member country must follow the rules of the advocacy association of the country in which he practises the professional activity, and also must concede the information concerning any rules that could impede him to practise his professional activity) [5, p. 377];

– the barrister's duty, while conceding legal assistance, to follow the human rights and main liberties that are recognized as norms of national and international legislation;

– the barrister's duty to act independently and persistently according to the law and admitted trade standards and ethic norms.

And the most important thing is that in the new law much heed is paid to the realization of the principle of independence of barristers in their activity. In general, speaking on the principle of independence, the thing is about the independence, both internal or personality and external one. So, point 2.1 of the General Code indicates that the tasks that are being executed by a barrister in the process of the professional activity demand his absolute independence and absence of any influence over him or of a pressure from outside. The keeping of the principle of independence contributes to a considerable increase of the level of the society's credence to an impartial justice and fairness of judges. The specific character of aims and tasks of the advocateship demands a barrister's complete independence for a due realization of his rights and professional duties. A barrister, while accomplishing a client's orders, cannot and must not be

governed by indications of other persons that could influence upon the end result on deciding both property controversies and cases of a non-material nature [4]. That is. The barristers must act in the interests of right on the whole and in the interests of those whose interests they defend.

Analyzing the statements of the Law of Ukraine «About the advocateship and advocatory activity», one can draw a conclusion about a considerable consolidation of a barrister's legal status owing to the extension of the range of his powers, increase of the guarantees of his activity and regulation of problems of his responsibility. In particular, the ascertainment of the duty of an organ or of a functionary that had detained a barrister or applied against him a punishment measure, to notify it immediately to a corresponding regional council of barristers. The order of conducting a search of barristers and their inspection is described in sufficiently detail as well.

In the Law is consolidated the new system of forming qualification and disciplinary commissions of advocateship (their composition is elected and recalled among the barristers by the organs of advocatory self-management), that increases considerably the independence of the advocateship on the whole. The court of law has no more right to stand the barrister off a legal investigation, and the state guarantees security to the barristers themselves and to their families members, and in case of danger for their life or health the state commits itself to concede them a proper guard and assist by all means to the security.

Also increases the barrister's role prestige after the innovations of the Law of Ukraine «About the advocateship and advocatory activity» adopted in 2012. In particular, it becomes more complicated to acquire a status of barrister due to growth of requests to the preparation level, now a legal defence is exclusively a professional matter. In the past anybody could plead at the bar: a relative, neighbor, any average citizen without a law education that provoked an absolute incomprehension of representatives of the European Union. There were also problems because of lack of explanation of the statement:

who could be considered an expert in the sphere of right. Before having adopted the Law of Ukraine «About free of charge juridical assistance», a person who had no money for a qualified juridical assistance could only hope for his own people and relatives who had no obligation to be even specialists in the sphere of right. Apropos, the new Law established that one's interests in criminal cases in a law court can be represented only by a legist having a higher legal education, who had passed the qualification exam successfully, passed a required training (formerly it was enough to have an experience of work in any sphere of right) and had become a member of a bar [6].

But it is necessary to determine more exactly the contents and the order of conducting of the qualification exam that is hold by the advocateship commission. The presence of a subjective factor raises the level of corruption, therefore it is necessary to think about a possibility of depersonalization of this process, for example, by means of conducting of an independent evaluation.

It is well worth indicating that a consolidation of a barrister's role all the same depends on conducting a complex reform in the judicial branch of government, public prosecution and law enforcing bodies of our country. In practice, the judges go on pronouncing a very insignificant number of absolutely sentences on the causes, up to date most of them are inclined to consider the prosecution and to disregard the defence's arguments. Unfortunately, does not dissolve an oppressive sensation of that the law court and public prosecution work in a long ago coordinated tandem that has been demonstrated during the recent tragic revolutionary events in Ukraine.

On the one hand, the new Law has enlarged to a certain extent the volume of barristers' professional rights, and not in a qualitative meaning but in a quantitative one, by means of an artificial allotment of concrete rights in the list that were guaranteed before, too. And unfortunately, it is difficult to object the fact that some of these rights have only a declaratory character and cannot be used properly in the barrister's practical activity.

In particular, in point 7, p. 1, art. 20 of this Law it is foreseen that a barrister



has a right to collect information and facts that can be used as proves, to present requests in the order established by law, to receive and take away the things, documents, its copies, to acquaint with them and to interrogate the persons with their consent. In reality it is rather difficult to realize this right in the practice because the procedural order of taking away by a barrister the things and documents from persons is absolutely unsolved, that's why remains dark the same machinery of realization by a barrister of this right and of the procedural status of such documents (things), in particular, during the examination of civil cases. Remains also unsolved the moment of realization of the right to conduct an interrogation of the persons with their consent. First and foremost, it is not still established the procedural machinery of realization by a barrister of his right, and such his acts can be considered as a pressure on the witnesses. And besides, the lawgiver has not determined a legal nature of referred persons' evidences, namely, a possibility to consider them as means of proof foreseen by the Civil Procedural Code of Ukraine.

Also debatable is the problem of instituting disciplinary proceedings against barristers, of probation time for those who wished to become barristers, and some others.

Stands over the problem referring to the organization of advocateship and is more widespread among the barristers who practise the advocatory activity: the payment for a judicial assistance conceded by a barrister. In world practice this problem is being resolved by determining the barrister's amount of fee within due limits that is correlated with the character of his services. The client must know in advance this fee in corpore. Regardless of existence of an agreement between the client and the barrister, the amount of fee is regulated according to the status of the advocatory association the member of which the barrister is. In case of a simultaneous membership of the barrister in several associations, must be applied the status the contents of which corresponds more to the contents of the agreement concluded between the parties. If the barrister demands to pay in advance a fee or to compensate possible

expenses related to the client's order accomplishment, these amounts must not exceed due limits. In case if the client had not effectuate the advance payment, the barrister has a right to refuse to take a further part in examining the cause or to provide services to the client.

**Conclusions.** There is no doubt that the reformation of the activity of the Ukrainian advocateship, putting it in correspondence to the European standards on the way of entering (integrating) of Ukraine to the European political, informative, economic and legal sphere of the European Union is not completed yet. It is necessary to draw maximally together for the future, too, to adapt the legislation of Ukraine to the normative base of the EU which will help in the development of political, entrepreneurial, social, cultural activity of people. The adaptation will contribute to the economic development of the country and to a gradual growth of well-being of the citizens, the level of their life and approaching its standards to those which have been formed in the EU member countries. And the problems of present-day advocateship in Ukraine depend completely on putting generally the Ukrainian legal system in correspondence to the European standards including all the spheres of right, which by-turn is one of the main criteria of gaining by Ukraine the membership in the European Union.

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