

Artículo de investigación

**Advocacy of Ukraine under constitutional reform**

АДВОКАТУРА УКРАЇНИ В УМОВАХ КОНСТИТУЦІЙНОЇ РЕФОРМИ

Abogacía de Ucrania bajo reforma constitucional

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**Abstract**

The relevance of the article is to find the answer to the question of the reasonableness of the abolition of the attorney's monopoly in Ukraine. The object of the study of this article was the social legal relationship that arises when a person is represented in court by a lawyer.

Both general scientific and legal research methods were used in the writing of the research. The article analyzed the draft laws on the abolition of the attorney's monopoly, the views of supranational bodies on this issue.

The authors concluded that a lawyer should remain the exclusive, sole, "external" representative who provides professional legal assistance.

**Keywords:** Attorney, lawyer, bar, monopoly.

**Анотація**

Актуальність статті полягає у пошуку відповіді на питання доцільності скасування адвокатської монополії в Україні. Об'єктом дослідження даної статті стали суспільні правовідносини, які виникають при представництві особи у суді.

При написанні дослідження були використані як загальнонаукові так і спеціально-юридичні методи дослідження. В статті було проаналізовано проекти законів щодо скасування адвокатської монополії, висновки наднаціональних органів з даного питання.

Авторами був зроблений висновок про те, що адвокат має залишатися виключним, єдиним, «зовнішнім» представником, який надає професійну правничу допомогу.

**Ключові слова:** адвокат, юрист, адвокатура, монополія.

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## Resumen

La relevancia del artículo es encontrar la respuesta a la pregunta de lo razonable de la abolición del monopolio del abogado en Ucrania. El objeto del estudio de este artículo fue la relación legal social que surge cuando una persona está representada en la corte por un abogado. Se utilizaron métodos generales de investigación científica y jurídica en la redacción de la investigación. El artículo analizó los proyectos de ley sobre la abolición del monopolio del abogado, las opiniones de los organismos supranacionales sobre este tema. Los autores concluyeron que un abogado debe seguir siendo el representante exclusivo, único y "externo" que brinda asistencia legal profesional.

**Palabras clave:** Abogado, abogado, bar, monopolio.

## Introduction

The establishment of a parliamentary majority after the 2019 presidential election in Ukraine gave the start of active legislative changes in order to properly regulate all spheres of public life. Successful implementation of far-reaching and complex reforms that will have a profound impact on Ukrainian society is only possible if they take place on the basis of broad political consensus and in a democratic manner that requires genuine discussion in a scientific and professional environment, in consultation with the National Bar Association of Ukraine, by international experts.

This has particular importance for the reform of Ukrainian Bar. The Draft Law of Ukraine «On Amendments to the Constitution of Ukraine (on the Abolition of the Attorney's Monopoly)» No. 013 of 29.08.2019, already submitted to the Verkhovna Rada of Ukraine, and provides the abolition of the professional representation of persons in the courts by the attorney.

The purpose of the article is to comprehensively analyze the reform of the bar in order to abolish the exclusive right of attorneys to represent persons in the courts and to identify ways of solving the problems that justify the reform.

## Methodology

General scientific methods: analysis, synthesis, induction, and deduction were used in the research.

Moreover, the method of systematic research provides the multilateral perspective on the problem of the study. Furthermore, the method of comparative law helps to find a positive foreign experience concerning the issue of the attorney's monopoly.

In addition, the method of complex analysis helps to understand the advantages of an attorney's monopoly in Ukraine.

## Analysis of recent research

The scientific-theoretical basis of the research is composed of the works of E. Vaskovskyy, S. Dekhanov, M. Kyku and others. However, the updating of the legislation that is taking place in Ukraine requires understanding and comprehensive analysis of current trends in the development of the Advocacy.

## Presentation of key research findings

International standards, which serve as a reliable benchmark for the national law systems, establish that, when amending the law on advocacy, consultations should be held with a professional advocacy organization (Basic Principles on the Role of Lawyers, 1990; On the freedom of professional activity of lawyers, 2010). These standards indicate that the views of the National Bar Association of Ukraine should be heard.

Thus, the National Bar Association of Ukraine believes that the Draft Law «On Amendments to the Constitution of Ukraine (on the Abolition of the Attorney's Monopoly)» cannot be adopted without the opinion of the European Commission for Democracy through Law (Venice Commission) (NBAU's Open appeal to the President of Ukraine and the Verkhovna Rada, 2019).

As a result of close cooperation with the Venice Commission, a package of legislative reforms on the organization and operation of the Bar (Joint Opinion of the Venice Commission and Directorate for Justice and Human Dignity within the Directorate-General for Human

Rights and Rule of Law) was introduced in 2012-2016 Europe on the draft Law of Ukraine «On the Bar and Advocate's Activity» of 18 October 2011), providing professional legal assistance in Ukraine and the exclusive right to represent persons in the courts (Interim Opinion of the Venice Commission on the Draft Law on Amendments to the Constitution of Ukraine of July 24, 2015; Final Opinion of the Venice Commission on the Draft Law on Amendments to the Constitution of Ukraine of October 23, 2015).

Resolutions of the Parliamentary Assembly of the Council of Europe on Ukraine have repeatedly touched on the reform of the Ukrainian legal profession, emphasizing the creation of a professional bar association in accordance with Ukraine's introductory obligations to the Council of Europe and the creation of a system of legal assistance capable of ensuring everyone's right to a fair trial within a reasonable time, in full accordance with European standards and values.

Declaration at the constitutional level the exclusive right of attorneys to represent persons in the courts took into account the need to balance the legal capacity of the prosecutor and the attorneys in the judicial process, since the functions of the prosecutor's office are specified in Article 131 of the Constitution of Ukraine (1996), including the representation of the state prosecutor's office in court in exceptional cases and by the manner prescribed by law.

In many European countries, attorneys have the exclusive right to represent people in courts and defend against prosecution (France, Luxembourg, Spain, Portugal, Norway, and Greece). Another way to develop the human rights sphere is where attorneys act alongside individuals with a law degree, as well as those who do not have a law degree at all also exist, but the experience of studying such a path indicates the problems that it leads to.

Thus, it is widely recognized that the Judicial system of Finland has suffered significant losses from unprofessional representation, and since 2002 the requirements for representation in courts have been increased and the need for representation in higher legal education has been enshrined (Dekhanov, 2011).

In the UK, there is also experience in alternative business structures alongside law firms and companies that bring together both attorneys and non-attorneys. These reforms were aimed at

ensuring access to justice for an increasing number of low-income citizens, but since 2011, when alternative forms of legal practice were introduced, prices for legal services have not only decreased but also, on the contrary, increased, which is explained by the high competition in the legal market (Regulation of the profession of a lawyer, 2019).

An effective system of legal aid to ensure the right to a fair trial for all citizens is impossible if such assistance is provided unqualified and irresponsible. The abolition of the exclusive right of attorneys to represent persons in the courts will lead to the activity in one court process of representatives with different legal status (attorneys, non-attorneys and lawyers), with different professional training, different responsibilities. Setting common standards for the activities of advocates and representatives is a logical step in the evolution of the legal system. Returning to an unregulated representation will be a step backward, reflecting on the quality of the trial, the length of the case, the state of justice, and more.

Proper representation of individuals and legal entities is ensured by the independence of the bar and the freedom of the attorneys in the performance of the guaranteed advocacy activities.

Attorneys practice based on established rules and international standards, which include the obligation to maintain an attorney's secrecy, the requirement for professional development, the inadmissibility of conflicts of interest, and so on. The special procedure of criminal proceedings with attorneys and the special procedure of bringing attorneys to disciplinary responsibility, as well as other guarantees established by the legislation of Ukraine, ensure that everyone is entitled to legal aid.

The protection of human and citizen's rights and freedoms is a function of modern countries, which is proclaimed in the constitutions of different countries. Among the main activities of the country is the human rights direction. The country provides the mechanism of exercising the rights and freedoms of citizens. Notwithstanding the importance of legal advisers, the Bar is the basis of professional legal assistance, the Institute for the Protection of Human Rights and Freedoms, and the provision of free legal aid to low-income categories of citizens.

Bar is a fundamental, essential element of the justice system: without an attorney, the exercise of the right to a fair trial is impossible (Kyku, 2010). The presence of a special subject of defense – an attorney who has a specific status and for which special guarantees are provided, as well as the content of types of advocacy, determine the role of the attorney in public life at all historical stages of its development.

Drawing on historical parallels, it should be mentioned that after the Judicial Reform of 1864, which is rightly considered to be one of the most progressive, the institute of private attorneys was instituted in 1874, to which the requirements of jury attorneys did not apply. This period went down in history as regressive, called "counter-reform". As Ukraine chooses the path of intensive development and the European vector of law-building, in no case should we abandon the high standards of justice that foresee the participation in the trials of highly qualified, professional representatives.

The modern world relies on social institutions that perform certain functions. Society has gone through the difficult way of their formation. In the human rights work, there was a transition from disparate actors to the organization of those who permanently act as representatives and advocates in courts, to an independent professional institute of the Bar. The casual approach to the protection of human rights and freedoms at the present stage of state development is unacceptable.

The abolition of the exclusive right of an attorney to represent in the courts will lead to the activity in one court process of representatives with different legal status (attorneys, non-attorneys and lawyers), with different professional training, the different scope of responsibility. Establishing common standards for the work of advocates and representatives is a logical step in the evolution of the legal system, and a return to unregulated representation will be a step backward, reflecting on the quality of the trial, the time of the case, the state of justice, and so on.

From September 30, 2016, when amendments to the Constitution of Ukraine came into force, which introduced the exclusive right of attorneys to represent persons in courts, the following advantages can be traced over the situation in which the attorneys and non-attorneys acted in the courts:

- 1) The provision of professional legal assistance is a constitutionally defined function of the bar, the implementation of which is carried out under international standards of advocacy and national law on advocacy and requires high-level attorneys;
- 2) The proper representation of individuals and legal entities is ensured by the independence of the bar and the freedom of the attorney in the practice of advocacy, which are guaranteed in each constitutional country;
- 3) Attorneys carry out advocacy based on established rules and standards, including the duty to maintain the attorney's secrecy, professional development, the inadmissibility of conflicts of interest, etc.;
- 4) The law establishes a special procedure for criminal proceedings with attorneys and a special procedure for bringing attorneys to disciplinary responsibility, as well as other guarantees that ensure the attorney's responsible attitude to the execution of the order;
- 5) Under the legislation of Ukraine, it is the attorneys themselves who are responsible for providing free legal assistance in courts in all types of judicial proceedings (secondary legal aid), which is also consistent with the exclusive right of attorneys to represent persons in courts.

The introduction of draft law No. 1013 is stipulated by the provisions on the representation of public authorities and local self-government bodies in the courts exclusively by prosecutors or attorneys – under part two of paras. 11 clause 16-1 of the "Transitional Provisions" of the Constitution of Ukraine is envisaged from January 1, 2020.

In the early twentieth century, well-known proceduralist Ye. V. Vaskovskyj analyzed the need to represent a person's interests in court on two aspects – the need for so-called legal representation (legal assistance from a person who knows the law and has experience in court cases) and due to the need to ensure that procedural actions are taken in court when a person for one reason or another cannot appear in court. The first need counteracts the dangers

of ignorance of the law, and the second is caused by the inconvenience of having to appear in court (Vaskovskyj, 2003).

Bar as a professional institution best meets the needs of society to secure the right to legal aid under international standards. However, the improvement of the legal aid sphere should not lead to a narrowing of the institution of representation as such and the personal involvement of legal persons in court cases.

Procedural legislation reforms in 2017 abolished the right of legal persons to be represented in courts by their full-time legal advisers. However, the worldwide experience of representation in courts shows that legal advisers belonging to the state of a legal entity are included in the list of persons who realize representation of a legal entity, as well as the head or a member of the executive body of a legal entity.

Under the provisions of Part 2 of Art. 78 of the German Civil Procedure Code, representation of public law bodies, authorities may be represented by these bodies and institutions entitled to hold the position of judge (such wording is based on the fact that under German law the qualification requirements for candidates for the position of judge and attorney are the same: Both applicants must pass two state exams, undergo a lengthy internship in the judiciary, in the bar, in the notary public, and in the prosecutor's office, after which the applicant acquires the title of assessor).

Under Singapore law, no one but attorneys can practice law, litigation, and arbitration. However, in addition to attorneys, lawyers who work in full-time positions in government bodies, enterprises and organizations can make representation in court when the legal entity in which they work is a person involved in the case (Scientific and Practical Conference of the International Union (Commonwealth) of Lawyers in Singapore, 2006).

Even in France, in which, as a general rule, an attorney's monopoly is considered inviolable, Art. 828 of the Code of Civil Procedure states that employees of the state-owned enterprise may be represented in the local court and the small court, and the state, departments, communes and public institutions may have as their representative a public servant or an employee of their administration.

## Conclusions

Thus, the urgent need to ensure an optimal balance between ensuring the freedom of choice for a legal entity of ways of protecting its rights in court proceedings (in person or with the involvement of attorneys) is to amend the procedural codes in the part of self-representation of a legal entity, with the aim of giving legal advisers to enterprises, bodies of state and local governments have the right to represent the relevant bodies and enterprises of which they are full-time employees or employees. At the same time, such changes do not return us to the irresponsible activities of any representatives, both with and without legal education, since the attorney must remain the exclusive, sole, "external" representative who provides professional legal assistance.

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