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CONTENT OF THE RIGHT TO DEFENCE IN CRIMINAL PROCESS

The article is aimed at defining the content and specific features of the right of a suspect or an accused person to defence in criminal proceedings as one of the basic principles of all criminal process. The right to defence is inseparable from the guarantees for its exercise, and in this regard, international legal norms and the Constitution of Ukraine as well enshrine the principle of ensuring the right to defence for suspects and accused persons, which they may exercise personally or with the assistance of a defence counsel or legal representative. The regulatory and legal mechanisms for ensuring the right to defence in criminal process at the international legal level have been established long ago; they have existed for a long time and are continuously evolving to implement more effective guarantees, which makes their study relevant both at the international legal and national levels. Today, the importance of the guarantees of the right to defence in criminal proceedings is of great significance, and therefore, the content of the right to defence in criminal proceedings provided for by the legislative provisions should be effectively implemented. In this regard, the author emphasises the importance of the inviolability of the right to defence and establishes that the content of the right to defence in criminal process should include the right of a person to know what he or she is accused of; to receive sufficient time and opportunities to prepare for defence and legal assistance; the right to defend oneself by all means not prohibited by law.

Keywords: *right to defence, guarantees of defence, defence, criminal process, criminal proceedings, criminal justice, human rights, guarantees and freedoms, sufficient time to prepare for defence, Criminal Procedure Code of Ukraine.*

Introduction. The protection of human rights and freedoms in criminal process is one of the most progressive and democratic guarantees in criminal procedure legislation. It is based on the observance, enforcement and protection of human rights and freedoms, which is the duty of the state, as well as other constitutional freedoms that guarantee judicial and international protection of human rights. The right to defence in criminal process is an important democratic value, approved in all modern states, and an external implementation of the humanistic principles of criminal justice.

The scientific study of the peculiarities of the right to defence is carried out in the works of such Ukrainian scholars as T. V. Babchynska, Yu. V. Bubyry, A. P. Chernenko, I. V. Hloviuk, T. Y. Marchenko, I. M. Zubach and others, which highlight the concept and peculiarities of the content of the right to defence in criminal process of Ukraine.

Purpose statement of the research paper is to analyse the content of the right to defence in the criminal procedure of Ukraine, taking into account the impact of international standards on the criminal procedure legislation of Ukraine, as well as scientific provisions that have formed an understanding of the essence and content of the right to defence in the criminal procedure of Ukraine.

Main part of the research paper. The right to defence in criminal process is a fundamental right of the individual, which is guaranteed both at the international and national legislative levels. General international legal standards and principles ensure the right to defence for persons held criminally liable, forming appropriate mechanisms to ensure it. Thus, the Article 11 of the Universal Declaration of Human Rights of 10 December 1948 provides for the right to defence for all persons accused of a crime [12]. At the same time, the Article 14 of the International Covenant on Civil and Political Rights

of 16 December 1966 states that ‘everyone is entitled in the determination of any criminal charge against him to at least the following guarantees in full equality of arms ... b) to have adequate time and facilities for the preparation of his defence and to communicate with legal assistance of his own choosing’ [9]. In addition, the Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights) of 4 November 1950 guarantees persons accused of crimes ‘the time and facilities necessary for the preparation of their defence; the opportunity to defend themselves in person or to have the legal assistance of counsel of their own choosing or, in the absence of sufficient means to pay for legal assistance, to receive such assistance free of charge when the interests of justice so require’ [6]. These international human rights standards are reflected in the Article 55 of the Constitution of Ukraine: ‘...everyone has the right to defend their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law’; in the Article 63: ‘...a suspect, accused or defendant has the right to defence. A convicted person enjoys all human and civil rights, except for restrictions specified by law and established by a court verdict’ [5], as well as in the provisions of Ukraine's criminal procedure legislation (Article 20 of the Criminal Procedure Code of Ukraine – ‘a suspect, accused, acquitted, or convicted person has the right to defence, which consists of providing them with the opportunity to give oral or written explanations regarding the suspicion or accusation, the right to collect and submit evidence, to participate personally in criminal proceedings, to use the legal assistance of a defence attorney, and to exercise other procedural rights...’) [7]. In addition, according to the Resolution No. 8 of the Plenum of the Supreme Court of Ukraine dated 24 October 2003 No. 8 ‘On the application of legislation ensuring the right to defence in criminal proceedings,’ courts are instructed that ‘ensuring the right to defence for suspects, accused persons, defendants, convicted persons and acquitted persons in accordance with the provisions of Article 59, Part 2 of Article 63 and Paragraph 6 of Part 3 of Article 129 of the Constitution of Ukraine and the current criminal procedure legislation is one of the fundamental principles of judicial proceedings, an important guarantee of objective consideration of the case and prevention of criminal prosecution of innocent persons. Courts must comply with the requirements of Articles 21 and 22 of the Criminal Procedure Code of Ukraine, according to which the person conducting the investigation, the investigator, the prosecutor, the judge, court must provide the suspect, accused, or defendant with the opportunity to defend themselves against the charges brought against them by means established by law and may not shift the burden of proving their innocence of the crime onto them’ [10].

Thus, the right to defence in criminal process is exercised in relation to certain persons, in particular suspects and defendants. This right is the basis for fair, objective, impartial and consistent criminal proceedings. The Article 7 of the CPC of Ukraine proclaims the right to protection of human rights and freedoms as one of the fundamental principles of criminal proceedings (para. 13) [7]. This means that ensuring the protection of individuals is the task of all criminal proceedings and criminal process, and the right to protection is granted to any subject of criminal process. In legal doctrine, the category of defence in criminal process relations has been considered and studied repeatedly. Thus, according to T.V. Babchynska, in criminal process, ‘the interpretation of the definition of ‘defence’ in a broad and narrow sense is consistent with the concept of fair trial’ [1, p. 173]. The author notes that ‘defence, in a broad sense, is a criminal procedural activity aimed at realising and ensuring the rights, freedoms and legitimate interests of persons involved in criminal proceedings; and should be considered as one of the components of the criminal justice system’ [1, c. 173–174]. In a ‘narrow’ sense, the researcher interprets defence as ‘a criminal procedural function aimed at ensuring the realisation of the right to defence’ [1, p. 174]. V. K. Voloshyna believes that ‘the right of every person accused of a crime to effective defence provided by a defence lawyer is one of the main features of a fair trial; and in order for the accused to exercise their right to defence, they must usually be given the opportunity to obtain effective assistance from a defence lawyer from the very beginning of the process’ [11, c. 227]. Scientists A. P. Chernenko and A. G. Shiyan propose to consider defence in criminal process in three meanings: ‘as a type of criminal procedural activity; as a criminal procedural function; and as an institution of criminal procedural law’ [3, p. 15]. At the same time, ‘protection in its primary meaning should be understood as the criminal procedural activities of participants in

criminal process – representatives of the defence – aimed at fully or partially refuting the suspicion (accusation), as well as identifying circumstances that mitigate responsibility or may be used in favour of the suspect (accused). Defence as a type of criminal procedural activity is, in fact, a specific area of such activity clearly defined by criminal procedural law. In this sense, defence and the function of defence should be understood as identical concepts. The function of defence in criminal process is the main focus of the activities of suspects (defendants) and their defence counsel, as well as other representatives of the defence, aimed at completely or partially refuting the suspicion or accusation and identifying circumstances that may be used in favour of the suspect (defendant) [3, c. 15–16]. At the same time, the authors consider protection as an institution of criminal procedural law to be ‘a set of criminal procedural norms regulating criminal process relations related to the refutation or mitigation of suspicion (accusation). The institution of protection regulates the criminal procedural activities of all subjects of protection and is part of criminal procedural law’ [3, c. 16]. At the same time, according to researcher I. V. Hloviuk, ‘the criminal procedural function of defence represents the direction of activity of the suspect, accused (defendant), convicted, acquitted, or person subject to proceedings involving the application of coercive measures of a medical or educational nature, as well as their legal representatives and defenders, which is determined by the objectives of criminal proceedings and aimed at challenging the legality and validity of criminal prosecution, identifying circumstances that refute suspicion, justify acquittal, and their legal representatives and defenders, aimed at challenging the legality and validity of criminal prosecution, identifying circumstances that refute suspicion, justify the accused (defendant), exclude or mitigate their responsibility, mitigate punishment and other consequences of conviction, to protect personal and property rights, to promote the application of the institution of rehabilitation, as well as to prevent violations and unjustified restrictions of rights and freedoms in the application of measures to ensure criminal proceedings, which is implemented by means of criminal procedure in the form regulated by criminal procedural legislation [4, c. 127]. A non-standard approach to defining defence in criminal proceedings is proposed by scholar I. M. Zubach, who considers defence to be ‘systematic creative and intellectual criminal – procedural activity, which is conditioned by the existence of charges based on the law and carried out by subjects of defence in order to defend their own rights and freedoms during criminal process and through the full realisation of their legal rights and powers, contributes to the establishment of certain circumstances that make the charges impossible or refute them’ [13, p. 182]. Moreover, criminal process law also provides the following definition of defence in criminal proceedings: ‘a type of legal practice that consists of ensuring the protection of the rights, freedoms and legitimate interests of suspects, accused persons, defendants, convicted persons, acquitted persons, a person in respect of whom the application of coercive measures of a medical or educational nature is envisaged or the question of their application in criminal process is being decided, a person in respect of whom the question of extradition to a foreign state is being considered (para. 5 of Part 1 of the Article 1 of the Law ‘On the Bar and the Practice of Law’)" [3, p. 13]. Thus, as we can see, the lack of consensus on the essence of the right to defence in criminal process allows us to identify the main directions and consider it as: 1) a principle of criminal justice; 2) a criminal procedural function that exists alongside the function of prosecution; 3) an institution of criminal procedural law; 4) procedural activity of the suspect or accused, which is carried out both personally and with the help of a defence lawyer. At the same time, in the context of criminal process, it is advisable to use a ‘narrow’ understanding of defence, which is related only to a person against whom criminal proceedings are being conducted. Thus, defence is perceived as one of the three procedural functions enshrined in Chapter 3 of the CPC of Ukraine [7]. We can assume that, in the ‘narrow’ sense, the right to defence in criminal process is the totality of all procedural opportunities provided by law to refute suspicion, mitigate liability and punishment, and the right of the acquitted to compensation for damage caused by unlawful detention, the application of preventive measures or conviction. As regards the content of the right, it can be said that it constitutes the semantic basis of every legal norm. The content of the right to defence in criminal process is formed by the following normative provisions:

– providing sufficient time and facilities for preparation of the defence. As noted above, this leading international standard of the right to defence is enshrined in the provisions of the European

Convention on Human Rights (the Article 6(3)(b)), which states that this right is the minimum among the rights enjoyed by any accused person. Preparation includes, in particular, time to familiarise oneself with the case materials. Thus, the Article 42 of the CPC of Ukraine establishes that a suspect or accused person has the right to familiarise themselves with procedural documents, including pre-trial investigation materials, to receive copies of procedural documents and written notifications, and 'to familiarise themselves with the court hearing log and technical recording of the court proceedings, which must be provided to them by authorised court employees, and to submit their comments on them, to receive explanations regarding the procedure for preparing and using the pre-trial report, refuse to participate in the preparation of the pre-trial report, participate in the preparation of the pre-trial report, provide the representative of the probation service with the information necessary for the preparation of such a report, familiarise themselves with the text of the pre-trial report, submit their comments and clarifications, etc.' as part of exercising their right to defence. The Article 221 of the Criminal Procedure Code of Ukraine obliges the investigator to provide the accused and his defence counsel with the case materials: 'The investigator, inquiry officer, or prosecutor is obliged, at the request of the defence, the victim, or the representative of the legal entity against which the proceedings are being conducted, to provide them with the materials of the pre-trial investigation for review, with the exception of materials concerning the application of security measures in respect of persons participating in criminal proceedings, as well as those materials, familiarisation with which at this stage of criminal proceedings may prejudice the pre-trial investigation. Refusal to provide for familiarisation a publicly available document, the original of which is contained in the materials of the pre-trial investigation, is not permitted' [7]. The issue of 'sufficient time' for preparing a defence has already been the subject of academic debate. For example, researcher T. Y. Marchenko notes that an analysis of a significant number of court precedents on the issue of 'sufficient' time for the defence to prepare its position in a case allows the following conclusions to be drawn: a) in most cases, the court considers the issues of 'sufficient time' and 'sufficient opportunities' in combination, as they are closely intertwined and interdependent: the more opportunities the defence needs (access to and communication with a defence lawyer, access to and familiarisation with case materials, interpreter services, the opportunity to question witnesses, obtain an alternative expert opinion, etc.), the more time it needs to implement them; the more time is given to the defence, the more effectively and efficiently the defence will be able to present its position in court. Specific aspects (components) of the right to 'sufficient time' for the defence to prepare its case include, in particular: the right to be informed in a timely manner of the nature and cause of the charge, any change in the charge, new circumstances in the case, including the submission of additional evidence by the prosecution; the right to receive legal assistance and the assistance of an interpreter in a timely manner, and to have sufficient time for meetings and communication with a defence lawyer; the right to have timely access to case materials and sufficient time to review them, prepare notes and photocopies, and discuss them with a defence lawyer; have sufficient time to call witnesses and obtain expert opinions; have sufficient time to study the full text of the court decision in order to prepare a position for its appeal in higher courts and be informed of the deadlines for its appeal [8, c. 94–95];

– the right of the accused to know what they are accused of, to participate in the evidence-gathering process, and to receive the necessary information about the process. This set of rights is one of the most fundamental, because only if a person understands and knows the charges against them is it possible to build an effective defence. Article 29 of the Constitution of Ukraine stipulates that 'everyone who is arrested or detained shall be informed immediately of the reasons for their arrest or detention and their rights shall be explained to them' [5]. At the same time, according to the Part 3 of the Article 42 of the CPC of Ukraine, a suspect/accused person has the right to "know what criminal offence they are suspected or accused of committing; to be clearly and promptly informed of their rights under the Code, and to receive an explanation of those rights" [7]. This, according to Yu. V. Buby, 'guarantees the right to collect and submit evidence to the investigator, prosecutor, or investigating judge, since the latter can be exercised provided that the person is already aware of the suspicion of committing a criminal offence raised by officials against him or her. In addition, the right of the suspect to know what criminal offence they are suspected of committing serves as a guarantee

of other rights: to give explanations and testimony regarding the suspicion, to appeal against the decisions, actions or inaction of the investigator, prosecutor or investigating judge' [2, p. 40];

– the right to legal assistance, which in criminal cases can only be provided by a lawyer, including free assistance, private meetings with the lawyer during the interrogation process, before the interrogation begins, without restrictions on duration or number. In determining the range of possible defence lawyers in criminal cases, Ukrainian lawmakers have adopted internationally established standards and provided for the provisions of the Article 131⁻² of the Constitution of Ukraine, which guarantee the right to legal assistance if necessary and require the defence counsel to have lawyer status, which in turn requires experience in the legal profession, establishes educational qualifications, and sets certain requirements for professional and personal qualities [5];

– defend themselves by any means provided for by criminal procedure and other legislation. According to criminal procedure legislation, a subject of criminal proceedings has the right to actively defend themselves, including independently, by filing motions for investigative actions or recusals, etc. At the same time, Article 55 of the Constitution of Ukraine provides that 'everyone has the right to defend their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law' [5]. Thus, the suspect or accused person has the right to defend himself by any means that do not contradict the current legislation of Ukraine. This definition is enshrined in the Constitution of Ukraine, which stipulates in the Article 29 that 'everyone who is arrested or detained shall be given the opportunity from the moment of detention to defend themselves personally and to use the legal assistance of a defence lawyer'. Therefore, the principle of ensuring the right of suspects and defendants to defence, based on the content of the Constitution and criminal process legislation, contains two main elements: the right to defend oneself or through a legal representative, and the right to use the services of a professional defence lawyer. In the first case, suspects and defendants are granted a set of rights, the exercise of which will enable them to defend themselves against the charges brought against them. In the second case, the law provides for the right of everyone to use the services of a lawyer both during the pre-trial investigation and in court, either by invitation or by appointment. An essential aspect of ensuring the right to defence is the fact that the defence lawyer is also granted rights, the exercise of which enables them to act actively in the interests of their client.

Conclusions and proposals. In summary, it should be noted that in order to correctly apply the rules governing the right to defence in criminal process, it is necessary to clarify the content of this right, namely the specific provisions that embody this principle and are an integral part of it. The right to defence in criminal process is regulated by international and national legislation and applies to a wide range of subjects, and also includes a set of rights to exercise defence personally or through a representative by all means not prohibited by law. At the same time, the content of the right to defence in criminal process includes the right of a person to know what they are accused of, to have sufficient time and opportunities to prepare for their defence, the right to a defence lawyer and legal assistance, and the right to defend themselves by all means not prohibited by law.

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Р. В. Мельничук. ЗМІСТ ПРАВА НА ЗАХИСТ У КРИМІНАЛЬНОМУ ПРОЦЕСІ

Стаття присвячена визначенню змісту та особливостей права підозрюваного або обвинуваченого на захист у кримінальному процесі як одного із основних принципів усього кримінального судочинства. Право на захист невіддільне від гарантій на його здійснення, у зв'язку з цим міжнародно-правовими нормами та Конституцією України закріплено принцип забезпечення підозрюваному, обвинуваченому право на захист, яке вони можуть реалізовувати особисто або за допомогою захисника чи законного представника. Нормативно-правові механізми забезпечення права на захист у кримінальному процесі на міжнародно-правовому рівні створені вже давно; вони існують упродовж досить тривалого часу та безперервно розвиваються задля втілення більш ефективних гарантій, що зумовлює актуальність їхнього дослідження як на міжнародно-правовому, так і на національному рівнях. Значення гарантій забезпечення права на захист у кримінальному процесі на сьогодні має неабияке значення, тому потрібно ефективно реалізовувати зміст права на захист у кримінальному процесі, передбачений законодавчими нормами, створюючи водночас усі відповідні умови, які не будуть перешкоджати підозрюваним чи обвинуваченим реалізовувати свої законодавчі гарантії, а навпаки, сприятимуть їм у цьому. У зв'язку із цим наголошено на важливості непорушності права на захист та встановлено, що зміст права на захист у кримінальному процесі має містити право особи знати, в чому її обвинувачують; отримувати достатньо часу й можливостей для підготовки до захисту; право на захисника та правничу допомогу; право захищатись всіма способами, не забороненими законодавством.

Ключові слова: право на захист, гарантії захисту, захист, кримінальний процес, кримінальне провадження, кримінальне судочинство, права, гарантії та свободи людини, достатній час на підготовку до захисту, Кримінальний процесуальний кодекс України.