Criminal procedure effects of abuse of human rights to defense

Кримінальні процесуальні наслідки порушення права особи на захист

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The aim of the article is the analysis of some common cases of violation of rights to defense in criminal proceedings. Taking in account present-day research into this issue as well as the practice of national courts and the European Court of Human Rights, proposals for current problems solution connected with violations of the principle under scrutiny have been made.

Introduction: The right of an individual to defense if one of the crucial principles of the criminal procedure, thus, it must not only be guaranteed by legislation, but a real possibility for its realization must be provided in any criminal proceeding. This principle is entrenched by the national law at the level of the Constitution of Ukraine (para. 5, part 3, art. 129, art. 59), as well as at the branch level, in particular, in in the Criminal Procedure Code of Ukraine (henceforth – CPC of Ukraine) (articles 20, 42, 87) and other regulatory legal acts. The right to defense is also a recognized principle of international law and it is regarded as a prerequisite for enforcement of rights to due process of law. At the international level it is guaranteed in art. 14 of the International Covenant on Civil and Political Rights, art. 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, etc. Therefore, enforcement of this principle in the international and national law justifies fundamentality and importance, which, in its turn, corresponds the obligation to provide its realization in criminal proceedings.

In part 1 of article 20 of CPC of Ukraine, the content of this principle is uncovered in accordance to which the right to defense lies in providing its subject an opportunity to give written or oral explanation regarding apprehension or accusal, the right to collect and tender evidence, participate in criminal proceedings, use legal services of a defense attorney as well as exercise due-process rights provided by the CPC of Ukraine[1] This strong sense grounds the complex nature of the human right to defense as the principle of criminal proceeding and enables to assert that abuse of this right may take various forms. Violations of any rights being elements of the right to defense are violations to the latter right, which testifies lack of provision of its rightful procedure in criminal proceedings and its recognition as an undoubted reason for admission of evidence obtained because of unlawful act as incompetent[2] In this regard, the issue of research into some aspects of violations of the principle under scrutiny in the national practice becomes topical. In accordance with the established practice of the European Court of Human Rights (hereinafter ECtHR) "although the right of every criminal defendant to effective legal support of the defender, which if necessary is provided officially, is not absolute, it is one of the main features of the due process of law" (para.89 in the case "Krombach versus France" of 13.02.2001, para. 50 in the case "Demebukov versus Bulgaria" of 28.02.2008, para. 49 in the case "Chopenko versus Ukraine" of 15.01.2015).

The degree of development of the topic. The right to defense as a principle of criminal proceedings is studied in the works by the scientists: N.M. Bakayanova, S.Yu. Butenko, T.V. Varfolomieieva, Ye.I. Vybornova, I.Yu. Glovatsky, A.N. Drozdov, Ya.P. Zeykan, S.A. Koval'chuk, T.V. Korcheva, A.Yu. Lan, T.V. Lukashkina, A.V. Malakhova, N.G. Motorygin, A.V. Ostroglyad, M.A. Pogoretsky, M.M. Pogoretsky, D.V. Ponomarenko, A.S. Staren'ky, G.K. Teteryatnik, M.I. Chvortkin, N.P. Chernyak, A.G. Shylo, A.V. Shvydkov, M.Ye. Shumilo, AG. Yanovs'ka etc.

[1] Панова А.В. Визнання доказів недопустимими у кримінальному провадженні : дис. … канд. юрид. наук : 12.00.09. Харків, Нац. юрид. ун-т ім. Ярослава Мудрого, 2016. С. 76.

[2] Панова А.В. Визнання доказів недопустимими у кримінальному провадженні : дис. … канд. юрид. наук : 12.00.09. Харків, Нац. юрид. ун-т ім. Ярослава Мудрого, 2016. С. 76.

Research objective. The aim of research is the study some cases of abuse of the human right to defense as a substantial violation of human rights and freedoms as well as development of some ways of preventing and solving the given problem.

Research findings. Primary to the study of some cases of abuse of the human right to defense, we consider the research into the content of the criterion of rights and freedoms violation materiality in case of nonobservance of proper enforcement necessary. Thus, N.V. Hlyns'ka and L.M. Loboyko conclude in their research into the impact of the criterion of materiality in case of violations of criminal procedure law of the general fairness in court proceedings that the ECtHR in its decisions demonstrates a reasoned approach to the appraisal of the committed due procedure violation character from with regard to their potential impact on the general fairness of court proceedings. The method of assessment of fairness of the proceeding taken as a whole does not presuppose research into the eligibility of any legal proceeding apart from other stages of the criminal process. in essence, the ECtHR emphasizes the necessity to distinguish whether "the committed violations (in the context of the merits of the case) made the whole court procedure unjustified". Furthermore, as the ECtHR proves, even if the court finds serious, in its opinion, violations of the right to a due process committed by national courts, the court proceeding, which was held, and the final judgement, which was delivered, are not always qualified as unjustified[3]. The authors also distinguished that the integral feature of the concept "materiality of criminal procedural law requirements violation" is its ability to disturb adoption of lawful and reasonable court decision (p. 1, article 412 of the CPC of Ukraine). In this regard, in the civil law countries, Ukraine among them, under the current conditions of rapid development of the law and the necessity to apply it "correctly" with regard to the conditions of the current legal reality, the judicial practice of the highest state judicial bodies, which pinpoints law interpretation and legislation vacuum elimination is gaining importance. The concept of materiality of criminal procedural law requirements violation has an undoubted appraisal nature, which cannot be eliminated. Meanwhile, judicial practice as broadly defined can be an effective means of assuring bigger definitiveness as to the materiality of violations made in adopting not only judicial decisions, but also certain types of pre-trial proceeding decisions. Therefore, the authors distinguish not only the measure of this violations materiality, but also their immateriality. The violations of criminal procedure law provisions made in adopting the final judicial decision, the presence of which does not and cannot affect the general fairness of court proceedings, can be considered immaterial[4].

Therefore, a conclusion can be made that the abuse of the right to defense is a major violation of human rights and freedoms because the legislation defines in para. 3, part 2, article 87 of the CPC of Ukraine the abuse of the individual's right to defense as a major violation of human rights and basic freedoms, which is an undoubted reason for suppressing the evidence obtained as a result of this abuse as immaterial. Thus, violation of this principle affects not only the legal situation of the individual suffering from it but also causes perversion of justice of the entire criminal proceeding relating thereto them, in particular, at the stage of court proceedings crucial to the whole process, because at this stage the decision of the individual's guilt is pending.

Having elucidated the issue concerning understanding of the abuse of the individual's right to defense as a major violation of human rights and freedoms, it is worth studying several aspects of their display in practice.

One of the examples of abuse of the individual's right to defense as a major violation of human rights and freedoms is the decision adopted by Zarichny District Court of Sumy (case № 591/2530/16-k) of 22.05.2017[5], in which the reason for recognizing the violation of the principle under study and suppressing the evidence was the fact that the witnesses were not present from the beginning of the search, but after the objects listed by police officers in the inventory were revealed, i.e. the search was not in essence conducted in their presence. This violation was proved not only by these witnesses to the search, but also by a witness, thus, Zarichny District Court of Sumy provided the following line of reasoning concerning the adopted decision: "The court considers involvement of witnesses to the search after certain objects were revealed as causing abuse of the accused person's right to defense because, under these conditions, the witnesses could not in essence prove or dispose of the fact of material evidence discovery. The court is also deprived of the opportunity to verify properly the possibility of police miscon-

[3] Глинська Н.В., Лобойко Л.М. Міра впливу порушень кримінального процесуального закону на загальну справедливість судового розгляду як критерій визначення їх істотності. Вісник кримінального судочинства. 2017. № 1. С. 30. URL: http://vkslaw.knu.ua/images/verstka/1_2017_Glunska_Loboyko.pdf.

[4] Вирок Зарічного районного суду м. Суми (Справа №591/2530/16-к) від 22 травня 2017 р. URL: http://www.reyestr.court.gov.ua/Review/66634473.

[5] Швидкова О.В. Обшук як спосіб збирання доказів. Часопис Національного університету «Острозька академія». Серія : Право. 2014. № 2. URL: http://nbuv.gov.ua/UJRN/Choasp_2014_2_35.

duct. Therefore, the inventory of the search is proved inadequate evidence as it was wrongfully obtained through violation of part 7, article 223 of the CPC of Ukraine and as a result of abuse of the accused person's right to defense. With regard to the ECtHR practices, in particular, in decisions adopted in the cases "Balyts'ki versus Ukraine", "Teixeira de Castro versus Portugal", "Shabel'nyk versus Ukraine", from which it appears that not only the evidence obtained directly as a result of violation, but also the evidence, which would not have been obtained if the first evidence had been obtained, with regard to the requirements of part 5, article 101 of the CPC of Ukraine, the court deems itnecessary to suppress the evidence being the report of the expert evidence because it is grounded on the evidence suppressed by the court. The court cannot base the charges on the police explanations regarding the detection of narcotic drugs, since they are to a certain extent interested persons and conducted the search in violation of the procedure provided for by the CPC of Ukraine. Moreover, the explanation given by these witnesses does not indicate withdrawal of namely the narcotic drug at the place of residence of the accused"[6].

The court resolution with this ratio decidendi can be lawfully recognized as specimen because the court was provided with full and closely reasoned arguments and it applied the provisions of the ECtHR practices.

We consider it reasonable to agree to the position of O.V. Shvydkova, who made a conclusion, when analyzing the problems of the procedural form of search, in particular, as to the individuals who must be present during this crime investigation activity, that "in search of the residence or any other property of the individual or the individual themselves, only participation of witnesses of investigative action is absolutely mandatory and does not depend on the judgement of the examining official or prosecutor; presence of individuals whose rights or legal interests can be limited or violated during the search is desirable but not mandatory"[7]. Due to the fact that participation of witnesses is mandatory during the search, it must be guaranteed from the beginning. This is explained by the fact that every stage of the search must meet the legal regulations for their compliance and prevention of any abuse of rights and freedoms of individuals, whose right to respect of home or any other property is limited, as well as the guarantee of fairness of the entire criminal proceeding.

It is worth adding that any violations of the breach of the order of a crime investigation procedure include disregard of its aim, devalue not only the need to conduct it (conducting it is pointless), but also the obtained results (in particular, facts gathered during the procedure will be recognized as inadequate evidence). Participation of witnesses in the search, as the ECtHR practice shows, is recognized as the supplementary guarantee in the criminal proceeding, which must not only be provided by legislation, but also fully applied in criminal proceeding in compliance of all procedural requirements. More specifically, in p. 20 of the ECtHR resolution in the case "Bahiiev versus Ukraine" (Statement № 41085/05) of 28.07.2016 the following is stated: "The Court reminds that when the member countries consider it necessary to take such measures as search of residence for the purpose of wrongdoing evidence reception, the Court will appraise if the warrant for such measures was reasonable and sufficient, and if the pro rata principle was observed" (judgement in the case "Buck versus Germany", statement № 41604/98, п. 45, ECHR 2005-IV). The Court will also consider the existence of effective safeguard from improper use and abuse of power in the domestic legislation, and it will verify how these safeguards were used in the case in hand (judgement in the case "Iliya Stefanov v. Bulgaria", statement № 65755/01, p. 38 of May, 22, 2008)"[8].

In the study of cases of violations of the right to defense in terms of the national practice, it is worth paying attention to the judgement in the case of the Central District Court of Mykolayiv (case № 490/6714/16-k) of 04.09.2017[9]. The Court considered failure to provide the suspect with the opportunity to review the terms of their examination, removal of nail sections without the participation of witnesses and in the absence of permanent video recording of the procedure, which in this case entailed abuse of the right to defense. In order to ground this abuse, the court stated: "With regard to article 18 of the CPC of Ukraine and common practice of the ECtHR, one of the elements of the right to defense is the individual's right to remain silent, i.e. the right not say anything concerning the suspicion or accusal of criminal offence. The common practice of the ECtHR, which, according to part 2 of article 8 of the Criminal Procedural Code of Ukraine, must be taken into account in criminal

[6] Вирок Зарічного районного суду м. Суми (Справа №591/2530/16-к) від 22 травня 2017 р. URL: http://www.reyestr.court.gov.ua/Review/66634473.

[7] Швидкова О.В. Обшук як спосіб збирання доказів. Часопис Національного університету «Острозька академія». Серія : Право. 2014. № 2. URL: http://nbuv.gov.ua/UJRN/Choasp_2014_2_35.

[8] Рішення Європейського суду з прав людини у справі «Луценко проти України» (Заява № 30663/04) від 18 грудня 2008 р. URL: http://zakon0.rada.gov.ua/laws/show/974_458.

[9] Вирок Центрального районного суду м. Миколаєва (Справа №490/6714/16-к) від 04 вересня 2017 р. URL: http://www.reyestr.court.gov.ua/Review/69764991.

proceedings, pinpoints that the content of the right to remain silent, inter alia, lies in the defense of the accused from unlawful coercion by the authorities, which enables to prevent miscarriages of justice and achieve aims set in art.6 of the Convention. Moreover, the privilege against self-incrimination presupposes that prosecution cannot use the evidence obtained from the accused against their will by means of coercion or pressure (see inter alia, Judgement of the European Court in the case "Saunders v. United Kingdom" of 17 December 1996, the case "Heaney and McGuinness v. Ireland", "J.B. v. Switzerland", "Allan v. United Kingdom" etc.)" The Court further studies the circumstances of the case with regard to the object of the dispute in this case, namely the material evidence. The Court adjudged that it was obtained without an adequate explanation of the purpose of seizure of the evidence provided by the law, without an adequate explanation of the individual's rights during this seizure and by deceit – disguised as the case of obtaining a sample, which by its nature cannot attend to the crime. This testifies hat in this case the material evidence was obtained against the will of the individual accused at that time, i.e. by means of intrusion into their physical integrity. Furthermore, the official prosecution renders crucial importance to the evidence obtained in this way. The court considered it proved that in this case the evidence obtained by the official prosecution with the abuse of the right to remain silent, thus, with the abuse of their right to the due process and the right to defense. With regard to express references in point 3, part 2 of article 87 of the CPC of Ukraine and references in point 4, part 2 of article 87 of the CPC (in the sense based on the common practice of the ECtHR analyzed earlier), this evidence must obviously be suppressed. In this regard, according to part 2, article 89 of this Code, the Court suppresses such evidence at any stage of the criminal proceeding, which entails its discharge from examining and inability to use the facts, the information about which is part of this evidence, in further proceeding in the case[10].

Taking into account the abovementioned facts, we agree with the fact that the violation of the privilege against self-incrimination provided by p.4, part 2, article 42 of the CPC of Ukraine is the abuse of the individual's right to defense, which stipulates the inability to use the evidence obtained in this case in the criminal proceeding, and, moreover, to use it as the decisive factor and fully ground accusal on it. Thus, we consider it necessary to support the approach elaborated both at the level of theory and applied in practice, which lies in the fact that one piece of evidence is not enough for censure; the main evidence must be supported by other available evidence. This ratio decidendi is also recognized by the ECtHR, more specifically p. 43 of the judgement in the case "Lutsenko v. Ukraine" (statement № 30663/04) of 18 December 2008 states that "the reliability of evidence is doubtful if it is obtained through violation of the privilege against self-incrimination, and that the privilege against self-incrimination, in particular, presupposes that prosecution in the criminal proceeding is trying to establish the guilt of the accused without providing evidence obtained against the will of the latter through coercion or suppression. In case of any doubt about the reliability of the source of evidence, it must be proved by the evidence obtained from other sources"[11].

In conclusion, it is worth noting that we studied only certain aspects of violation of such crucial principle as the right of an individual to defense, thus, we emphasize the need in further scientific research into this problematics as well as it further practical study for a more profound approach to solving issues concerning this problem. Based on the analysis of the judgements of national courts that we studied, a conclusion can be made that in the law enforcement practice there exist expressions of violation of the right to defense, however, they are paid particular attention in exercising the function of justice by the corresponding bodies, which provides for compliance of other principles of the criminal proceeding, more specifically, concerning fairness of the criminal proceeding and the process as a whole. This is the manifestation of the positive trend towards real provision and compliance with the rights and basic freedoms of individuals in Ukraine.

Summary

The article contains the results of the investigation of some cases of violation of the right of a person to be protected as a significant violation of human rights and freedoms and the development of ways to prevent and overcome this problem. The article contains the proposals for solving existing problems related to violation of the right of a person to protection.

[10] Вирок Центрального районного суду м. Миколаєва (Справа №490/6714/16-к) від 04 вересня 2017 р. URL: http://www.reyestr.court.gov.ua/Review/69764991.

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Анотація

У статті наведено результати дослідження деяких випадків порушення права особи на захист як істотного порушення прав і свобод людини та розроблення шляхів попередження й подолання цієї проблеми. У статті сформовано пропозиції вирішення наявних проблем, пов'язаних із порушенням права особи на захист.

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