
*Dmytro Riabov*¹

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ON REVOCATION OF THE LAWYER'S MONOPOLY THROUGH INTRODUCING THE PROFESSIONAL INSTITUTION OF LEGAL ADVISERS

Key words: lawyer's monopoly, lawyer, legal adviser, Republic of Poland, legal counselor, representation.

ABSTRACT: The article studies the legal nature of the introduction of the lawyer's monopoly in Ukraine. The author notes the introduction of the lawyer's monopoly in Ukraine had to take four steps. However, at the last stage of the introduction of the lawyer's monopoly, the legislator amended the procedural codes regulating the course of civil, commercial, and administrative proceedings. With these changes, the legislator expanded the concept "self-representation" by substituting the concept of "representation". In addition, the legislator brought in a draft to revoke the lawyer's monopoly which was approved by the Constitutional Court of Ukraine. The scientist states that the relevant strategy of abolishing the lawyer's monopoly is not a positive phenomenon. The introduction of court representation of citizens, business entities, state bodies, central and local authorities by a professional institute of advocacy is an upside in reforming the Ukrainian legal system. However, according to the author, the profession of a lawyer is primarily aimed at providing defense in criminal proceedings or when bringing to administrative responsibility or considering a case of an administrative offense. At the same time, the scientist marks that the reversion to the previous wording of Article 131-2 of the Constitution of Ukraine is inadmissible since the provision of legal services in Ukraine should be carried out professionally. After analyzing the legislation of the Republic of Poland, the author has concluded that lawyers and legal advisers, who carry out practical legal activities on a professional basis and permits, provide the public with legal aid. However, the only difference between a lawyer and a legal adviser in the Republic of Poland is that the latter cannot provide legal assistance in

¹ Postgraduate Student at the Department of Commercial and Administrative Law, Vasyl Stus Donetsk National University, riabov.d@donnu.edu.ua, ORCID: orcid.org/0000-0003-3864-4859.

criminal proceedings, unlike a lawyer. Therefore, to create a professional and competitive market of legal services in Ukraine, the researcher proposes to borrow the experience of the Republic of Poland and introduce a professional institute of legal advisers in Ukraine, as this profession is legally identified in Ukraine.

INTRODUCTION

On June 2, 2016, the lawyer's monopoly on court representation, which was to take four steps, was introduced in Ukraine. However, the legislator adopts regulations focused on revoking the relevant type of monopoly. Moreover, a draft on the revocation of the lawyer's monopoly was submitted to the Verkhovna Rada of Ukraine and approved by the Constitutional Court of Ukraine. The introduction of court representation of the state, individuals, and legal entities by a professional institute of advocacy is a positive phenomenon. The hypothesis of whether it is possible to revoke the lawyer's monopoly in Ukraine through introducing two separate, independent, and professional legal institutes by borrowing European experience requires further scientific study. Thus, it is proposed to examine the revocation of the lawyer's monopoly in Ukraine without violating the main purpose of its introduction – court representation of others by a professional legal institution.

Analysis of recent researches and publications. In general, the lawyer's monopoly has been studied by the following scientists: Khlabytova K.V., Stepanova T.V., Yavorska V., Braha D., Bereza N., et al. Most scientific papers are devoted to the revocation or, on the contrary, benefits of the lawyer's monopoly. This paper suggests considering the introduction of the lawyer's monopoly in Ukraine in another dimension: without specifying its advantages or disadvantages but studying the option of revoking the lawyer's monopoly in Ukraine without violating the primary purpose of its introduction – court representation of others by a professional legal institution. This highlights its relevance and scientific significance.

THE PURPOSE OF THE RESEARCH

The article aims to study the option of revoking the lawyer's monopoly in Ukraine by introducing a professional institute of legal advisers. To perform this task, the author has applied the following research techniques: formal-logical and formal-legal methods, structural method, comparative method and method of analogy of law.

BASIC MATERIAL STATEMENT

On June 2, 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (Regarding Justice)", which entered into force on 30.09.2016. By this law, the Verkhovna Rada of Ukraine determined to amend Article 131-2 of the Constitution of Ukraine, according to which exclusively a lawyer represents another person in court as well as defenses from criminal charges, thereby establishing the lawyer's monopoly on court representation. The introduction of the lawyer's monopoly in Ukraine provokes lively discussions among representatives of the Ukrainian scientific community. Thus, Khlabytova K.V. emphasizes the legal and socio-economic inexpediency of constitutional changes the lawyer's monopoly, because there is no balance between the stated goals and effects of such a monopoly (Khlabytova, 2017, p. 96). Stepanova T.V. holds that statutory limitation of the lawyer's monopoly to criminal proceedings seems possible and such that doesn't contradict domestic realities and European practice (Stepanova, 2019, p. 302). Instead, Yavorska V. notes that positive characteristics of the lawyer's monopoly encompass: the quality and efficiency of the services provided by the lawyer; professional training of a lawyer; positive approval of the lawyer's monopoly by international institutions; the importance of the lawyer's monopoly for criminal process; growing importance of lawyers for the protection the victim's rights in criminal proceedings (Yavorska, 2020, p. 206). According to Braha D., by relying on the statutory regulations on the legal status of a lawyer, the state guarantees the provision of professional legal assistance to citizens due to high requirements

for his candidacy (Braha, 2020, p. 309). It is also worth mentioning the standpoint of N. Bereza, who believes that this norm is logical at first glance. A lawyer is a specialist who has a special permit (license) to provide legal assistance. A lawyer can be prosecuted for the violation of the rules of legal ethics. Therefore, this norm will somewhat facilitate the work of judges, who find it easier to conduct a trial involving a legally aware person (Bereza, 2016, p. 12).

CHRONOLOGY OF THE INTRODUCTION OF THE LAWYER'S MONOPOLY IN UKRAINE

The introduction of the lawyer's monopoly comprised four steps: 2017 – introduction of the exclusive right of lawyers to representation in the courts of cassation; 2018 – introduction of the exclusive right of lawyers to representation in the courts of appeal; 2019 – introduction of the exclusive right of lawyers to representation in the courts of first instance; 2020 – introduction of the exclusive right of lawyers to representation in the courts of state and local self-government bodies. There was the shared objective – introduction of a professional institute for the protection of the rights and freedoms of citizens, business entities, state and local self-government bodies (Matsko, 2019).

The weight of evidence suggests that the fourth step in the introduction of the lawyer's monopoly in Ukraine did not take place due to the Law of Ukraine “About amendments to some legislative acts of Ukraine on the enhancement of self-representation in court of public authorities, authorities of the Autonomous Republic of Crimea, local governments, other legal entities regardless the order of their creation”, which was approved by the Verkhovna Rada of Ukraine and entered into force on December 29, 2019. The same law amended the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine by expanding the concept of self-representation. According to amendments made in legislation, legal entities, public authorities, and local governments may participate in court proceedings with the assistance of any authorized person under the law,

statute, regulations, employment agreement (contract) as self-representation. In terms of court self-representation of business entities, it is worth paying attention to the opinion of Sviatiuk S. He marks that the Law of Ukraine No 390-IX dated 18.12.2019 allowed businesses to protect their interests with the assistance of their staff – legal advisers – and deprived them of the need for a lawyer's license. In practice (as evidenced by numerous decisions on return/abandon of procedural documents), there are challenging issues concerning the range of persons who are authorized to carry “self-representation” of a legal entity and the list of documents confirming the relevant powers (Sviatiuk, 2020).

There is a reason to believe that these legislative changes cannot be considered positive. It is undeniable that the introduction of a professional institution for judicial protection of the rights and freedoms of citizens, business entities, state bodies, public authorities and local self-government is a positive step in reforming the Ukrainian legal system. Therefore, the introduction of the lawyer's monopoly on court representation of interests should help improve the quality of legal services in Ukraine since this type of professional legal practice is based on licensing preceded by experience in law, lawyer internship, or exemption from it provided by law, passing the qualifying exam. Moreover, the availability of legal levers of influence on lawyers, i.e., disciplinary action for breach of their professional duties including disbarment, also contributes to the legal services market in Ukraine because it encourages lawyers to be responsible for fulfilling their professional obligations.

However, on September 3, 2019, Chairperson of the Verkhovna Rada of Ukraine D. Razumkov declared the Draft Resolution of the Verkhovna Rada of Ukraine “On inclusion of the draft law of Ukraine “On amendments to the Constitution of Ukraine (regarding the abolition of advocacy monopoly)” in the agenda of the second session of the Verkhovna Rada and its submittal to the Constitutional Court for constitutionality check”. According to the draft, Article 131-2 of the Constitution of Ukraine is proposed to be worded as follows: “The independence of the bar is guaranteed. The principles of organization of advocacy and its implementation in Ukraine are determined by law. Only a lawyer protects a person from criminal charges”. On October 31, 2019, in the case upon the constitutional

appeal of the Verkhovna Rada of Ukraine for providing opinion on compliance of the draft law on introducing amendments to the Constitution (on abolishing the lawyer's monopoly) (registration no. 1013) with the requirements for Articles 157 and 158 of the Constitution of Ukraine (Case No. 2-248/2019(5580/19)), the Constitutional Court of Ukraine held to declare the draft law on amendments to the Constitution (on abolishing the lawyer's monopoly) as complying with the requirements of Articles 157 and 158 of the Constitution.

THE LEGAL NATURE OF THE LAWYER'S MONOPOLY

At the same time, most contributions of the national legal doctrine consider the introduction of the lawyer's monopoly in Ukraine in general, adduce arguments for its abolition or, on contrary, regard it positively. Thus, the author offers to regard the introduction of the lawyer's monopoly in Ukraine in another dimension: without enumerating its advantages or disadvantages but relying on its legal nature and terms of introduction. First of all, despite the positive aspects of the introduction of the lawyer's monopolies in Ukraine, it should be noted that one of the primary tasks of the bar is legal defense. In accordance with Art. 1 of the Law of Ukraine "On the Bar and Practice of Law", legal defense should be understood as a type of advocacy which is to protect the rights, freedoms and legitimate interests of the suspect, accused, defendant, convicted, acquitted, a person subject to coercive measures of medical or educational nature or the issue of their application in criminal proceedings, the person in respect of whom the issue of extradition to a foreign state is considered, as well as the person who is brought to administrative responsibility during the consideration of the case of an administrative offense.

Moreover, before introducing the lawyer's monopoly in Ukraine, the interests of business entities in the courts were usually represented by employees of the legal department of business entities, namely legal advisers. However, compared to advocacy activity, court representation of business entities is one of the core areas of their practice. It is logical to assume that since legal department staff provides all types of legal support

of business entities, including their court representation, it is expedient to empower the relevant employees to represent the interests of business entities in courts.

PRACTICAL EXPERIENCE OF THE REPUBLIC OF POLAND

Given that the professions of a lawyer and legal adviser are different, the author proposes to refer to the legislative aspects of practical legal activity in the Republic of Poland. The European country has a partial lawyer's monopoly, which is extended to criminal law, and the profession of a legal adviser is separated into an independent legal institution. The author believes that borrowing this experience will facilitate creating a professional and competitive market of legal services in Ukraine and release full-time legal advisers from obtaining a law license without violating the primary objective of the lawyer's monopoly in Ukraine, which was to introduce a professional legal institution to represent the interests of others in court – the importance of which is undeniable.

Keeping in mind the above, the author considers the legislative aspects of conducting professional practical legal activities in the Republic of Poland. Thus, after studying the Polish experience of professional activities of a legal adviser and analyzing current legislation, Voloshina Ya. L. concluded that the European experience and identified during the study features of the legal service are a model or guide for improving the scope of legal consultative practice in Ukraine (Voloshina, 2018, p. 39).

In general, the professional activity of lawyers in the Republic of Poland is regulated by two statutory acts: the Law of the Republic of Poland on Advocacy (USTAWA z dnia 26 maja 1982 r. Prawo o adwokaturze) and the Law of the Republic of Poland on Legal Advisers (USTAWA z dnia 6 lipca 1982 r. o radcach prawnych). Following these statutory acts, lawyers and legal advisers, i. e., legal counselors, are authorized to provide legal aid in this country.

Having analyzed provisions of the Law of the Republic of Poland “On Legal Advisers”, it is noticed that this country provides for the availability of self-governing bodies of legal advisers, maintenance of the Register of

Legal Advisers, taking the oath, established rules of professional ethics of legal advisers, and the principle of professional secrecy that resonate with the bar institution in Ukraine. Another important aspect is a disciplinary liability of a legal adviser, which may involve suspension of the right to practice of a legal adviser from three months to five years or deprivation of the right to work as a legal adviser (Section 6, Article 65 of the Polish Law on Legal Advisers) that is also common with the institution of advocacy in Ukraine. The author believes that these principles should become the basis for the reform of professional legal practice in Ukraine. This should contribute to the quality of rendering legal services to business entities and the market of legal services in Ukraine as a whole. The author also holds that compliance with the principle of non-disclosure of information, which has come to notice during the provision of legal assistance, that is peculiar only to lawyers and established by Article 22 of the Law of Ukraine “On the Bar and Practice of Law” would make activities of legal advisers confidential at the legislative level. For instance, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers defines legal secrecy as the primary and fundamental lawyer’s right and duty. The author believes that this principle should be established not only for lawyers but also for legal advisers.

The scientist also considers it necessary to borrow the principles of professional ethics, which are provided by the Law of Ukraine “On the Bar and Practice of Law”. Thus, paragraph 1 of Article 21 of the Law of Ukraine “On the Bar and Practice of Law” states that one of the professional duties of a lawyer is to abide by the oath of attorney of Ukraine and the professional conduct rules. In this regard, on June 9, 2017, the Congress of Advocates of Ukraine approved the rules of lawyer ethics. In the author’s opinion, the professional ethics of legal advisers can be based on both the Ukrainian Code of Ethics and the Code of Conduct for European Lawyers, or, for example, Code of Ethics of Attorneys at Law in Poland, to learn European best practices that would determine professional ethical principles of professional consultative legal activities in Ukraine. In addition, maintaining a single register of legal advisers and establishing disciplinary liability, which may involve temporary suspension of the relevant activity or deprivation of the right to engage in legal counseling, would be a lever

for providing in Ukraine high-quality and professional legal assistance to those who do not have the status of a lawyer.

In view of the above, the author holds that the introduction of the lawyer's monopoly in Ukraine is a positive step in reforming the national legal system. At the same time, given that the main task of the bar is to conduct defense, the author proposes to draw a legislative analogy with the Republic of Poland, i.e., to introduce a new professional legal institution. Keeping in mind that before introducing the lawyer's monopoly in Ukraine, the interests of business entities were represented in the courts by their full-time legal advisers, and the interests of individuals were represented by civilian representatives, the author focuses the establishment of the institution of legal advisers. According to the Order of the Ministry of Social Policy of Ukraine dated December 29, 2004, № 336 "On Approval of Volume 1 "Professions of Employees Common to All Types of Economic Activity" of the Guide of Qualification Characteristics of Employees' Occupation", a legal counsel is an official profession in Ukraine. Therefore, the introduction of the institution of legal advisers is a rewarding experience for Ukraine. Taking into account that Ukraine has a similar legal profession but does not have the same official statute, the author puts forward the profession available in Ukraine – a legal adviser.

CONFIRMATION OF THE NEED TO CREATE TWO SEPARATE, PROFESSIONAL, AND INDEPENDENT LEGAL INSTITUTIONS

Not only the Republic of Poland Legal renders legal services to the population using two different legal professions. For instance, in England, legal services are also provided by two professions. Thus, lawyers in this country are divided into barristers and soloists. Traditionally, a barrister is a lawyer whose competence includes court representation and a solicitor – a lawyer engaged in drafting legal documents and advising clients (Liu-tova, Nevolchuk, 2018, p. 81). In modern England, the division of competence between a solicitor and a barrister retains traditional features. Solicitors deal with drawing up contracts of business entities, acting as consultants to legal entities, litigating in inferior courts, resolving family

disputes, and inheritance issues. Barristers offer specialized services associated with court representation of the interests of individuals and legal entities and, as a rule, have a narrow area of expertise (Liutova, Nevolchuk, 2018, p. 81).

Moreover, there are many other legal services in Ukraine provided by independent and professional entities who carry out their professional activities based on permits which demand candidates to meet some legal requirements (notaries, private executors, court-appointed trustees, appraisers, auditors, etc.)

CONCLUSIONS AND PROSPECTS FOR FURTHER RESEARCH

Summarizing the above, the research notes the revocation of the lawyer's monopoly in Ukraine should take place differently. According to the author, the return to the previous wording of Article 131-2 of the Constitution of Ukraine is inadmissible because the provision of legal services in Ukraine should be carried out by highly skilled specialists. In order to create a strong, professional and competitive market of legal services in Ukraine, it is proposed to borrow the experience of the Republic of Poland and introduce a professional institution of legal advisers in Ukraine. Thus, the market of legal services of Ukraine will have two independent and professional legal institutions rendering quality legal services to the population, legal entities, and government agencies. In addition, the professional activity of legal advisers in Ukraine, as well as the practice of law, should be conducted as a professional and independent activity based on permits, passing the qualifying exam and internship, or exemption from passing it. Moreover, in terms of the professional activity of legal advisers in Ukraine, there should be compliance with the principles of professional secrecy, professional ethics, maintenance of a special register of legal advisers, and disciplinary liability for improper performance of their professional obligations.

It is worth mentioning the expedience of further reimbursement of court costs related to the involvement of professional legal advisers in court proceedings. Under existing procedural codes, the parties are reim-

bursed court costs exclusively on professional legal assistance, i. e., a lawyer. This approach will allow trial participants to fully exercise their right to reimbursement for legal fees, which has been enshrined in the new procedural codes based on the adoption of the Law of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, Civil Procedure Code of Ukraine, Code on Administrative Offences, and other legislative acts”.

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