

ABSTRACT

Tychyna T. E. The criminal liability for interfering in the activity of a defender. – Qualification scholarly paper: a manuscript.

Thesis submitted for obtaining the Doctor of Philosophy Degree in Law, Speciality 081 – Law. – V. N. Karazin Kharkiv National University, Ministry of Education and Science of Ukraine, Kharkiv, 2021.

The dissertation is devoted to criminal liability for interfering in the activities of a defender. The state of research of the problem of criminal liability for interfering in a lawyer's activities is revealed. It is stated that there are no complex system developments on this issue at the monographic level in Ukraine. Experts focus only on specific components of the criminal offense under Art. 397 of the Criminal Code of Ukraine, and its general characteristics. The critical research task remains a crucial analysis of criminal liability grounds for interfering in defense counsel activities, clarifying the content of this offense's elements and features, the means of differentiation, and implementation of responsibility for him. It has been established that many issues related to liability for this criminal offense are debatable, and some of them are either not considered at the scientific level at all or insufficient attention is paid to their study.

The paper clarifies the principles and prerequisites for criminalization taken into account by the legislator in establishing criminal liability for interference in defense counsel activities. It is proved that the objective need to establish a criminal law prohibition to interfere in the lawful activities of a lawyer or a representative of a person existed at its adoption. It is stated that the social conditionality of criminalization, in this case, was determined mainly by objective realities - negative trends in the legal culture of the citizens of Ukraine.

A comparative analysis of domestic and foreign experience in criminal law protection of the defender's activity is carried out. It is emphasized that the method of establishing criminal liability for interfering in the activities of a lawyer, used in the Criminal Code of Ukraine, is not widespread but not unique. It is noted that a number

of foreign countries contain in their legislation similar to Art. 397 of the Criminal Code of Ukraine norm. At the same time, it is stated that the criminal law prohibition of interference in the professional activity of persons providing protection or obstruction of it is implemented in foreign countries, in particular, by establishing criminal liability for committing (or not committing) acts by officials significant violations of the rights and guarantees of persons, including during their professional activities to provide legal assistance.

The legal structure of the criminal offense is provided by Art. 397 of the Criminal Code of Ukraine (the content of all its elements - the object, the objective side, the subject, and the subjective side of this criminal offense).

The analysis of the object of interference in the defender's activities in work is based on the criminal offense object's view as public relations, which are protected by criminal law.

It is emphasized that the direct object of the studied composition is two-component, is complex, complex. It is emphasized that the primary component in the structure of the analyzed direct object is the guarantee of the defender's normal activity. The secondary (derived from the first) is the realization of the person's right to receive legal aid.

It is determined that the victim in the interference in the activities of defense counsel is, in fact, the person who performs the function of protection (mandatory victim), as well as the person whose rights are protected - an optional victim - suspect, accused, the defendant, acquitted, the person in respect of whom the application of coercive measures of a medical or educational nature or the issue of their application has been resolved, as well as the person in respect of whom the issue of extradition to a foreign state is envisaged (extradition), with this use the legal assistance of counsel.

The subject of the criminal offense of "interference in the activities of defense counsel" is defined as such information as legal secrecy. As part of the investigated criminal offense, this feature is included in the content of the leading direct object. It is

an optional feature, as it is inherent in only one of the forms of the analyzed encroachment - a violation of professional secrecy guarantees.

It is concluded that the objective side of the criminal offense under Art. 397 of the Criminal Code of Ukraine is expressed in the commission of obstacles to the lawful activities of the victim through active or passive voluntary illegal behavior aimed at violating the professional rights and guarantees of the defender's legal assistance in criminal or administrative proceedings.

It is determined that the objective side of interfering in the activities of a lawyer is the obstruction of the lawful activities of a lawyer or a representative of a person providing legal assistance. It is emphasized that the implementation of lawful activities of a lawyer to provide legal assistance should be understood as the implementation by a lawyer or a representative of a legal assistance person of any legal measures to protect individuals' rights and interests during criminal or administrative proceedings. And by means and methods not prohibited by law, provided that such activity is professional.

An analysis of the legal literature and judicial practice allowed us to conclude that the subject of most criminal offenses, which are to obstruct the activities of a lawyer, is a physically sane person who has reached 16 years of age.

Analysis of the subject as part of a criminal offense under Art. 397 of the Criminal Code of Ukraine found some difficulty in bringing the perpetrators of the acts provided for in Part 2 of Art. 397 of the Criminal Code of Ukraine, as this rule contains instructions on implementing the objective side of the offense, is a special entity that coincides with the subject of the criminal offense under Art. 364 of the Criminal Code of Ukraine. It is proposed, qualifying a criminal offense under Part 2 of Art. 397 of the Criminal Code of Ukraine, to pay attention directly to the object of encroachment and to apply the specified legal basis of criminal liability only on the condition that the object of encroachment became public relations providing guarantees of the professional activity of the defender on rendering in criminal procedural and administrative legal relations who has the right to it and needs it.

According to the results of the analysis of the subjective side of the criminal offense proposed in the norm of Art. 397 of the Criminal Code to provide for the

purpose as a mandatory feature of the subjective side of the intervention in the activities of the defender.

Problems of qualification of a criminal offense under Art. 397 of the Criminal Code of Ukraine. The differentiation and limits of criminal liability for interfering in the activities of a lawyer are analyzed.

It is determined that the obligatory precondition for the effective application of criminal liability for interfering in the defense counsel's activities is the correct and accurate qualification of the encroachment under Art. 397 of the Criminal Code of Ukraine.

The analysis of statistical data showed that unconvincing official statistics, according to which criminally illegal cases of interference in the professional activities of a defender in Ukraine are recorded, may be one of the reasons for the error in qualifying violations of the rights of defenders under Art. 397 CC. At the same time, it is emphasized that a small number of cases of official qualification of criminal offenses under Art. 397 of the Criminal Code testifies to the significant latency of criminal interference in the defender's activities and not to the lack of relevant facts in real life.

It is emphasized that in the qualification of interference in the activities of the defender under Art. 397 of the Criminal Code, it is necessary to differentiate the composition of criminal offenses against justice, which form a separate group of encroachments, aimed at ensuring the right to defense, against the activities of defense counsel related to legal aid, against lawyers provided by the Law of Ukraine "On Advocacy and Advocacy," others legislation of professional rights (Article 374 of the Criminal Code; Article 397 of the Criminal Code; Article 398 of the Criminal Code; Article 399 of the Criminal Code; Article 400 of the Criminal Code) on objective and subjective grounds.

It is determined that criminal liability for interfering in the activities of a defense counsel is the application to the person who committed the act, a formal conviction expressed in a court conviction, as well as further restriction of his personal property and other rights within the limits of the types and amounts of punishments—established by the sanctions of Art. 397 of the Criminal Code of Ukraine, and the state of the

criminal record of the person for the specified criminal offense. Its application's purposes coincide with the expected socially positive results of criminal liability for any other criminal offense, taking into account the special purpose of the norm of Art. 397 of the Criminal Code as a last resort to ensure the normal, unhindered activities of defenders in the field of legal aid.

The main element of criminal liability for interfering in a defender's activities is a set of restrictions on rights and freedoms defined in the criminal penalty provided by the legislator for this criminal offense - in the sanctions of Part 1 and Part 2 of Art. 397 CC.

It is concluded that the sanctions of Art. 397 of the Criminal Code, which determines the limits of criminal liability for interfering in a lawyer's activities, mostly meet scientifically sound requirements.

Key words: defender, representative of a person, right to legal aid, professional guarantees, professional activity, interference in professional activity, obstruction of activity, criminal liability.