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THE STATE OF SCIENTIFIC AND THEORETICAL DEVELOPMENT OF THE PROBLEM OF REPRESENTATION IN COURT WITHOUT AUTHORITY

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Abstract. The scientific and theoretical development of the problem of representation in court without authority is a relatively new direction of scientific knowledge and practical application, which contains contradictory procedural aspects and is at the junction of criminal, civil and procedural law, as well as lawyer ethics. The constitutional reform of 2016 and the adoption of a number of laws on amendments to procedural legal acts in the field of representation in court, as well as the importance of protecting social relations as the object of a criminal offense related to representation in court without proper authority, prompted researchers to search for new scientific approaches to combating this phenomenon through theoretical and applied developments.

In general, the study of the concept of procedural representation and the legality of its implementation is based on the scientific works of Ukrainian and foreign scientists. And the problematic aspects of combating illegal representation were studied by a number of scientists - specialists in the field of civil and criminal law and process.

Having analyzed a number of scientific works by domestic specialists in the field of criminal and civil law and process, it should be noted that the methodology for studying criminal liability for representation in court without authority, in the vast majority, is based on a system of scientific approaches and an optimal set of methods of scientific knowledge (historical and legal, dialectical, analysis, synthesis of logical and semantic analysis, modeling, etc.), which ensure the achievement of the tasks set and the formation of substantiated conclusions.

Having studied the scientific and applied achievements on the issue of improper representation, it is necessary to point out the relevance of further scientific search for a solution to the issue of eliminating a certain conflict in the application of judicial practice in matters of confirmation of the powers of a lawyer. As well as the expediency of decriminalizing Article 400-1 of the Criminal Code of Ukraine due to excessive formalism and exaggeration of the public danger that arises in connection with the exercise of representation in court without the necessary powers.

KeyWords: *representation, lawyer, prosecutor, criminal law, civil procedure, genesis, formality, decriminalisation.*

Statement of the problem. The study of the offence of unlawful representation in court is at the intersection of criminal, civil and procedural law, as well as attorneys' ethics. In particular, a significant number of scholars theoretically examine this issue through the prism of criminal law and civil procedure, as well as attorney-at-law practice.

When considering the criminal law aspect of the above issue, it should be noted that the study of liability for illegal representation in court is considered in the context of criminal liability under Article 400-1 of the Criminal Code of Ukraine. However, the complexity of such a study arises primarily due to the blanket nature of this provision, the disposition of which only names the very corpus delicti, and to determine the signs of such a crime, refers to the provisions of other branches of law or other bylaws.

In addition, most scientific works by legal scholars analyse civil rather than criminal procedural mechanisms that allow courts to verify the powers of representatives and prevent the participation of persons without proper documents in a case. Thus, according to the Civil Procedure Code of Ukraine, the Commercial Procedure Code and the Code of Administrative Procedure, persons representing the interests of the parties are required to provide documents confirming their powers. Thus, the civil procedure aspect of the theoretical study of unlawful representation in court has a significant legislative basis, scientific development and methodological foundations.

The practice of law plays a key role in preventing unlawful representation in court. Advocates, as subjects of human rights activities, not only provide professional representation of clients' interests, but also contribute to the observance of the rule of law in the judicial process. In particular, scientific research of advocacy practice should focus on the following issues: interaction with courts to verify the powers of representatives; initiating prosecution for forgery of documents and unlawful interference with the judicial process; protection of the advocates' monopoly on representation in court through legislative initiatives and interaction with the Ukrainian National Bar Association; use of digital technologies in preventing unlawful representation.

The importance of protecting public relations as an object of a criminal offence caused by representation in court without authority prompted researchers to search for new scientific ideas to counteract illegal representation through theoretical and applied developments. Special attention of scholars to the issue of illegal representation in court was drawn due to the Constitutional reform of 2016. This reform, in particular, expanded the subjective composition of the justice system and emphasised the important role of the High Council of Justice, the prosecutor's office and the bar in achieving the main goal of such institutions as justice. Also, the Law of Ukraine 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts' No. 2147-VIII dated 03.10.2017 determined the need to criminalise representation without powers due to the low level of legal culture of the parties to the process, abuse of procedural rights and failure to fulfil procedural obligations.

In general, the study of the concept of procedural representation and the legality of its implementation is based on the scientific works of Ukrainian and foreign scholars. The problematic aspects of combating unlawful representation have been studied by a number of scholars - specialists in the field of civil and criminal law and procedure, including: O. Dzhuzha, D. Balabanova, O. Bulgakova, O. Kryshevych, O. Matiushenko, I. Mytrofanov, O. Yanovska, K. Doroshenko, O. Marin, V. Zaborovsky, I. Kopotun, L. Paliukh, T. Tychyna, O. Yakymchuk, M. Zhushman, V. Pozhar, I. Pavlunyk, L. Shapoval, S. Kerimov, N. Antoniuk.

The purpose of the article is to analyse the current state of development of the legal characteristics of representation in court without authority by national experts and the methodological framework for studying the elements of the offence of representation in court without authority.

Summary of the main material. The genesis of criminal liability for representation in court without authority was studied by O. Dzhuzha, having considered a number of adopted legal acts which became a prerequisite for criminalisation of representation in court without authority. The scientist argued that the judicial reform in Ukraine will update the laws and amend the Constitution, paying special attention to the independence of the judiciary, depoliticisation and fair trial to ensure the rule of law and the right of everyone to a fair trial [1]. He also identified the problematic aspects of criminal liability for representation in court without authority in national legislation through the prism of studying foreign experience in establishing criminal liability for such or similar acts [2].

A thorough study of criminal liability for representation in court without authority was carried out by O. Bulgakova. Based on the analysis of modern achievements in the theory of criminal law, the author made a theoretical generalisation and proposed a solution to the scientific problem of developing proposals for improving the criminal legislation of Ukraine in terms of liability for the offence under Article 400-1 of the Criminal Code of Ukraine. Thus, the author argues for the expediency of decriminalisation of this provision. The researcher also carried out an in-depth analysis and generalisation of foreign practice regarding liability for representation in court without authority, as well as for similar acts; provided an object-subject characteristic of the crime and determined the peculiarities of legal qualification of such a criminal offence [3].

The controversial issue of criminalisation of Art. 400-1 of the CC of Ukraine, the inappropriateness of which was argued by O. Bulgakova, was also supported by D. Balobanova in her scientific article, pointing to violations of the requirements of the theory of criminalisation during the introduction of criminal liability for the act in question. She emphasised that the public danger of the latter was taken into account as

the main reason for its criminalisation and that such a 'special' rule was excessive. The scholar also noted that the actions provided for in Art. 400-1 of the Criminal Code of Ukraine may fall under the elements of the crime provided for in Part 2 of Art. 358 of the Criminal Code of Ukraine 'Forgery of documents, seals, stamps and forms, sale or use of forged documents, seals, stamps', which, in her opinion, is a duplication of criminal norms. In particular, these norms have the same subject and subjective party, the same actions, but a rather 'conditional' difference in the object of criminal legal protection [4].

H. Antoniuk has her own vision of the expediency of special criminalisation of representation in court without authority. The scientist pointed out the need to consider and analyse the activities in court proceedings without the relevant powers of not only a lawyer, but also a prosecutor and an investigator. Thus, N. Antoniuk noted that the consequences of representation without powers by a prosecutor are no less dangerous than representation by a lawyer in court without powers, but there is no separate article in the Criminal Code of Ukraine which would provide for criminal liability for representation by a prosecutor without powers. The author notes in her article that, depending on the specific circumstances of the case, such offences by the prosecutor may be qualified under Article 366 of the Criminal Code of Ukraine (forgery in office), and the prosecutor may also be brought to disciplinary responsibility [5].

K. Doroshenko, having analysed the elements of the criminal offence under Article 400-1 of the Criminal Code of Ukraine and having studied the views of lawyers on the need for such criminalisation, came to the conclusion that this article should be decriminalised, pointing out that this article will not contribute to the protection of public relations, since in fact the covered acts are already protected by the related provisions of the law on criminal liability. The introduction of criminal

liability for advocates, as provided for in Article 400-1 of the Criminal Code of Ukraine, only creates unjustified risks of obstructing the practice of law [6].

A detailed criminal law description of the offence under Article 400-1 of the Criminal Code of Ukraine was provided by I. Mitrofanov. Having analysed the corpus delicti of the offence - representation in court without authority, he concluded that such corpus delicti is formal, therefore, to establish its existence, the law does not require clarification of the consequences of the act; the disposition of Art. 400-1 is banqueting, and therefore, to interpret it, it is necessary to refer to the relevant provisions of procedural and other legislation; the subject of declaring false information is special subjects, the list of which is established by procedural legislation: lawyers, prosecutors, legal representatives, etc.[7].

Given that the main role in court representation is played by attorneys-at-law, it is necessary to study in more detail the powers of an attorney-at-law in court proceedings.

M. Zhushman in his study ‘Problems of theory and practice of confirming the powers of an attorney-at-law in the process’ established the ambiguity of interpretation of the provisions of the current procedural codes. Consequently, the practice of applying their provisions in conjunction with other legislative acts, in particular the Law of Ukraine ‘On the Bar and Practice of Law’, regarding the legality of the exercise of powers by an attorney-at-law in court, unfortunately, may raise doubts both among the parties to the case and the court. In this regard, there is a need to ensure the unity of judicial practice in determining an exhaustive list of documents, their form and content, which confirm the proper powers of an attorney-at-law [8].

O. Yanovska, also focuses on the lack of unity of judicial practice in matters of confirmation of the attorney's competence. In her research, the scholar notes that excessive formalism on the part of the court when verifying the competence of an

attorney-at-law in a trial leads to a violation of the right to access to court and to a fair trial. In her opinion, by introducing criminal liability of attorneys for unlawful representation in court, it would be advisable to introduce a presumption of good faith when courts verify the powers of an attorney as a representative or defender in a trial [9].

A thorough dissertation study of the institute of representation in criminal proceedings was conducted by V. Pozhar. The researcher examined the genesis and current state of the institute of representation in criminal proceedings; the concept and features of representation were investigated and its classification was made on various grounds. The author defines the concept of a representative as a subject of criminal procedure. The author examines the prerequisites and grounds for acquiring the procedural status of a representative by a certain person, as well as the grounds for its loss. The author also analyses the problems of legal regulation of representation of the applicant, victim, civil plaintiff and civil defendant; representation of legal entities; representation of the interests of citizens and the State by the prosecutor; representation of a witness and suggests ways to solve them [10, p. 17].

Given that the issue of legitimacy of representation in court proceedings is considered at the intersection of various branches of law, including civil law, we have analysed a number of scientific works on civil procedure of the institute of representation in court.

Thus, experts in the field of civil procedure have studied the problems of modern and prospective development of the institute of civil procedural representation. I. Pavlunyk studied the historical path of formation and development of the institute of procedural representation, defined the concept of procedural representation and its objectives. He classified procedural representation into types, revealed the content and limits of the institute of procedural representation, and determined its difference from

the institute of representation in civil law [11, p. 13]. Conducting a comprehensive study of representation in civil law, L. Shapoval revealed the concept, legal nature and content of representation; carried out a general theoretical analysis and provided a legal description of the subjects of representative legal relations; investigated the essence of representation as a legal institution through the concept of powers. The author also examined the peculiarities of contractual and non-contractual representation; clarified the difference between transactions performed by representatives on behalf of legally capable persons and transactions performed by representatives on behalf of incapacitated persons; and analysed the specifics of commercial representation.

In his works, Venia pays considerable attention to the concept of power of attorney and its legal characteristics. The grounds for termination and cancellation of a power of attorney are considered separately [12, p. 19]. S. Kerimov analysed the representation by law in the civil law of Ukraine. The author clarified the essence and significance of representation by law in modern conditions, and also analysed in detail the grounds for the emergence and types of representation, the formation of the category of mandatory representation [13, p. 18].

Conclusion. Having analysed a number of scientific works by national experts in the field of criminal and civil law and procedure, it should be noted that the methodology for studying criminal liability for representation in court without authority is, for the most part, based on the system of scientific approaches and the optimal set of methods of scientific knowledge (historical and legal, dialectical, analysis, synthesis of logical and semantic analysis, modelling, etc.) which ensure the achievement of the tasks set and the formation of reasonable conclusions.

Thus, criminal liability for representation in court without powers is a relatively new area of scientific knowledge and practical application, and it also has a number of contradictory procedural provisions. Analyzing the scientific and applied achievements

on the issue of unlawful representation, it is necessary to point out the relevance of further scientific search for a solution to the issue of eliminating a certain conflict in the application of case law in matters of confirmation of powers by an attorney-at-law, as well as the expediency of decriminalization of Article 400-1 of the Criminal Code of Ukraine due to excessive formalism and exaggeration of the public danger arising from representation in court without the necessary powers.

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