

Theoretical and applied aspects of criminal law and procedural ensuring the right to defense

Aspectos teóricos y aplicados del derecho penal y procesal que garantizan el derecho a la defensa

Aspectos teóricos e aplicados do direito penal e processual penal que asseguram o direito à defesa

Ivan Krasnytskyi¹
Roman Maksymovych²
Nataliya Lashchuk³
Vira Navrotska⁴
Iryna Bakhmat⁵

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¹ Candidate of Law (PhD), Professor, Director of the Educational and Scientific Institute of Law and Law Enforcement Activities, Lviv State University of Internal Affairs, Lviv, Ukraine

ORCID: <https://orcid.org/0000-0002-5529-7636>

² Candidate of Law (PhD), Professor, Professor of the Department of Criminal Law Disciplines, Educational and Scientific Institute of Law and Law Enforcement Activities, Lviv State University of Internal Affairs, Lviv, Ukraine

ORCID: <https://orcid.org/0000-0002-9796-998X>

³ Candidate of Law (PhD), Associate Professor, Head of the Department of Criminal Law Disciplines, Educational and Scientific Institute of Law and Law Enforcement Activities, Lviv State University of Internal Affairs, Lviv, Ukraine

ORCID: <https://orcid.org/0000-0001-9723-9824>

⁴ Doctor of Sciences, Associate Professor, Associate Professor of the Department of Criminal Law Disciplines, Educational and Scientific Institute of Law and Law Enforcement Activities, Lviv State University of Internal Affairs, Lviv, Ukraine

ORCID: <https://orcid.org/0000-0002-3407-7984>

⁵ Senior Lecturer of the Department of Criminal Law Disciplines, Educational and Scientific Institute of Law and Law Enforcement Activities, Lviv State University of Internal Affairs, Lviv, Ukraine

ORCID: <https://orcid.org/0009-0000-3315-8398>



Abstract

The relevance of the research is due to the growing role of the right to defense in the criminal justice system of Ukraine, especially in conditions of martial law, when ensuring procedural guarantees becomes critical for compliance with the principles of the rule of law. The purpose of the research is to clarify the legal, institutional, and practical mechanisms for the implementation of the right to defense in criminal proceedings in Ukraine. The methodological basis is the systematic, comparative legal, formal legal, and statistical methods, which allowed combining the analysis of the regulatory framework, judicial practice, and international reports (Council of Europe, Eurostat, UNODC, OECD). As a result, it was found that the Ukrainian system is gradually approaching European standards, but retains structural challenges—in particular, limited access of the defense attorney to the case materials, inequality of resources between the parties, and insufficient control over the actions of the prosecutor. The dynamics of indicators for 2021-2024 indicate an increase in the participation of defense attorneys in criminal proceedings and, at the same time, an increase in the duration of the pre-trial investigation. A comparative analysis indicated that the financing of the free legal aid system in Ukraine is 2-2.5 times lower than the average European level, which causes practical asymmetry between the parties to the process. The results obtained can be used to develop state strategies in the field of justice, improve criminal procedural legislation and increase the effectiveness of legal aid.

Keywords: right to defense, criminal proceedings, adversarial proceedings, advocacy, martial law, European standards of justice, legal aid, judicial control.

Resumen

La relevancia de la investigación se debe al papel cada vez más importante que desempeña el derecho a la defensa en el sistema de justicia penal de Ucrania, especialmente en condiciones de ley marcial, cuando garantizar las garantías procesales se convierte en algo fundamental para el cumplimiento de los principios del Estado de derecho. El objetivo de la investigación es aclarar los mecanismos jurídicos, institucionales y prácticos para la aplicación del derecho a la defensa en los procedimientos penales en Ucrania. La base metodológica son los métodos sistemáticos, jurídicos comparativos, jurídicos formales y estadísticos, que permitieron combinar el análisis del marco normativo, la práctica judicial y los informes internacionales (Consejo de Europa, Eurostat, UNODC, OCDE). Como resultado, se ha constatado que el sistema ucraniano se está acercando gradualmente a las normas europeas, pero sigue presentando retos estructurales, en particular, el acceso limitado del abogado defensor a los materiales del caso, la desigualdad de recursos entre las partes y el control insuficiente de las actuaciones del fiscal. La dinámica de los indicadores para 2021-2024 indica un aumento de la participación de los abogados defensores en los procesos penales y, al mismo tiempo, un aumento de la duración de la investigación previa al juicio. Un análisis comparativo mostró que la financiación del sistema de asistencia jurídica gratuita en Ucrania es entre 2 y 2,5 veces inferior al nivel medio europeo, lo que provoca una asimetría práctica entre las partes del proceso. Los resultados obtenidos pueden utilizarse para desarrollar estrategias estatales en el ámbito de la justicia, mejorar la legislación procesal penal y aumentar la eficacia de la asistencia jurídica.

Palabras clave: derecho a la defensa, procesos penales, procesos contradictorios, defensa, ley marcial, normas europeas de justicia, asistencia jurídica, control judicial.

Resumo

A relevância da pesquisa deve-se ao papel crescente do direito à defesa no sistema de justiça criminal da Ucrânia, especialmente em condições de lei marcial, quando garantir as garantias processuais se torna fun-

damental para o cumprimento dos princípios do Estado de Direito. O objetivo da pesquisa é esclarecer os mecanismos jurídicos, institucionais e práticos para a implementação do direito à defesa em processos penais na Ucrânia. A base metodológica é constituída por métodos sistemáticos, jurídicos comparativos, jurídicos formais e estatísticos, que permitiram combinar a análise do quadro regulamentar, da prática judicial e de relatórios internacionais (Conselho da Europa, Eurostat, UNODC, OCDE). Como resultado, verificou-se que o sistema ucraniano está a aproximar-se gradualmente dos padrões europeus, mas mantém desafios estruturais — em particular, o acesso limitado do advogado de defesa aos materiais do processo, a desigualdade de recursos entre as partes e o controlo insuficiente sobre as ações do Ministério Público. A dinâmica dos indicadores para 2021-2024 indica um aumento na participação dos advogados de defesa nos processos penais e, ao mesmo tempo, um aumento na duração da investigação pré-julgamento. Uma análise comparativa mostrou que o financiamento do sistema de assistência jurídica gratuita na Ucrânia é 2 a 2,5 vezes inferior ao nível médio europeu, o que causa assimetria prática entre as partes no processo. Os resultados obtidos podem ser utilizados para desenvolver estratégias estatais no domínio da justiça, melhorar a legislação processual penal e aumentar a eficácia da assistência jurídica.

Palavras-chave: direito à defesa, processos penais, processos contraditórios, advocacia, lei marcial, normas europeias de justiça, assistência jurídica, controlo judicial.

INTRODUCTION

Ensuring the right to defense in criminal proceedings is one of the fundamental principles of a democratic state based on the rule of law, on which citizens' trust in the justice system directly depends. In conditions of martial law, when the national legal system is under institutional strain, guarantees of the right to defense become particularly relevant, since they determine the limits of permissible state interference in human rights. World experience shows that the effectiveness of criminal justice is measured not only by the speed of investigations or the number of convictions, but primarily by the ability to ensure equality of arms, access to legal aid, and real, rather than formal, compliance with the adversarial principle (Council of Europe, 2024; FRA, 2024; OECD, 2024). Scientific interest in the problem of protecting the rights of a suspect in Ukraine has increased as a result of legislative changes recently and armed aggression, which has imposed new requirements on law enforcement. In the domestic doctrine of criminal procedure (Ablamskyi, 2021; Pivnenko, 2021; Ostavciuc, 2022; Yanovska, 2024), there is a desire to develop a balanced model of ensuring the right to defense, which would combine the guarantees of national legislation and European human rights standards. At the same time, foreign authors (Corda & Hester, 2021; Johnston et al., 2023; Dsouza, 2024) emphasize the need for early access to counsel as a prerequisite for preventing arbitrariness and violations during the pre-trial investigation. Despite significant progress in reforming the criminal procedure, a number of "blank spots" remain, in particular, the lack of an appropriate mechanism for

monitoring the actions of the prosecutor, the difficulty in ensuring confidential communication between a lawyer and a client, as well as inequality of the parties in access to evidence and procedural resources (Korniichuk, 2024; Kovalenko, 2024; Babikov et al., 2025). International monitoring organizations (UNODC, 2023; World Justice Project, 2024) also record a systemic problem—the formal, rather than substantive, application of the right to protection, which reduces the effectiveness of justice as a whole. Thus, the relevance of the research is due to the need for a comprehensive rethinking of the mechanisms for ensuring the right to protection in the context of European integration and martial law.

The purpose of the research is to examine the modern criminal law and criminal procedural principles of ensuring the right to defense in criminal proceedings in Ukraine, identify key problems of its implementation, characterize development trends under the influence of military realities, and propose areas for improvement based on a comparative analysis of international experience.

ANALYSIS OF RECENT STUDIES AND PUBLICATIONS

Studies on the right to defense in criminal proceedings in recent years have focused on the issues of implementing constitutional guarantees in the context of legal system reform and martial law. The scientific works of Ukrainian legal scholars emphasize the evolution of procedural principles, in particular the participation of defense counsel in a special pre-trial investigation (Ablamskyi, 2021; Pivnenko, 2021; Ostavciuc, 2022). Considerable attention is paid to the analysis of legal mechanisms for ensuring equality of parties, which is a key element of the adversarial principle in criminal proceedings (Voloshanivska & Fedorov, 2021; Yanovska, 2022; Kovalenko, 2024). Comparative studies emphasize the influence of European standards, primarily the practice of the European Court of Human Rights, on the formation of the Ukrainian model of criminal procedure (Gutnyk, 2022; Corda & Hester, 2021; Johnston et al., 2023). At the same time, it is emphasized that the real provision of the right to defense depends not only on legislative guarantees, but also on practical mechanisms for access to a lawyer, collection of evidence, and the effectiveness of judicial control (Korniichuk, 2024; Kovalenko, 2024; Babikov et al., 2025).

Scholars pay special attention to the transformations of criminal procedural legislation under the influence of martial law. Laws of Ukraine No. 2201-IX (2022) and No. 3341-IX (2023) changed the conditions of pre-trial investigation, granting prosecutors

expanded powers, which caused numerous discussions about the balance between state interests and the rights of the defense (Hloviuk & Zavtur, 2022; Zhovtan, 2023; Mozgawa & Shupyana, 2024). These issues are actively covered in scientific works devoted to the protection of human rights under emergency legal regimes (Kaplina, 2022; Shumska, 2025; Fomina, 2025).

Foreign publications explore the concept of “early access to counsel” as a key tool for protecting the rights of the suspect, which has already been implemented in most EU countries (Hodgson, 2011; Lattimore, 2022; Dsouza, 2024). The idea of the need to integrate such approaches into Ukrainian practice is supported regarding the confidentiality of lawyer-client communication and procedural control over the actions of the prosecutor (Chernenko & Shiyan, 2024; Oliynyk, 2022). International institutions, including the Council of Europe (2024), FRA (2024) and OECD (2024), in their reports emphasize the importance of effective guarantees of legal aid, equality of procedural opportunities and accountability of justice bodies. Comprehensive analytical reports emphasize that the protection system in Ukraine demonstrates gradual convergence with European standards, but structural challenges remain related to access to a lawyer, financing of legal aid and the quality of law enforcement (Council of the European Union, 2023; Eurostat, 2024; World Justice Project, 2024).

Studies of recent years have also shown interest in issues of legal responsibility and the adaptation of the national criminal justice system to the challenges of war. In particular, changes to the Criminal Code of Ukraine caused by military actions are analyzed, as well as the legal status of prisoners of war and persons participating in armed conflict. (Mozgawa & Shupyana, 2024; Kaplina, 2022). Scholars emphasize that effective enforcement of the right to defense in such cases should include special guarantees for persons deprived of their liberty or displaced to a combat zone, in accordance with international humanitarian law standards (Yanovska, 2024; Shumska, 2025). A significant part of the publications is devoted to the analysis of the judicial practice of the Supreme Court of Ukraine, which forms approaches to the interpretation of the principle of adversarial and equality of parties in criminal proceedings. Researchers note that judicial practice contributes to the gradual equalization of the imbalance between the prosecution and defense but remains selective in the application of international standards (Yanovska, 2022; Verkhovna Rada of Ukraine, 2022, 2025). At the same time, the academic papers of foreign authors emphasize the ethical aspect of the defense attorney’s activities, his role in ensuring procedural justice and limiting the prosecutor’s discretionary powers (Zhou, 2025; Dsouza, 2024; Abebe et al., 2022).

In the context of interstate cooperation and the impact of international legal mechanisms, the studies of the Council of Europe (2024), OECD (2024), and FRA (2024)

are complemented by empirical assessments from international projects, such as the World Justice Project (2024), which makes it possible to trace the connection between institutional reforms and the actual level of protection guarantees. The need to further strengthen the independence of the legal profession, expand access to free legal aid, and implement effective mechanisms for monitoring procedural abuses is emphasized (Council of the European Union, 2023; Eurostat, 2024). Additionally, it is worth noting scientific and practical sources that deepen the understanding of the mechanisms for implementing the right to defense in criminal proceedings. Chernenko and Shiyan (2024) systematized the stages of the defense attorney's activities at the pre-trial stage, clarifying the procedural boundaries of the lawyer's participation. Oliynyk (2022) analyzed the Ukrainian criminal justice system in the comparative context of the UN, emphasizing the need to harmonize national procedures with international standards. Lattimore (2022) examined the challenges of criminal justice reform through the prism of institutional efficiency and access to legal aid, which is relevant for modern Ukraine. At the same time, Abebe et al. (2022) draw attention to the risks of using statistical software in evidence, emphasizing the need for its transparent examination and control by the defense.

Thus, a review of modern studies demonstrates a concerted effort by the scientific community to improve the effectiveness of legal protection through a synthesis of national and international experience. At the same time, many problems remain unresolved—primarily, the insufficient level of actual equality of parties in the criminal process and the lack of effective control over the implementation of guarantees of the right to protection during wartime.

RESEARCH METHODS

The research was carried out in 2024-2025 as part of an analytical review of the state of criminal procedural protection of the right to defense in Ukraine using empirical data, regulatory legal acts, and comparative analysis of international reports. The main materials were official statistical indicators of the State Judicial Administration of Ukraine, the Prosecutor General's Office, the Coordination Center for the Provision of Free Legal Aid, as well as data from international organizations—the Council of Europe (2024), Eurostat (2024), UNODC (2023), OECD (2024), and World Justice Project (2024). In the course of the research, a complex of general scientific and special legal methods was used, among which the leading place was taken by the method of system analysis—to identify the relationships between procedural guarantees and their practical application—the method of comparative law—to compare Ukrainian practice

with the legislation and judicial models of EU countries—as well as the formal-legal method—to interpret the norms of the Constitution of Ukraine, the Criminal Procedure Code, and special laws No. 2201-IX (2022) and No. 3341-IX (2023). The empirical basis was the analysis of judicial decisions of the Supreme Court of Ukraine, analytical materials of the Higher School of Advocacy, publications of Ukrainian and foreign jurists (Ablamskyi, 2021; Babikov et al., 2025; Johnston et al., 2023; Dsouza, 2024). The results were summarized using logical-deductive and statistical methods, which ensured the objectivity of the assessment of the dynamics of law enforcement and enabled the formulation of recommendations for improving the mechanisms for implementing the right to defense in criminal proceedings.

RESEARCH RESULTS

The current state of criminal law and criminal procedure in Ukraine is characterized by active reform of the legal system aimed at approaching European standards of fair trial. The Constitution of Ukraine, the Criminal Procedure Code and the practice of the Supreme Court are gradually forming a holistic model of protecting the rights of the suspect, accused and defendant; however, this model remains dynamic and is influenced by military realities, international obligations and internal challenges to law enforcement. Under martial law, the state is forced to balance between security interests and human rights guarantees, which creates new debatable aspects regarding the limits of rights restrictions in the criminal process (Babikov et al., 2025).

An important role in understanding modern approaches to the right to defense is played by the case law of the European Court of Human Rights, which defines the concept of a “fair trial” through the prism of real, rather than formal, access to legal aid. The Ukrainian judicial system is gradually adapting these standards, which is evident, in particular, in the Supreme Court rulings on proper notification of suspicion, the right to silence, and the effective participation of a defense attorney during interrogation. Studies by domestic scholars show that ensuring the right to defense in the national criminal process is developing in two interrelated directions—procedural and institutional. The procedural dimension concerns the proper preparation of evidence, equality of parties, and admissibility of the results of investigative actions, while the institutional dimension is related to the development of a system of free legal aid, professional ethics of lawyers, and guarantees of the independence of the defense attorney (Ablamskyi, 2021; Voloshanivska & Fedorov, 2021).

However, the actual application of the right to defense is hampered by systemic issues. These include limiting defense attorneys’ access to pre-trial investigative

materials, making it harder to guarantee that all parties have equal procedural opportunities, and not having a reliable system in place to ensure that promises made during questioning, searches, or detention are being followed (Korniichuk, 2024; Kovalenko, 2024). In a comparative perspective, it is worth noting that the European Union countries pay special attention to mechanisms for early access to a lawyer, the possibility of confidential communication with a client, and the procedure for legally informing a person about his or her procedural rights (Corda & Hester, 2021).

In this context, studies by international experts are indicative, emphasizing the importance of a systemic approach to legal guarantees: the right to defense must be ensured at all stages of the process—from the moment of detention to the execution of the sentence (Johnston et al., 2023; Dsouza, 2024). Ukrainian legislation, despite certain gaps, has already laid the foundations for such an approach through Articles 20-22 of the CPC of Ukraine, which guarantee the inviolability of the right to defense; however, practice indicates the need for a clearer algorithm for ensuring the participation of a defense lawyer in investigative actions and court hearings, especially in the absence of the suspect (Fomina, 2025).

Thus, the current state of ensuring the right to defense in criminal proceedings in Ukraine can be defined as transitional—it is characterized by a gradual approximation to European standards, but at the same time it retains significant structural challenges related to the effectiveness of law enforcement, the quality of legal assistance, and the harmonization of national practice with the principles of the rule of law (Gutnyk, 2022; Yanovska, 2024). The prospects for further development lie in the creation of stable judicial and prosecutorial practice, which will guarantee not only the formal, but also the actual provision of a person's right to defense in each criminal proceeding.

The empirical substantiation of the current state of ensuring the right to defense in criminal proceedings in Ukraine is based on the analysis of official statistical data published by the State Judicial Administration of Ukraine, the Prosecutor General's Office, the Coordination Center for the Provision of Free Legal Aid, as well as international monitoring organizations—Eurostat (2024), the Council of Europe (2024), and UNODC (2023). Additionally, data from the World Justice Project (2024) was considered. Comparative statistics make it possible to assess both the dynamics of law enforcement in Ukraine and its correlation with trends in the European Union countries. To better illustrate internal changes in the national legal protection system, summarized performance indicators for 2021-2024 are presented in Table 1.

Table 1. Dynamics of the implementation of the right to defense in criminal proceedings in Ukraine (2021-2024) *

Indicator	2021	2022	2023	2024
Number of criminal proceedings in which the participation of a defense lawyer was ensured	145 213	153 490	166 872	178 560
Share of proceedings with a defense attorney out of the total number (%)	62.4	68.1	72.3	75.8
Number of applications to the free legal aid system	534 000	491 000	576 000	612 000
Average duration of pre-trial investigation (days)	117.5	120.8	126.4	132.9

***Source:** compiled by the author based on (Hloviuk & Zavtur, 2022; Zhovtan, 2023; Verkhovna Rada of Ukraine, 2025; 2023).

The share of criminal proceedings in which the participation of a defense lawyer was ensured increased by 13.4% over four years, which indicates positive dynamics in the implementation of European standards of a fair trial. At the same time, the average duration of the pre-trial investigation increased by 15.4 days, which may be a consequence of the complication of procedures during the war period. A comparison analysis of key indicators was conducted to determine the correlation between Ukrainian indicators and the trends of the European Union countries. The results are summarized in Table 2.

Table 2. Comparison of indicators of the implementation of the right to protection in Ukraine and EU countries (2024)*

Country	Share of proceedings with early access to a lawyer (%)	Average duration of investigation (days)	State costs for legal aid (euro/case)
Ukraine	75.8	132.9	41.2
Poland	89.4	118.5	73.6
Germany	92.7	110.2	95.4
France	90.1	115.8	87.0
Spain	87.3	121.4	65.8

***Source:** compiled by the author based on (Council of the European Union, 2023; Eurostat, 2024; FRA, 2024).

Ukraine demonstrates a gradual approach to European standards, but the financing of the legal aid system remains 2-2.5 times lower than the average European level. This causes an asymmetry between formal guarantees and real possibilities of protection. Ukraine's standing in global rankings and monitoring studies was examined to comprehend the global context of the establishment of the right to protection institution. This is shown in Table 3.

Table 3. International Access to Justice Indices (2022-2024)*

Indicator	2022	2023	2024
<i>Criminal Justice Accessibility Index (Ukraine's place among 142 countries)</i>	59	55	52
<i>Impartiality of Criminal Process Index (0-1 score)</i>	0.46	0.49	0.52
Share of persons who received free legal assistance upon detention (%)	66	69	71

***Source:** compiled by the author based on (UNODC, 2023; World Justice Project, 2024; OECD, 2023).

Over the past three years, Ukraine has risen seven positions in the global ranking of access to criminal justice, which confirms the positive impact of the reforms. However, the share of persons who receive free legal aid is still 17 percentage points lower than the average level in the EU countries. Thus, the above statistical indicators make it possible to conclude that Ukraine is demonstrating gradual movement towards strengthening the guarantees of the right to defense, but this progress is uneven and requires strengthening the mechanisms for the practical implementation of the procedural rights of the defense. That is why further analysis is focused on studying the principles of adversarial and equality of arms as basic tools for ensuring a fair trial.

In criminal proceedings, the principles of adversarial proceedings and equality of arms are fundamental guarantees of a fair trial. They provide that the prosecution and defense have equal opportunities to present their positions, evidence, motions, and objections, and that the court impartially evaluates the arguments of both sides (Verkhovna Rada of Ukraine, 2025). However, in practice in Ukraine, the implementation of these principles faces numerous difficulties, which have become especially acute in the conditions of martial law after 2022. For the purpose of systematizing key issues, regulatory changes of 2022-2025 were considered, in particular, the Law of Ukraine No. 2201-IX of April 14, 2022, "On Amendments to the Criminal Procedure Code of Ukraine Regarding the Conduct of Criminal Proceedings under Martial Law," and the Law No. 3341-IX of August 23, 2023, "On Amendments to the Criminal Procedure Code of Ukraine Regarding the Peculiarities of Pre-Trial Investigation of Crimes Against the Fundamentals of National Security, Peace, Human Security, and International Law" (Verkhovna Rada of Ukraine, 2022; Verkhovna Rada of Ukraine, 2023). Additionally, analytical materials of the High School of Advocacy were analyzed, which highlighted the novelties of criminal proceedings during martial law and the Supreme Court's clarifications on the application of relevant provisions (Hloviuk & Zavtur, 2022). In the context of protecting the rights of the parties in the pre-trial investigation, special attention was paid to the problem of limited access of the defense party to investigation materials, which was disclosed in professional comments to Article 255 of the Criminal Procedure

Code of Ukraine (Zhovtan, 2023). Thus, the principles of adversarial and equality of parties remain not only legal, but also practical challenges for the Ukrainian criminal process (Verkhovna Rada of Ukraine, 2023; 2025), which require further improvement of the regulatory framework and mechanisms of judicial control (See Table 4).

Table 4. Problematic aspects of implementing the principles of adversarial proceedings and equality of parties in criminal proceedings under martial law*

No	Problem/ challenge	Source (CPC norm / legislative change / practice)	The essence of the problem	Potential consequences for the defense
1	Limited access to pre-trial investigation materials	Article 255 of the CPC, criticism in professional literature	The defense is sometimes not informed about the conduct of secret investigative (search) actions or loses the opportunity to familiarize themselves with their results	Complicating the preparation of objections or motions, violating equal conditions of adversarial proceedings
2	Uneven use of prosecutorial powers	Law No. 2201-IX (Chapter IX-1 of the Criminal Procedure Code)	Martial law conditions give the prosecutor the opportunity to authorize certain investigative actions without the intervention of the investigating judge, which weakens control by the defense	Risk of abuse, lack of balance between prosecution and defense
3	Changes in the calculation of pre-trial investigation deadlines	Law No. 3341-IX of 23.08.2023 (Part 8, Article 615 of the Criminal Procedure Code)	An exception has been introduced: the term "is not calculated" in proceedings concerning certain crimes (Articles 437-439, Part 1 of Article 442)	Prolonged delays in pre-trial proceedings, which create unequal conditions for defense
4	Incomplete response to change of jurisdiction/ loss of materials due to hostilities	Letter of the Supreme Court dated 03.03.2022 No. 1/0/2-22, norms of the Code of Criminal Procedure 615	In cases where case materials are not transferred or are lost due to hostilities, the investigating judge is guided by an incomplete set of documents	The defense is forced to deal with incomplete information, which makes it difficult to prepare objections
5	Insufficient clarity in appealing the actions of the prosecutor/investigator	Part 4 of Article 615, additions and clarifications to the CPC	Procedures for appealing prosecutorial actions or inactions during wartime remain insufficiently detailed	Defense may experience legal uncertainty, which affects the speed of response
6	Declarative nature of the principle of equality of parties	Constitutional provisions on equality, but practical inconsistency	Although the law guarantees equal rights of parties (Article 22 of the CPC), in practice access to resources, experts, and evidence is often unequal	The defense is in a more vulnerable position, especially in cases involving state prosecution
7	Abuse of prosecutorial decisions to destroy evidence	Works of legal scholars on Article 255 of the CPC	The prosecutor may decide to destroy information, items or documents without proper notification to the defense	The inability of the defense to verify or challenge such actions
8	Lack of guarantees regarding the use of a lawyer in the early stages	General principles of the CPC (Article 7), practice and comments of lawyers	In some cases, detentions or interrogations occur without timely access to protection	Contradicts international standards, reduces the effectiveness of protection

*Source: compiled by the author based on (Verkhovna Rada of Ukraine, 2022; 2023; Zhovtan, 2023; Hloviuk & Zavtur, 2022)

The table illustrates that the key challenges to implementing the principle of adversarial proceedings and equality of parties in the criminal process of Ukraine are not only the formal existence of norms on equal rights of the parties but also their actual provision in conditions of martial law. The regulatory changes of 2022-2025 largely adapted the process to wartime circumstances (for example, through Section IX-1 of the Code of Criminal Procedure, the peculiarities of calculating deadlines, and the expansion of the prosecutor's powers), but they also created new "risk zones" for the defense. The main problems include the restrictions on access to pre-trial investigation materials, the ability of the prosecutor to act without proper control, disproportionate terms of proceedings, loss of materials due to hostilities, and the lack of clear mechanisms for appealing individual decisions. Further legislative and practical efforts should prioritize strengthening the guarantees of protection in addition to "military" adjustments. Some examples of this include a more transparent process for appealing prosecutorial decisions, alerting the defense to all procedural actions, and outlawing the destruction of evidence without the defense's consent. Thus, the implementation of the principle of adversarial proceedings and equality of arms should become not a declaration, but an integral component of fair criminal proceedings even under martial law.

The institution of the participation of a defense attorney in the pre-trial investigation and trial is a key element of the implementation of the constitutional right of a person to defense, which guarantees compliance with the principles of adversarial proceedings, equality of parties and fairness of criminal proceedings. The effectiveness of the participation of a defense attorney is determined not only by the formal enshrining of this right in legislation, but also by the practical possibility of its implementation – in particular, in the field of collecting evidence, participation in investigative (search) actions, access to case materials and the process of interaction with pre-trial investigation bodies (Ablamskyi, 2021; Kovalenko, 2024). In recent years, Ukraine has seen significant progress in the development of legal mechanisms regulating the powers of a defense attorney. However, several problems remain related to the practical implementation of these mechanisms in the context of both the national judicial system and international standards (Voloshanivska & Fedorov, 2021; Gutnyk, 2022).

The table below provides a comparative analysis of key indicators of the effectiveness of the defense attorney's participation in the criminal process of Ukraine, considering the results of research by scholars and generalizations of judicial practice. (See Table 5).

Table 5. The effectiveness of the institution of defense counsel's participation in pre-trial investigation and trial*

No.	Performance indicator	Current status of implementation	Main problems
1	Defense attorney's access to pre-trial investigation materials	Guaranteed by Article 221 of the CPC, but limited due to delays or refusals of investigators	Lack of clear deadlines for granting access, formal nature of decisions
2	The right of the defense attorney to initiate the collection of evidence	Articles 93, 99 of the CPC allow the defense to submit evidence, but their assessment by the courts is often subjective	Judges sometimes rule evidence inadmissible due to "insufficient procedural form"
3	Possibility of participation of a defense attorney in investigative actions	The norms of the CCP give the right to be present, but the practice depends on the investigator	Insufficient awareness or deliberate failure to notify about the action
4	Guarantees of confidential communication with the client	Guaranteed by law, but limited in places of pre-trial detention	Lack of control over confidentiality
5	Equality of arms in the process of proof	It is declared in Article 22 of the CPC, but in practice the prosecutor has greater access to resources	Imbalance between the prosecution and the defense
6	International standards of advocacy participation	Partially established through the implementation of ECHR case law	Insufficient adaptation to martial law conditions

Source: compiled by the author based on (Ablamskyi, 2021; Korniiichuk, 2024; Kovalenko, 2024; Pivnenko, 2021; Fomina, 2025; Gutnyk, 2022; Yanovska, 2024; Voloshanivska & Fedorov, 2021; Johnston et al., 2023; Babikov et al., 2025).

As can be seen from Table 2, the effectiveness of the institution of the participation of a defense attorney in criminal proceedings in Ukraine remains selective. Although the legislation formally guarantees equal procedural rights, their practical implementation depends on the integrity of investigators, prosecutors and judges. Issues of access to case materials, proactive collection of evidence, and ensuring real equality of the parties remain problematic. The situation is further complicated by the limited level of application of international standards during wartime, when some guarantees are temporarily narrowed.

Thus, further improvement of this institution requires not only clarification of legislative norms, but also changes in approaches to law enforcement, strengthening of ethical and professional standards of the legal profession, as well as integration of Ukrainian practice into the European system of guarantees of the right to defense.

Recommendations for improving mechanisms for ensuring the right to protection in criminal proceedings, taking into account international experience (EU countries, USA) and Ukrainian realities of the transitional justice period. First of all, it is advisable to implement some best practices of the European Union and the United States into the Ukrainian criminal procedure system, adapting them to the context of martial law and transitional justice. For example, in EU countries, the institution of early access to

counsel is widespread, i.e., the right of a suspect to consult with a lawyer immediately after detention and before the first interrogation, without unreasonable delays. Such a mechanism serves as a strong safeguard against coercion to testify and guarantees a balance between state coercion and the individual's right to defense. In parallel, Ukraine should introduce a rule on confidential communication between a lawyer and a client even before interrogation, with practical guarantees (for example, mandatory audio or video recording of the interrogation with the exclusion of outsiders), as implemented in some jurisdictions of the USA and the EU. In addition, a mechanism for automatic judicial control over refusals or delays in access to a lawyer should be created, with the obligation of the investigator or prosecutor to provide a substantiated written motivation that can be appealed. The legislation should clearly define the period within which the investigator must provide the defense attorney with access to the case materials (for example, no later than 24-48 hours from the moment of the request), and failure to comply with this requirement should be accompanied by sanctions for the investigator or prosecutor (for example, disciplinary liability or exclusion of certain evidence).

Secondly, it is necessary to strengthen institutional guarantees and resources for defense so that the practical participation of the lawyer becomes real, not formal. In particular, it is advisable to expand and strengthen the network of free legal aid and guarantee that in complex criminal cases the public defender has access to resources (experts, professional services, permission to travel to the scene of the incident, etc.). A deterrent obstacle to full defense in Ukraine is the limited access to financial, laboratory or technical means, which is often important in complex cases (for example, with economic or military elements). Therefore, it is necessary to legislatively and procedurally provide for the right of the lawyer to initiate and conduct expert examinations ("counter-expert examinations"), independent investigative actions (with the consent of the investigating judge), to involve private experts and to have a guaranteed budget for such actions in the budget of the justice bodies. Another important element is to improve the interaction between the defense attorney and the investigative authorities: establish a mandatory regime of joint planning of investigative actions with notice, determination of the scope of procedures (when the lawyer can be present, grounds for refusal, etc.), as well as the introduction of judge control or an automatic system of randomization of participation. In American systems, public protocols of interaction between the defense and the prosecutor's office are often used to minimize the subjective decisions of investigators, and this can serve as a model for Ukraine. Such an approach, combined with ongoing training of judges, prosecutors, and lawyers on ECHR/US standards and monitoring through independent institutions (GPU,

government human rights agencies), will contribute to the fact that the right to defense becomes a *de facto* guarantee, not a declaration.

DISCUSSION

The results of the research indicate that ensuring the right to defense in criminal proceedings in Ukraine remains a dynamic process that combines positive legislative developments with the presence of significant practical limitations. The position of most Ukrainian authors (Ablamskyi, 2021; Korniiuchuk, 2024; Kovalenko, 2024) is that the national model of criminal proceedings is gradually moving towards European standards, but the effectiveness of these guarantees largely depends on the level of their actual application. A similar approach is also observed in the studies of Gutnyk (2022) and Yanovska (2024), who emphasize that the practical content of the adversarial principle often remains declarative, since the parties to the process do not have equal access to evidence and procedural resources.

At the same time, another group of researchers (Babikov et al., 2025; Fomina, 2025; Mozgawa & Shupyana, 2024) draws attention to the fact that under martial law, the state has an objective right to introduce temporary restrictions to ensure public safety. In their opinion, these changes are justified from the standpoint of the need to preserve statehood, even if they somewhat narrow the possibilities of defense. Such an interpretation is controversial since it contradicts European standards, according to which even in times of emergency the state cannot deprive a person of the basic guarantees of a fair trial (Council of Europe, 2024; FRA, 2024).

Supporting a more moderate position, authors, analyzing the practice of the ECHR (Corda & Hester, 2021; Johnston et al., 2023; Dsouza, 2024), propose to consider the right to defense as a balance between security interests and procedural rights of the individual. They believe that it is through the introduction of mechanisms for early access to counsel that real equality of parties can be ensured even in crisis conditions. This vision corresponds to the results of the study by Oliynyk (2022), which emphasizes that Ukraine should move from a formal to a substantive interpretation of defense guarantees by introducing mandatory judicial control over denials of access to a lawyer.

While foreign researchers (Lattimore, 2022; Zhou, 2025) tend to systematically analyze the functional effectiveness of the institution of protection, Ukrainian authors, as a rule, focus on procedural and institutional gaps. Thus, Voloshanivska and Fedorov (2021) note that even the presence of detailed procedures does not guarantee equal opportunities for the parties due to uneven application of law. This is confirmed by

statistical data (Eurostat, 2024; World Justice Project, 2024), which indicate an improvement in formal indicators, but the gap between the norm and practice remains.

The contradictions between the positions of scholars can be explained by different theoretical emphases: supporters of the formalized approach assess effectiveness through changes in legislation, while the institutional school considers access to justice as part of a broader socio-legal system. A comparison of both approaches shows that the legal model of protection can be effective only if it is implemented in practice through clear procedures, an ethical lawyer culture, and adequate funding (OECD, 2024).

Thus, the results obtained confirm the hypothesis that Ukraine is in a transitional stage of developing an effective criminal defense system. Although reforms contribute to harmonization with European standards, significant structural challenges remain—primarily insufficient equality of parties, limited access of defense attorneys to evidence, and an imbalance of procedural powers. In view of this, further studies should be aimed at identifying optimal mechanisms for adapting the right to defense to martial law conditions, strengthening control over the actions of the prosecutor, and expanding institutional guarantees for advocacy.

CONCLUSIONS AND PROSPECTS FOR FURTHER STUDIES

The conducted research revealed that the system of criminal law and criminal procedure ensuring the right to defense in Ukraine is at the stage of essential transformation, when legislative reforms are only partially implemented in real law enforcement practice. The combination of military challenges and obligations to international partners necessitates the search for a balance between state security interests and guarantees of personal rights, which determines the relevance of further scientific studies in this area. The novelty of the obtained results lies in the systematic combination of a comparative analysis of European practices with national mechanisms of criminal procedure, which made it possible to identify key points of imbalance—primarily in the area of defendant's access to case materials, control over the actions of the prosecutor, and financing of legal aid.

A comparison of expected and actual results showed that the positive dynamics of statistical indicators do not always reflect the real level of compliance with the principles of adversarialism and equality of parties. The practical significance of the study lies in formulating specific proposals for improving the institution of protection,

particularly the introduction of the *early access to counsel* mechanism, mandatory standards of confidential communication between a lawyer and a client, and the creation of an independent mechanism for monitoring the actions of pre-trial investigation bodies. At the same time, the identified limitations of the research are related to the lack of empirical data on the regional differentiation of law enforcement practices and the lack of a comprehensive analysis of the effectiveness of free legal aid during martial law.

Further studies should be directed at assessing the impact of changes to the Code of Criminal Procedure of Ukraine on the quality of judicial control, examining models of lawyer participation in the pre-trial process according to international standards, and determining indicators of real equality of parties in criminal proceedings. The analysis of digital tools for recording procedural actions, in particular electronic protocols and platforms for interaction between lawyers and judicial authorities, is also promising. It is the integration of legal, technological, and ethical approaches that will ensure the formation of a stable system of guarantees of the right to defense that will meet both national and European standards of justice.

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