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ADVOCACY IN THE SYSTEM OF FREE LEGAL AID

The article describes the role of the Bar in the system of free legal aid provision.

The principle of protection and priority of human and civil rights and freedoms is the most important principle of any state governed by the rule of law, which proclaims the priority of human and civil rights and freedoms and establishes the limits of administrative law. States undertake to comply with international human rights standards historically achieved. A democratic state and civil society cannot exist without the effective functioning of an independent and strong bar. The Bar is able to significantly influence all aspects of the state's life, actively contribute to the implementation of reforms and the formation of the rule of law.

The process of optimising the functioning of the legal aid system in Ukraine requires synchronised reform of both special substantive and procedural legislation. After all, the effectiveness of ensuring and exercising the right to free legal aid depends primarily on the quality, perfection and efficiency of the legal framework in this area, the constant improvement of its norms and provisions, which would take into account new challenges, opportunities and prospects, and meet the current needs of vulnerable segments of society.

Keywords: lawyer, advocacy, free legal aid, professional legal aid, human rights, human rights protection, free legal aid system.

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Адвокатура в системі надання безоплатної правової допомоги

У статті розкрито роль адвокатури в системі надання безоплатної правової допомоги.

Принцип захисту та пріоритету прав і свобод людини та громадянина – це найважливіший принцип будь-якої правової держави, яка проголошує пріоритет прав і свобод людини та громадянина, установлює межі дії норм адміністративного права. Держави беруть на себе зобов'язання дотримуватися міжнародних історично досягнутих стандартів прав людини. Без ефективного функціонування незалежної та сильної адвокатури існування демократичної держави і громадянського суспільства не можливе. Адвокатура здатна істотно впливати на всі сторони життєдіяльності держави, активно допомагати здійсненню реформ, формуванню правової держави.

Процес оптимізації діяльності системи надання безоплатної правової допомоги, яка функціонує в Україні, вимагає синхронізованого реформування норм як спеціального матеріального, так і процесуального законодавства. Адже ефективність забезпечення та реалізації права на безоплатну правову допомогу, перш за все, залежить від якості, досконалості та дієвості нормативно-правової бази в цій сфері, постійного вдосконалення її норм та положень, які б брали до уваги нові виклики, можливості та перспективи, а також відповідали сучасним потребам вразливих верств суспільства.

Ключові слова: адвокат, адвокатура, безоплатна правова допомога, професійна правова допомога, права людини, захист прав людини, система безоплатної правової допомоги.

Statement of the problem. The provision of free secondary legal aid to certain categories of persons is a constitutional guarantee and a positive obligation of the state, which is implemented through the system of free legal aid and largely involves advocates, who are one of the entities authorised to provide various types of legal services. The system of administration of free legal aid provides for organisational aspects of interaction with advocates, in particular, their selection, distribution of cases, remuneration, reporting and control over the quality of their activities, which are the subject of the article.

The state of research of the problem. Certain aspects of the activities of attorneys-at-law as subjects of free secondary legal aid were the subject of research by S. Breus, Y. Bysaha, I.S. Kovalchuk, I.V. Mishchuk, T. Yuzko and others.

Presentation of the main research material. Providing legal aid is the main activity of advocates and their absolute prerogative. It is well known that in Ukraine there is a so-called partial monopoly on the provision of professional legal aid by advocates. This situation arose in connection with the amendments to the Constitution of Ukraine, according to which Article 131-2 stipulates that only an advocate can represent another person in court, as well as defend against criminal charges [1]. At the same time, the Basic Law provides for exceptions to representation in court in labour disputes, disputes concerning the protection of social rights, elections and referendums, minor disputes, as well as representation of minors and persons declared incapacitated by a court or whose legal capacity is limited [1].

The legislator's position has sparked a reasoned debate in academic and practical circles. The overwhelming majority supports the exclusive right of advocates to provide defence. The main arguments include:

- Firstly, it is in this way that it becomes possible to introduce unified standards for the provision of legal aid. The high professionalism of a lawyer must be beyond doubt. This can only be achieved by establishing the same rules of the game for all those who will represent their clients in court. The author proposes to understand the same rules as access to the profession, control over the proper performance of duties, disciplinary liability, etc. [2, p. 2];

- secondly, the global trend of developed legal systems, which points to the formation of a single market for legal services and the establishment of common rules for its regulation. Thus, to varying degrees, the attorneys' monopoly is widespread in a number of European countries, such as Belgium, France, Norway, Denmark, Holland, Portugal, etc. [3, p. 69].

Those who are confused by the exclusive right of advocates to representation in court and defence speak mainly about the deprivation of practitioners of the opportunity to carry out their professional activities [4], increase in prices for legal services and increase in the cost of litigation [5]. We believe that the first approach is more convincing, since it is indeed Given this partial monopoly, it is lawyers who provide free secondary legal aid and within the system created by the state to ensure the relevant right, as provided for in the Law of Ukraine "On Free Legal Aid" of 02.06.2011 No. 3460-VI [6]. The statistics demonstrate the indicators of clients' appeals to local centres for free secondary legal aid, according to which 251,907 instructions were issued to lawyers for the period from 1 July 2015 to 31 January 2023 and 844,141 instructions to provide free secondary legal aid to clients in accordance with the CPC and the Code of Administrative Offences of Ukraine [7]. The above statistics demonstrate the importance of the work of lawyers in the system of free legal aid and their demand.

It should be emphasised that the organisational aspects of cooperation between lawyers and the legal aid system are, firstly, the selection of lawyers, secondly, the distribution of cases, thirdly, the payment of fees and, fourthly, the control of the quality of their work.

Thus, the selection of advocates for the free legal aid system is carried out on a competitive basis. Every year or even several times a year, the Ministry of Justice holds competitions to select advocates who, in accordance with the Law of Ukraine "On Free Legal Aid", are engaged by the state to provide free secondary legal aid. The issues related to the procedure for organising and conducting a competition for the selection of advocates involved in the provision of free secondary legal aid are regulated by the Procedure and Conditions for Conducting a Competition for the Selection of Advocates Involved in the Provision of Free Secondary Legal Aid, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1362 of 28 December 2011 [8]. In accordance with the above Procedure, the competition for the engagement of advocates to provide secondary legal aid consists of two stages. At the first stage, the commission considers the scanned copies of the advocate's documents sent by the Coordination Centre and, on the basis of the information contained in the said documents, evaluates the advocate according to the criteria of the length of his or her practice of law, the presence or absence of disciplinary sanctions against the advocate, and also takes into account the result of the advocate's completion of the distance learning course. At the second stage of the competition, the commission conducts an individual interview with the advocate. During this interview, the advocate is assessed according to the criteria of motivation to provide legal aid, communication skills, emotional balance and the ability to present examples of legal aid provided by him or her [9, p. 60].

At the same time, practicing lawyers say that this procedure is too formalised. S.M. Berus emphasises that the current system for the selection of advocates and their admission to the secondary legal aid system often creates artificial bureaucratic barriers. Such an approach is a hidden form of state regulation and does not always ensure a fair selection of lawyers who are allowed to practice in the secondary legal aid system. This situation is unacceptable, since all advocates have already undergone preliminary training and confirmed their qualifications by passing a specialised exam [10, p. 21]. In our opinion, there should be clear criteria for lawyers to be eligible

to provide legal aid, since without them it is impossible to hold a competition. At the same time, the selection of lawyers for the legal aid system should be as transparent as possible.

Another issue is the distribution of cases between lawyers. Practice shows that secondary free legal aid centres arbitrarily distribute cases between lawyers who are eligible to provide such assistance, i.e. it is a “manual” distribution of cases by the state between lawyers. There is also a risk that free legal aid centres may influence the lawyers they appoint. In this context, the main drawback of the Law of Ukraine “On Free Legal Aid” is the lack of an effective mechanism for monitoring the activities of free legal aid centers [11, p. 62].

This problem is further evidenced by the existence of court decisions in which advocates challenge the order of case assignment. In addition, the Ukrainian National Bar Association has expressed some criticism about the lack of transparency in the distribution of cases among different lawyers and their uneven workload. In our opinion, this aspect can be resolved by improving the information and analytical system of free legal aid, which should include an automated procedure for the distribution of cases.

Payment for services is another aspect of the interaction between advocates and the centres. Payment for the services of an advocate is made in accordance with the Procedure for Payment for Services and Reimbursement of Expenses of Advocates Providing Secondary Legal Aid, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 465 of 17 September 2014 (as amended by the Resolution of the Cabinet of Ministers of Ukraine No. 1048 of 21 December 2016) [12]. Pursuant to paragraph 6 of the Procedure for Payment for Services and Reimbursement of Expenses of Attorneys Providing Free Secondary Legal Aid, approved by Resolution of the Cabinet of Ministers of Ukraine No. 465 of 17 September 2014, payment of remuneration to attorneys for legal aid and reimbursement of expenses related to the provision of such aid is made on the basis of a power of attorney and an act of providing free secondary legal aid with the relevant annexes, drawn up in the form approved by the Ministry of Justice [12].

Payment for the services of lawyers providing free secondary legal aid and reimbursement of expenses related to its provision is carried out exclusively under the budget programme «Payment for Services and Reimbursement of Expenses of Lawyers Providing Free Secondary Legal Aid», the budget allocations of which are determined by the Law of Ukraine «On the State Budget of Ukraine for 2021» [13].

Under martial law, the problem of proper funding of the legal aid system has arisen. Thus, the budget legislation during the martial law was amended, as the main financial burden of the state budget of Ukraine is aimed at meeting the needs of the Armed Forces of Ukraine, territorial defence, the operation of public utilities, and taking measures to ensure the safety of the population. Given these circumstances, the state temporarily stopped funding the payment for services and reimbursement of expenses of lawyers providing free secondary legal aid, which resulted in arrears of payment for the services of lawyers cooperating with the system as of 31.05.2022. Compensation to advocates for their work in the free legal aid system is classified by the state as an unprotected item of budget expenditures, which affects the full protection of the rights and freedoms of citizens and the protection of the right to remuneration of advocates [14]. Today, such debts to lawyers have been almost repaid.

In accordance with the Law of Ukraine «On the Bar and Practice of Law» of 05.07.2012 No. 5076-VI, the bar self-government bodies should facilitate the functioning of the system of free legal aid. For example, the assessment of the quality, completeness and timeliness of the provision of secondary legal aid by lawyers is carried out upon request to the centre for the provision of secondary legal aid by commissions established for this purpose by the bar councils of the regions In Ukraine, the relevant legislative framework is provided for the implementation of this principle [15].

Conclusions. The organisational aspects of cooperation between advocates and the legal aid system are, firstly, the selection of advocates, secondly, the distribution of cases, thirdly, the payment of fees and fourthly, the control over the quality of their work. In this context, the issues of excessive formalisation of the selection of lawyers for the free legal aid system, fair distribution of cases among them, arrears incurred at the beginning of the introduction of martial law and control over the quality of their work remain problematic. All these issues require further research and discussion in academic circles and among practitioners.

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