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REALIZATION OF THE RIGHT TO FREE LEGAL AID: CONSTITUTIONAL AND SECTORAL ASPECTS

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Summary

The purpose of the article is to analyze the constitutional and sectoral aspects of the realization of the right to free legal aid, to determine the optimal subject of administration of the system of free secondary legal aid in Ukraine.

Research methods. The methodological basis of this work is a complex of general scientific and special methods and techniques of scientific knowledge, in particular, dialectical, system-structural, formal-logical, statistical method, as well as methods of modeling, analysis and synthesis, etc.

Results and conclusions. According to art. 59 of the Constitution of Ukraine, the Law of Ukraine «On free legal aid», procedural codes and by-laws, an extensive system of free legal aid has been created in Ukraine, including the provision of free primary and secondary legal aid.

Despite the harsh conditions of a full-scale war, the free legal aid system has demonstrated institutional stability and an intention to develop and strengthen its human resources. The advocate's corpus is an advanced vanguard and the basis of the FLA system, which is able to solve difficult professional and ethical issues that arose in connection with the Russian military invasion. The realization of the management (administration) function of the FSLA system should be carried out by the Coordination center for legal aid provision. The transfer of this function to the bodies of the Ukrainian national bar association is not justified and carries the risks of reducing the clarity of the distribution of assignments for the provision of FSLA between advocates and payment for their services from the state budget.

Many Ukrainian advocates have changed ethical approaches to protect those suspected of committing crimes related to facilitating Russian military aggression. The main reasons were patriotic beliefs, risks of human condemnation, identification of advocate and client, reputational and moral factors.

To increase trust and transparency in the work of the FSLA system, it is advisable to stage the introduction of automated distribution of assignments among advocates based on certain criteria.

Key words: legal aid, advocate, court, defender, detention, war, free legal aid, ethics, ECHR, martial law.

1. Introduction

One of the consequences of Russia's full-scale aggression against Ukraine was a 30.4% drop in GDP (Minekonomiky popередno otsiniuiie padinnia VVP v 2022 rotsi na rivni 30,4%, 2023), an increase in unemployment and poverty. Reducing the financial capabilities of citizens actualizes the importance of free legal aid as a mechanism that contributes to the defense of the rights and interests of socially unprotected categories of the population in the legal sphere.

During martial law, the actual conditions and legal foundations of the functioning of the system of free legal aid in Ukraine changed, the list of recipients of such assistance was expanded and changes were made to the procedure for providing it. Along with this, in 2022 there was a sharp aggravation of criticism of the free legal aid system by the bodies of the Ukrainian national bar association (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, shcho diie v skladi NAAU, z aktualnykh pytan funktsionuvannia systemy bezoplatnoi pravovoi dopomohy v Ukraini, 2022). The main leitmotif of the criticisms expressed on their part was the desire to transfer the administration of the system of free secondary legal aid from the Coordination center for legal aid provision to the Ukrainian national bar association.

Some aspects of the implementation of the right to free legal aid were the object of attention of such scholars as R.L. Abel, J.M. Barendrecht, Y.M. Bysaga, I. Chaara, J.-B. Falisse, V.V. Zaborovskyy, L.R. Nalyvaiko, M.V. Novikova, J. Moriceau, L.M. Moskvich, A. Paterson, M.A. Pogoretsky, O.Z. Khotynska-Nor and others (Barendrecht, 2011, p. 4; Chaara, Falisse & Moriceau, 2022, p. 820; Nalyvaiko & Novikova, 2021, p. 7; Moskvych, 2017, p. 125), however, at the theoretical level, the problems of exercising the right to free legal assistance in difficult conditions of large-scale war are not sufficiently investigated, which determines the need for further scientific researches in this area.

The purpose of this article is to analyze the constitutional and sectoral aspects of the realization of the right to free legal aid, to determine the optimal subject of administration of the system of free secondary legal aid in Ukraine.

2. Normative standards for providing free legal aid in Ukraine.

In 2016, Article 59 of the Constitution of Ukraine was stated in a new edition, according to which «everyone has the right to professional juridical assistance. Such assistance is provided free of charge in cases envisaged by law...» (Konstytutsiia Ukrainy, 1996).

The updated approach of the Ukrainian legislator takes into account the standards of the European Convention on Human Rights and the case practice of the European Court of Human Rights. Thus, according to article 6 § 3 (c) of the Convention for the protection of human rights and fundamental freedoms, everyone

charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

According to the practice of the ECHR, «the right to legal aid, is subject to two conditions, which are to be considered cumulatively (Quaranta v. Switzerland, § 27). First, the accused must show that he lacks sufficient means to pay for legal assistance (Caresana v. the United Kingdom (dec.)). He need not, however, do so «beyond all doubt»; it is sufficient that there are «some indications» that this is so or, in other words, that a «lack of clear indications to the contrary» can be established (Pakelli v. Germany, Commission report, § 34; Tsonyo Tsonov v. Bulgaria (no. 2), § 39). Second, the Contracting States are under an obligation to provide legal aid only «where the interests of justice so require» (Quaranta v. Switzerland, § 27). In this regard, the ECHR takes into account various criteria, in particular, the seriousness of the offence and the severity of the penalty at stake, the complexity of the case, the personal situation of the accused» (Guide on Article 6 of the European Convention on Human Rights, 2021) etc.

In any case, legal assistance should be «practical and effective», because the nomination of a defender does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations (Artico v. Italy, 1980, § 33).

It should be noted that at the sectoral level, the Law of Ukraine «On free legal aid», procedural codes and by-laws take into account key international legal and constitutional standards, develop and detail them.

Thus, according to the Law of Ukraine «On free legal aid» an extensive network of free legal aid has been created, including the provision of free primary and secondary legal aid. Before the start of full-scale military aggression of the Russian Federation against Ukraine, the system of providing free legal aid in Ukraine included 535 points of access to legal services: 23 regional, 84 local centers for providing free secondary legal aid and 428 legal assistance bureaus in all regions of Ukraine (Adresy tsentriv z nadannia bezoplatnoi pravovoi dopomohy, 2020). In 2022, part of the points of access to legal assistance temporarily suspended its activities due to the threat of shelling and occupation of Ukrainian territory.

The most feck of free primary legal aid is provided by in-house lawyers of the relevant points of access to legal assistance. At the same time, due to the existence of the so-called monopoly of the bar, the most significant part of free secondary legal aid (FSLA) is provided by advocates on the basis of agreements with centers for the provision of FSLA.

In 2022, the system of free legal aid supported 642 187 cases for the provision of free legal aid (in 2021 – 806 272, in 2020 – 656 207), of which 506 914 cases of providing free primary legal aid (in 2021 – 627 281, in 2020 – 510 118) and 135 273 cases of free secondary legal aid (in 2021 – 178 991, in 2020 – 146 089) (Bezoplatna pravova dopomoha. Zvit 2022, 2023).

Despite the war, the system of free legal aid (FLA) has demonstrated institutional stability and an intention to develop and strengthen its human resources. So, in 2022, according to the results of a new competition, 513 advocates were included in the Register of advocates providing free secondary legal aid (a total of 8639 advocates are in the register) (Bezoplatna pravova dopomoha. Zvit 2022, 2023). These processes are due, in particular, to the general decrease in the number of clients due to hostilities, the desire of advocates to obtain government funding in order to survive in difficult economic conditions.

3. Subject of administration of the system of free secondary legal aid

In 2022, criticism of the free legal aid system by the bodies of the Ukrainian national bar association (UNBA) sharply intensified. The key question is who should administer the FSLA system?

According to some representatives of the UNBA, the function of management (administration) the FSLA system should be transferred from the Coordination center for legal aid provision (CC) to the bodies of the advocate's self-government. This is justified by «the hypothesis of the presence of significant and conceptual problems in the implementation of free secondary legal aid in Ukraine» (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

In favor of this position, arguments are made that the Ministry of justice of Ukraine and the CC are trying to encroach on the independence of the bar, introduce a subordinated model of relations with advocates, and demonstrate attempts to interfere in advocate secrecy under the guise of FSLA quality control (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

Representatives of the UNBA note that this is facilitated by the artificial recognition of the competition for the position of director of the CC as invalid, as well as the fact that for two years the system has been headed by an acting director, that is, a person who has not passed the necessary selection and is directly dependent on the will to occupy this position. Thus, in fact, the state-created guarantees of the necessary degree of independence of the FLA system from the state represented by the Ministry of justice are leveled (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

Critics of the existing model draw attention to the fact that FLA centers are influenced by corruption risks, which is manifested in the provision of

unreasonable benefits and advantages in the distribution of assignments in criminal cases, the removal of «inconvenient» advocates from the provision of FLA, the formation of a procedural imbalance in criminal proceedings in favor of the prosecution (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

A separate group of comments by members of the bodies of the advocate's self-government concerns the volume and types of legal aid, which should be provided free of charge. In their opinion, the FLA system forms a consumer attitude towards an advocate among the recipients of the FLA. Thus, the work of advocates is depreciated, and the latter are forced to work in competitively unhealthy conditions. Given that FLA is provided at the expense of taxpayers, and the volumes of FLA are excessively wide and constantly gravitate towards expansion, representatives of the UNBA pay attention to the threat to the commercial interests of the advocacy and dumping in the cost of legal services, emphasize the need to limit categories and narrow the list of recipients of FLA (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

It should be noted that during the public discussion, deputy minister of justice of Ukraine V. Kolomiets gave her counterarguments regarding some of these arguments. From her point of view, the attempt to discredit the FLA system by the UNBA is due to the desire of the latter to get the opportunity to manage budget funds of the FLA system, which amount to approximately 800 million uah per year (Kolomiets, 2023). The deputy minister of justice of Ukraine draws attention to the fact that in the world there are different models for providing FLA and each state independently chooses the best variant for itself. In Ukraine, as in many developed countries, the state is responsible for the distribution of budget funds for these purposes, which, in its opinion, seems correct taking into account more than 10 years of successful functioning of this system (Kolomiets, 2023).

In our opinion, the giving to the state institution (CC) of the function of allocating budgetary funds to pay for the services of advocates is correlated with the need to provide its representatives with the authority to monitor the quality of assistance provided by advocates. Today, it is doubtful whether such control powers can be quickly and impartially implemented by the commissions for assessing the quality, completeness and timeliness of the provision of free legal aid by advocates created by the regional bar council, since in many areas these commissions do not work.

It should be admitted that to date, there is no convincing evidence that under the control of the UNBA, the FSLA system will be better administered than under the leadership of the CC. In fact, this is only an assumption, because numerous and systemic corporate problems identified by authoritative international institutions (CCBE follow-up report on

Ukraine, 2014, p. 6-8; Ukraina: konflikt, pozbavlennia prava zaimatysia advokatskoiu diialnistiu ta zupynennia dii litsenzii na zdiisnennia advokatskoi diialnosti, 2014, p. 7, 9-10, 13-14, 16-20; Report on the CCBE fact-finding mission to Kiev, 2013, p. 3, 5, 9, 11, 13-14) remain unresolved in the system of bodies of the advocate's self-government. In the professional community, there are views that the transfer of the function of distributing assignments between advocates to provide FSLA to the bar authorities will lead to nepotism, abuse and other voluntary actions, because it is becoming easier to control a government official than an elected representative of the advocate's self-government (Ivanytskyi, 2017, p. 392).

How to minimize the impact of corruption risks in the activities of FSLA centers for the distribution of assignments between advocates? It should be noted that the necessary steps on this path are constantly being implemented precisely at the initiative of the CC. So, from November 1, 2022, a new mechanism was introduced, according to which regional centers for the provision of FSLA in the Ternopil and Chernivtsi regions centrally accept and process all reports of detentions that come from subjects presenting information from all over Ukraine, as well as process solutions of criminal prosecution bodies and decisions of courts on the involvement of a defender in accordance with the provisions of the law. This approach will reduce the potential impact of «local informal communications», because the decision on a specific candidate for a advocate will usually be made by the center of the FSLA from another region. Among additional measures, the introduction of automated distribution of assignments among advocates based on certain criteria can be proposed. Similar software products are used to distribute cases and materials in the courts, the Qualification and disciplinary commission of public prosecutors, the High qualification commission of judges of Ukraine.

We agree with the position of representatives of the UNBA that the long non-appointment of the director of the CC limits the potential of this body and increases its dependence on the Ministry of justice of Ukraine. At the same time, it should be understood that the current legislation directly determines that the CC is a government agency and belongs to the sphere of management of the Ministry of justice. The director of the CC is appointed and dismissed by the Minister of Justice, and the staffing and estimates of the CC are approved by the Secretary of state of the Ministry of justice. The main tasks of the CC are organizational, expert-analytical, informational and material-technical support for the implementation of the powers of the Ministry of justice in the field of providing free legal aid, managing the system of free secondary legal aid, coordinating the activities of specialized institutions to provide free primary legal aid (Polozhennia pro Koordynatsiinyi tsentr z nadannia pravovoi dopomohy, 2012), etc.

At the same time, according to the amendments made to the relevant Regulation (Polozhennia pro Koordynatsiinyi tsentr z nadannia pravovoi dopomohy, 2012) of the 24.02.2023, during the period of martial law, the director of the CC is appointed by the Minister of justice without holding a competition.

It is necessary to agree with the arguments of the UNBA that the list of types of assistance and subjects receiving FSLA is excessively wide. Maintaining the status quo is possible during the war in difficult social and economic conditions, while after defeating the Russian aggressor, it is advisable to narrow the list of grounds for obtaining FSLA, and spend taxpayer funds more responsibly and economically.

The practice of providing FSLA under martial law also showed the need to correct (weaken) the normative requirements regarding the time of arrival of an advocate to the client by securing the possibility of the arrival of a defender after the end of an air raid, curfew or the resumption of transport connection.

4. Special ethical issues that arose before advocates participating in the FSLA system during martial law

During the war in Bucha, Izyum and many other cities of Ukraine, russian military committed crimes that hit the whole world with their excessive cruelty and sophistication. Along with the invaders, a significant amount of crimes were committed by collaborators and their accomplices. We are talking about a wide range of crimes against the foundations of national security of Ukraine, as well as criminal offenses against peace, security of mankind and international legal order.

For many advocates, the protection of those suspected of committing such crimes has become unacceptable on ethical grounds. There was a rise in patriotism among the advocates, some of the advocates joined the Armed forces of Ukraine with the aim of defence the country. Under these conditions, it has become much more difficult to find advocates who will agree to provide legal assistance in these categories of criminal cases.

A change in ethical approaches to customer service with «russian participation» occurred in relation to other branches of law (civil, administrative law, etc.). Many leading law firms in the world (Linklaters, Dentons, Baker McKenzie, etc.) and domestic advocate's companies have radically rethought their priorities in this area. This was partly facilitated by the introduction of sanctions against the Russian Federation.

At the same time, according to art. 49, 52, 53 of the Code of criminal procedure of Ukraine in criminal proceedings, the mandatory participation of a defense counsel for persons suspected of crimes, including those contributing to russian aggression, must be ensured.

The main part of this work is carried out by defenders included in the Register of advocates pro-

viding FSLA. Of course, they are subject to the risks of human condemnation, identification of advocate and client, reputational and moral losses. If this is contrary to the conscience of a lawyer, the UNBA Rules of professional conduct allow him to refuse to accept an assignment in defense of the client.

Nevertheless, the specifics of criminal proceedings require a balance of interests and abidance formal legal requirements, which necessitates to carry out such «unpopular» work, because in the long term this will avoid questions about the improper quality of evidence in this category of criminal proceedings for national and international courts. Awareness of justice, which should be realized in the future, is one of the moral reference point that can help an advocate agree to provide legal assistance to clients suspected of facilitating russian military aggression.

5. Conclusions

Thus, despite the harsh conditions of a full-scale war, the free legal aid system has demonstrated institutional stability and an intention to develop and strengthen its human resources. The advocate's corpus is an advanced vanguard and the basis of the FLA system, which is able to solve difficult professional and ethical issues that arose in connection with the russian military invasion. The realization of the management (administration) function of the FSLA system should be carried out by the Coordination center for legal aid provision. The transfer of this function to the bodies of the Ukrainian national bar association is not justified and carries the risks of reducing the clarity of the distribution of assignments for the provision of FSLA between advocates and payment for their services from the state budget. To increase trust and transparency in the work of the FSLA system, it is advisable to stage the introduction of automated distribution of assignments among advocates based on certain criteria.

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РЕАЛІЗАЦІЯ ПРАВА НА БЕЗОПЛАТНУ ПРАВОВУ ДОПОМОГУ: КОНСТИТУЦІЙНІ ТА ГАЛУЗЕВІ АСПЕКТИ

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Анотація

Метою статті є аналіз конституційно-правових та галузевих аспектів реалізації права на безоплатну правову допомогу, визначення оптимального суб'єкта адміністрування системи безоплатної вторинної правової допомоги в Україні.

Методи дослідження. Методологічною основою наукової праці є комплекс загальнонаукових та спеціальних методів і прийомів наукового пізнання, зокрема, діалектичний, системно-структурний, формально-логічний, статистичний метод, а також методи моделювання, аналізу та синтезу та ін.

Результати та висновки. Відповідно до ст. 59 Конституції України, профільного Закону України “Про безоплатну правову допомогу”, процесуальних кодексів та підзаконних нормативно-правових актів в Україні створено розгалужену систему безоплатної правової допомоги, що включає надання безоплатної первинної й вторинної правової допомоги.

Незважаючи на суворі умови повномасштабної війни, система безоплатної правової допомоги продемонструвала інституційну стійкість й прагнення до розвитку та посилення свого кадрового потенціалу. Адвокатський корпус є передовим авангардом й основою системи безоплатної правової допомоги, що здатен вирішувати складні професійні та етичні питання, які постали у зв'язку з російським військовим вторгненням. Реалізація функції управління (адміністрування) системою БВПД має здійснюватися Координаційним центром з надання правової допомоги. Передача цієї функції до органів Національної асоціації адвокатів України не є обґрунтованою та несе ризики зменшення прозорості розподілу доручень про надання БВПД між адвокатами та оплати їх послуг з державного бюджету. Покладення на Координаційний центр з надання правової допомоги повноважень щодо розподілу бюджетних коштів на оплату послуг адвокатів корелюється із необхідністю надання його представникам повноважень щодо моніторингу якості наданої адвокатами допомоги.

Багато українських адвокатів змінили етичні підходи щодо захисту осіб, які підозрюються у вчиненні злочинів, пов'язаних із сприянням російській військовій агресії. Основними причинами цього стали патріотичні переконання, ризики людського осуду, ототожнення адвоката й клієнта, репутаційні та моральні втрати.

Необхідним є корегування нормативних вимог щодо часу прибуття адвоката до клієнта шляхом закріплення можливості приїзду захисника після закінчення повітряної тривоги, комендантської години або поновлення транспортного сполучення. Для підвищення довіри й транспарентності в роботі системи БВПД доцільним є поетапне запровадження автоматизованого розподілу доручень між адвокатами на підставі визначених критеріїв.

Ключові слова: правова допомога, адвокат, суд, захисник, затримання, війна, безоплатна правова допомога, етика, ЄСПЛ, воєнний стан.