

UDC 342.9

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## THE CONCEPT AND LEGAL NATURE OF PROVIDING FREE JURIDICAL AID BY ATTORNEYS-AT-LAW

**Abstract. Purpose.** The purpose of the article is to define the concept and to reveal the legal nature of providing free juridical aid by attorneys-at-law. **Results.** Relying on the analysis of scientific views of scholars, the article argues that it is more appropriate to use the term 'juridical' rather than 'legal' aid, since the latter is directly related to the provisions of law, legislation under which such aid is provided. The author offers an original definition of the concept of 'provision of free juridical aid by attorneys-at-law.' The key factors characterising the legal nature of providing free juridical aid by attorneys-at-law are highlighted. It is established that in the course of regulating social relations which arise and develop in connection with the provision of free juridical aid by attorneys-at-law, the actors authorised by the State apply the provisions of law of various branches - administrative law, criminal law and criminal procedure law, civil law and civil procedure law, economic law and economic procedure law, etc. **Conclusions.** It is concluded that the provision of free juridical aid by attorneys-at-law should be understood as the professional practice of attorneys-at-law regulated by the provisions of current national legislation and guaranteed by the State to provide legal services at the expense of the sources of financing established by law, which ensures protection of the rights, freedoms and interests of a person in a difficult legal situation, in accordance with the conditions and grounds clearly defined by law and free of charge for such a person. The legal nature of free legal aid is characterised by the following factors: it is in the process of formation and development, which is associated with the gradual replacement of the institution of legal aid by the institution of juridical aid provision; the grounds and procedure for providing free juridical aid are regulated by a significant number of legal regulations which together determine the legal basis for the functioning of this field of social relations; the activities of attorneys-at-law in providing free juridical aid are professional and guaranteed by the State; the provision of free juridical aid is financed from the sources of funding determined by law; the rights, freedoms and interests of a person in a difficult legal situation are protected in accordance with the conditions and grounds clearly defined by law; the provision of free juridical aid is free of charge for the person receiving it; the state establishes a system of legal guarantees for the provision of free juridical aid by attorneys-at-law; the provision of free juridical aid by attorneys-at-law has its own institutional component as a system of participants in these social relations.

**Key words:** legal nature, free juridical aid, attorney-at-law, regulatory framework.

### 1. Introduction

According to Basic Law of Ukraine, a human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Moreover, human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State (Constitution of Ukraine, 1996). It should be noted, however, that the mere enshrining of guarantees of individual rights, albeit in the provisions of an act of the highest legal force, is not enough. It is necessary to develop effective mechanisms for the protection and defence of individual rights, freedoms and interests, as well as to establish and arrange for the functioning of effective

institutions for their restoration in case of unlawful encroachments. One of such institutions is undoubtedly the institution of juridical aid provided by lawyers, which, in cases provided for by the current national legislation, is free of charge.

The essence, features and significance of juridical aid provision have been studied in the works by many legal scholars, such as: V.V. Berch, V.V. Dzhuska, V.V. Zaborovskyi, M.T. Lodzhuk, O.V. Martovytska, O.M. Muzychuk, V.S. Nalyvaiko, M.M. Pohrebniak, V.B. Pchelin, O.V. Tarashchuk and others. The works by these scholars have contributed to the improvement of both theoretical and practical principles of providing juridical aid to

persons in need. However, the administrative and legal guarantees of the provision of juridical aid by attorneys-at-law have been studied in a fragmentary manner, as part of the solution of broader legal issues. Moreover, the issues of the essence of the concept and the legal nature of the provision of juridical aid by attorneys-at-law have received almost no attention. In addition, it should be noted that the current national legislation defining the legal basis for the functioning of this sector of public relations has been significantly updated, which is, *inter alia*, due to the introduction of the legal regime of martial law in connection with Russia's armed aggression against our country. That is why, today, the issues of defining the essence of the concept and the legal nature of the provision of free juridical aid by lawyers are of particular importance.

Therefore, the purpose of the article is to define the concept and to reveal the legal nature of providing free juridical aid by attorneys-at-law.

## **2. The essence of the concept of "juridical aid"**

To begin with, it should be noted that today the essence of the concept of 'juridical aid' is revealed in the provisions of the current national legislation, but, in our opinion, in an ambiguous way. For example, the content of the right to free juridical aid, the procedure for exercising this right, actors, grounds and procedure for providing free juridical aid, and state guarantees for providing free juridical aid are defined in the provisions of the Law of Ukraine 'On Free Legal Aid' of 2 June 2011. According to the above-mentioned legal act, Article 1, part 1, clause 1, free juridical aid is juridical aid guaranteed by the State and fully or partially provided at the expense of the State Budget of Ukraine, local budgets and other sources (Law of Ukraine On Free Legal Aid, 2011). This suggests that the legislator defines the essence of free juridical aid as juridical aid, that is, the essence of the phenomenon is revealed through the same phenomenon, which is a rather wrong approach.

Consequently, judicial aid is activities that cover all of the above components of judicial services, which is no longer consistent with the legislator's position on understanding the essence of certain types of free judicial aid, which he defines not as a relevant service, but as a state guarantee. According to Law of Ukraine 'On Free Legal Aid', Article 7, part 1, free primary judicial aid is a type of state guarantee that consists in informing a person about his/her rights and freedoms and obligations, the procedure for their implementation and enforcement, restoration of rights in case of their violation and the procedure for appealing against

decisions, actions or inaction of state authorities, local self-government bodies, officials and employees. On the other hand, Article 13 of the above-mentioned law states that free secondary judicial aid is a type of state guarantee, which consists in creating equal opportunities for access to justice and includes the following types of legal services: defence; representation of the interests of persons entitled to free secondary judicial aid in courts, other state bodies, local self-government bodies, before other persons; drafting of procedural documents (Law of Ukraine On Free Legal Aid, 2011).

The analysis of the above legislative provisions regarding the general understanding of the essence of judicial aid, including free of charge, reveals that the legislator is inconsistent, since in some cases it indicates that it is a set of legal services, and in others it is a state guarantee. Moreover, if we consider juridical aid as a set of legal services, some of its free varieties will not include all of them, which will also contradict its original meaning. In case we consider juridical aid purely as a state guarantee, it should be noted that it itself includes a set of legal guarantees designed to ensure both its proper implementation by lawyers and its receipt by its addressees. That is, the State guarantee does not refer to the provision of free juridical aid, but to the right to receive it. For example, the legislator himself in part 1 of Article 3 of the Law of Ukraine 'On Free Legal Aid' establishes that the right to free juridical aid is the ability of a citizen of Ukraine, a foreigner, a stateless person, including a refugee or a person in need of additional protection, guaranteed by the Constitution of Ukraine, to receive free primary juridical aid in full, as well as the ability of a certain category of persons to receive free secondary juridical aid in cases provided for by law (Law of Ukraine On Free Legal Aid, 2011). It follows that the provision of free juridical aid is a practice guaranteed by the State.

In this context, M.V. Stamatina argues that the concept and essence of free legal aid in Ukraine can be revealed as a professional practice of relevant specialists guaranteed by the State to provide legal services free of charge aimed at realisation and protection of rights, freedoms and legitimate interests of persons who have applied for assistance (Zaborovskiy, 2016). In this case, in contrast to the legislator's approach to defining the essence of judicial aid, we believe that it is quite successful to emphasise its free-of-charge nature, rather than to indicate specific sources of its financial support. Nevertheless, in our opinion, this approach has a number of drawbacks. In particular, the author does not indicate that the grounds and procedure for

such assistance are regulated by the provisions of the current national legislation, which, given that this category is legal, is unacceptable.

In addition, it should be noted that not in all cases the persons requesting for the provision of free legal aid are those who need it. For example, as established in part 1 of Article 52 of the Criminal Procedure Code of Ukraine of 13 April 2012 (hereinafter - the CPC of Ukraine), the participation of a defence counsel is mandatory in criminal proceedings concerning particularly serious crimes. In this case, the participation of a defence counsel is ensured from the moment a person acquires the status of a suspect (Criminal Procedure Code of Ukraine, 2012). Moreover, the analysis of the provisions of Article 23 of the Law of Ukraine 'On Free Legal Aid' suggests that the provision of free secondary judicial aid is terminated by the decision of the centre for the provision of free legal aid if a person refuses to receive free secondary judicial aid, except in cases where the participation of a defence counsel (attorney-at-law) is mandatory (Law of Ukraine On Free Legal Aid, 2011). In other words, a definition of the essence of free juridical aid should not focus on its recipients as persons who have applied to a lawyer for it, since in cases provided for by law such assistance is mandatory.

Therefore, it should be noted that a deeper and more detailed understanding of the essence of the concept under study will be possible by defining the legal nature of free juridical aid. In this regard, it should be noted that the professional literature reasonably notes that the term 'legal nature' is frequently used in legal literature, since legal nature is inherent in all legal phenomena, but what is meant by legal nature is mostly not disclosed by researchers (Bondarev, 2018). That is, the legal nature of the phenomenon, in the case of the provision of juridical aid by attorneys-at-law, can be determined by identifying its characteristic features which indicate its place, role and purpose among the array of similar phenomena and processes. According to D. Prytyka, the essence of any legal institution is its service role and the methods by which this role is manifested. That is why, according to the scholar, the legal nature refers to the specific features of legal phenomena which characterise their place in the legal superstructure (Prytyka, 2003). Moreover, it should be noted that the features that determine and indicate the legal nature of the relevant phenomenon may be both positive and, in some cases, negative, which is especially evident in the legal nature of the provision of juridical aid by attorneys-at-law.

### 3. The legal nature of judicial aid

One of the main features indicating the legal nature of providing free juridical aid by attor-

neys-at-law is actually the legal framework, that is, a set of legal regulations which determine the grounds and procedure for the functioning of this field of social relations. Moreover, the analysis of such framework may be retrospective in nature, given another, no less significant aspect of the legal nature which should be considered when studying the essence of the relevant legal phenomenon. In this context, it would be appropriate to cite the statement of M. Ye. Hryhorieva, who emphasises that the conclusion about the legal nature should be based on the analysis of the relevant legal provision, its place in the system of legislation, on clarifying the correlation of this provision with other provisions and institutions, and the concept under study - with related legal concepts and principles of law. In case the concept under study is enshrined in law, it is natural and appropriate to study the 'past', the history of legislative development in order to trace the origin, formation and development trends of the provision and the concept enshrined in it (Hryhorieva, 2007).

Thus, emphasising the importance of judicial aid, scholars of law reasonably emphasise its fundamental nature in the context of proper protection of rights, freedoms and interests of man and a citizen. For example, M.T. Lodyzhuk, in a study of the forms of legal aid in legal clinics in Ukraine, argues that legal aid is one of the most important legal remedies, a necessary element of the mechanism for ensuring the rights and freedoms of man and a citizen. According to the scholar, this is due to the fact that the objective difficulties of an ordinary citizen who does not have special legal knowledge and skills to effectively use legal means to realise and protect their interests give rise to the need for the assistance of a professional lawyer (Explanatory note to the draft Law of Ukraine on amendments to the Constitution of Ukraine (regarding justice), 2015). We strongly agree with the scientist, but we cannot but note that he uses the category 'legal' instead of 'judicial'. Moreover, today such cases are still quite common, which, in our opinion, is primarily due to the imperfection of national legislation regulating the provision of legal aid, including free of charge, which is manifested, in particular, in the ambiguous use of conceptual and categorical apparatus. From the perspective of a semantic analysis of the above category, it should be noted that a large explanatory dictionary of the modern Ukrainian language notes that the word 'legal' should be used in reference to law, that is, a just social order and legislation chosen by the people; a system of generally binding rules (norms) of conduct established or sanctioned by the State, which express the will of the ruling class or the entire people or legislation; a form

of legislation implemented by the state, depending on the social structure of the country; interests of a certain person, social group, etc., based on the law, religious postulates, ancient customs, etc.; protection of interests and opportunities of a person to participate in something, to appeal against something, etc., stipulated by a resolution of the state, institution, etc. (Busel, 2009).

Relying on the above arguments, it is more appropriate to use the term 'juridical' rather than 'legal' aid, since the latter is directly related to the provisions of law, legislation under which such aid is provided. Moreover, the word 'jurist' in the pages of a large explanatory dictionary of the modern Ukrainian language is used in the sense of a lawyer, a specialist in jurisprudence. Whereas the word 'juridical' means the same as legal, that is, related to legislation, legal provisions and their practical application; connected with the study and scientific development of law studies, jurisprudence; having an official right to something; connected with the study and scientific development of law studies, jurisprudence; intended for training lawyers (Busel, 2009).

In other words, the category "juridical," unlike "legal," is more subjective, since its use is associated with the characteristics of a certain person, that is, a jurist. It follows that the amendments introduced by the Law of Ukraine 'On amendments to the Constitution of Ukraine (regarding justice)' (2016) in terms of correcting the conceptual and categorical apparatus were quite justified. However, such changes mostly concerned constitutional provisions, while the rest of the legislation defining the grounds and procedure for exercising the right to free juridical aid still used the term "legal aid."

The analysis of the provisions of current legislation enables to state that the institution of free juridical aid has not received its proper consolidation in the provisions of national legislation which constitute the regulatory framework for the functioning of the field of public relations under study. It should be noted that such a framework is one of the leading factors determining the legal nature of the provision of free juridical aid by attorneys-at-law, as it establishes both the grounds and procedure for its provision, as well as other equally important rules of conduct for the subjects of such social relations. That is why, first of all, we traced the historical path of formation and development of the institution under study, which, *inter alia*, enables to identify the following features of the legal nature of the provision of free juridical aid by attorneys-at-law: it is in the process of formation and development due to the gradual replacement of the institution of legal aid

by the institution of juridical aid provision; the grounds and procedure for providing free juridical aid are regulated by a significant number of legal regulations, which together determine the legal basis for the functioning of this field of social relations.

In view of the last of the above features that determine and indicate the legal nature of the provision of free juridical aid by attorneys-at-law, it is necessary to emphasise such a feature as the sectoral affiliation of the provisions. According to A.A. Koreniuk, the legal nature of the phenomenon is, nevertheless, an issue of the sectoral affiliation of the provisions that regulate these relations in order to determine which provisions are 'responsible' for regulating a certain group of social relations (Koreniuk, 2019). In this regard, the analysis above reveals that in the course of regulating social relations which arise and develop in connection with the provision of free legal aid by attorneys-at-law, the actors authorised by the State apply the provisions of law of various branches - administrative law, criminal law and criminal procedure law, civil law and civil procedure law, economic law and economic procedure law, etc. Furthermore, we believe that the field of social relations under study is most subject to the regulatory influence of administrative and legal provisions, which also indicates the specific legal nature of the provision of free juridical aid by attorneys-at-law.

#### 4. Conclusion

Therefore, as follows from the analysis of the above material, the professional practice of attorneys-at-law regulated by the provisions of current national legislation and guaranteed by the State to provide legal services at the expense of the sources of financing established by law, which ensures protection of the rights, freedoms and interests of a person in a difficult legal situation, in accordance with the conditions and grounds clearly defined by law and free of charge for such a person. The legal nature of free legal aid is characterised by the following factors: it is in the process of formation and development, which is associated with the gradual replacement of the institution of legal aid by the institution of juridical aid provision; the grounds and procedure for providing free juridical aid are regulated by a significant number of legal regulations which together determine the legal basis for the functioning of this field of social relations; the activities of attorneys-at-law in providing free juridical aid are professional and guaranteed by the State; the provision of free juridical aid is financed from the sources of funding determined by law; the rights, freedoms and interests of a person in a difficult legal situation are

protected in accordance with the conditions and grounds clearly defined by law; the provision of free juridical aid is free of charge for the person receiving it; the state establishes a system of legal guarantees for the provision of free juridical aid by attorneys-at-law; the provision of free juridical aid by attorneys-at-law has its own institutional component as a system of participants in these social relations.

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## ПОНЯТТЯ ТА ПРАВОВА ПРИРОДА НАДАННЯ БЕЗОПЛАТНОЇ ПРАВНИЧОЇ ДОПОМОГИ АДВОКАТАМИ

**Abstract. Purpose.** Мета статті полягає у визначенні поняття та розкрити правову природу надання безоплатної правничої допомоги адвокатами. **Results.** У статті, спираючись на аналіз наукових поглядів вчених, аргументовано, що більш доречно вживати термін «правнича», а не «правова», адже останній пов'язаний безпосередньо з нормами права, законодавством, на підставі й у порядку якого така допомога надається. Запропоновано авторське визначення поняття «надання безоплатної правничої допомоги адвокатами». Виділено ключові чинники, які характеризують правову природу надання безоплатної правничої допомоги адвокатами. З'ясовано, що при здійсненні правового регулювання суспільних відносин, що виникають і знаходять свій розвиток у зв'язку з наданням адвокатами безоплатної правничої допомоги, уповноважені державою суб'єкти застосовують норми права, що належать до найрізноманітніших галузей – адміністративного права, кримінального та кримінального процесуального права, цивільного та цивільного процесуального права, господарського та господарського процесуального права тощо. **Conclusions.** Зроблено висновок, що

під наданням безоплатної правничої допомоги адвокатами слід розуміти регламентовану приписами чинного національного законодавства, професійну, гарантовану державою діяльність адвокатів щодо надання за рахунок визначених законодавством джерел фінансування правничих послуг, що забезпечує захист прав, свобод та інтересів особи, яка перебуває у складній правовій ситуації, відповідно до чітко окреслених законодавством умов та підстав та на безоплатній основі для неї. Правову природу надання безоплатної правової допомоги характеризують наступні чинники: перебуває в стадії свого становлення та розвитку, що пов'язано з поступовою заміною інститутом надання правничої допомоги інституту надання правової допомоги; підстави та порядок надання безоплатної правничої допомоги регламентовано значною кількістю нормативно-правових актів, що в сукупності визначають правові засади функціонування даної сфери суспільних відносин; діяльність адвокатів щодо надання безоплатної правничої допомоги є професійною і гарантованою державою; фінансування надання безоплатної правничої допомоги здійснюється за рахунок визначених законодавством джерел фінансування; захист прав, свобод та інтересів особи, яка перебуває у складній правовій ситуації, здійснюється відповідно до чітко окреслених законодавством умов та підстав; надання безоплатної правничої допомоги здійснюється на безоплатній основі для особи, яка її отримує; державою закріплюється система юридичних гарантій надання безоплатної правничої допомоги адвокатами; надання безоплатної правничої допомоги адвокатами має власну інституційну складову як систему суб'єктів даних суспільних відносин.

**Ключові слова:** правова природа, безоплатна правнича допомога, адвокат, правове регулювання.