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ON THE QUESTION OF THE CONCEPT OF LEGAL AID

The article explores the concept and types of legal aid. Theoretical approaches to defining the concept of legal aid, its character and nature, as well as the correlation of the concept of legal aid with such concepts as «legal aid», «legal services», «legal services» have been analyzed.

The following special features of legal activity are outlined: the connection with constant work on legal texts, the objectivity of lawyers in their professional activity, the use during its implementation of such professional categories as guilt, causality, responsibility, etc.; relation to law-making, legal interpretation, legal implementation and law enforcement; expression in legal actions and operations – purposeful, planned, which require professional and legal skills, abilities, techniques, training, technical equipment, etc.; obtaining a result by means of legal means and various methods, the occurrence of legal consequences or the creation of conditions for actions, the performance of which determines such consequences.

It was established that the legal definition of legal aid does not reflect the full essence of this concept, since it is not enough to define legal aid only as the provision of legal services. It would be appropriate to approach the consideration of the concept of legal aid both from the point of view of legal activity and from the position of legal service, since legal aid as a process flows and occurs as a legal activity of a qualified subject (attorney or specialist in the field) and is expressed externally in the form of legal service as a result of practical legal activity.

It was concluded that the study of the concept of legal aid and consideration of its various components represent an important research link that ensures the development of the mechanism of obtaining and providing legal aid to individual and collective subjects.

Key words: legal assistance, legal activity, practical legal activity, legal service.

Formulation of the problem. Today, many researchers are interested in the concept of legal aid, there are ongoing scientific discussions about the nature and nature of legal aid, there are many approaches to defining the very concept of legal aid. The relationship between the concepts of «legal aid» and «defense against prosecution» is widely discussed. Despite the numerous publications devoted to these issues, the vast majority of them are devoted to free legal aid and the problems of its implementation in Ukraine. The concept of legal aid as a whole is not given the attention it needs. This can be explained by the fact that interest in the category of legal assistance is in most cases directly related to the provision and receipt of this assistance. However, knowledge about the concept of legal aid will allow you to better understand the essence of this category, understand the types of legal aid and ways of obtaining and providing it.

As already mentioned, in recent years, scientists began to address the problem of obtaining and providing legal aid more often. Some of them

emphasized the study of legal aid in constitutional law (N.V. Albrant, T.I. Ilyina, O.V. Krivosova, A.G. Manafov, R.G. Melnychenko), others considered the role of lawyers and notaries in the process of providing legal aid, the third – the legal nature of advocacy, the status of an advocate and the organization of advocacy. Certain aspects of ensuring a person's right to legal aid in various spheres of state activity were studied in the works of O.M. Bandurky, T.V. Varfolomeeva, A.T. Komzyuka, V.V. Kopeychikova, O.F. Skakun, P.T. Rabinovych et al.

It is worth noting that studies of the institution of legal aid from the standpoint of constitutional law, as a rule, are reduced to the analysis of the right to legal aid itself, its features as an element of the constitutional status of a person and a citizen. The constitutional right to qualified legal assistance belongs to the institution of the basic rights and freedoms of a person and a citizen, which are the basis of the legal status of an individual. This right, on the one hand, is one

of the most important rights of a person and a citizen, and on the other hand, it is a guarantee of compliance with a set of other individual rights.

Presenting main material. The legal nature of the right to legal aid contains in its normative content the unity of material and procedural origins, it can be considered as a right-guarantee, which must ensure the proper legal conditions for the consistent implementation of the right and the effective achievement of legal goals by citizens [1, c. 18-19].

In general, legal aid is considered as an interdisciplinary institution [2, p. 375], which combines legal norms that form the basis for the activity of state and public bodies aimed at providing citizens and organizations with legal assistance. In a narrow sense, it is a system of actions aimed at ensuring and protecting the rights and legitimate interests of citizens and legal entities.

Today, there is no unambiguous definition of the concept of legal aid. In the sources, we can find the following interpretations of this legal category:

- legal assistance is assistance that is provided only in the case of defense against prosecution in criminal cases by lawyers only;

- legal aid is any type of legal aid, with the exception of the protection of a person against prosecution in criminal cases, which is the same concept as legal aid and is not included in the latter [3, p. 21];

- legal assistance is any type of assistance provided by lawyers, as opposed to private practicing lawyers who are not lawyers (specialists in the field of law) and legal entities under private law (law firms, legal companies) providing legal services;

- legal assistance is any assistance of a legal nature, which is provided free of charge on the grounds defined by law and by the subjects provided for in the law [4]. According to the criterion of payment (free of charge), legal assistance differs from legal services, which are always provided on a paid basis in accordance with the provisions of the Civil Code of Ukraine [5].

In the legal literature, along with the concept of «legal assistance», the concepts of «legal assistance», «legal services», «legal services» are used. There is also a point of view according to which legal assistance provided by lawyers is a service [6, p. 31,32].

This is the opinion of the Constitutional Court of Ukraine – in its decision dated November 16, 2000 No. 13-пп/2000 in the case of the constitutional appeal of citizen S. regarding the official interpretation of the provisions of Article 59 of the Constitution of Ukraine, Article 44 of the Criminal Procedure Code

of Ukraine, Articles 268, 271 of the Code of Ukraine on Administrative Offenses (the case on the right to freely choose a lawyer) defines the concept of «right to legal aid» as the possibility of an individual to receive legal (legal) services guaranteed by the Constitution of Ukraine [7, p. 24-30].

In the Constitution of Ukraine [10], along with the term «legal aid», such a concept as «protection from prosecution» is used. Of course, the question arises whether this field of activity is covered by the concept of «legal aid». Today, this question gives rise to scientific discussions.

The main difference between the concepts of «legal aid» and «defense against prosecution» is seen in the subject of providing legal aid. These concepts are related because they contain the same goals, which can be defined as the protection of rights, freedoms and legitimate interests [8, p. 21].

In the criminal process, the defense attorney combines defense and legal assistance. This can be clearly proven on the example of Article 44 of the Criminal Procedure Code of Ukraine [9, p. 200], the norms of which determine that the defender can be not only a lawyer, but also relatives, guardians, custodians with the consent of the defendant. These persons may not possess legal knowledge, which means that they cannot provide legal assistance, although they will provide protection.

The activity of a lawyer has a subjective-objective nature, is aimed at obtaining a result with the help of legal means and various methods and is expressed in purposeful, planned actions. In this context, it seems interesting to study the concept of legal aid through the prism of legal activity, which would make it possible to highlight the relationship between these concepts and the place of legal aid in the system of legal activity.

O.F. Skakun understands legal activity as a system of specific actions for the protection and protection of the rights, freedoms and legitimate interests of an individual, which are carried out by a professional lawyer within the limits of the law and have legal consequences. It can be noted that in the process of carrying out legal activities aimed at protecting the rights, freedoms and legitimate interests of an individual, a professional lawyer (lawyer, specialist in the field of law) provides legal assistance [11, p. 798].

M. V. Koval distinguishes as a type of legal activity the protection of clients in legal cases pending in court, using the work of lawyers who also provide consulting work on the application of legal norms [12, p. 116].

O.H. Yushkevich and I.A. Logvinenko define legal activity as a type of social activity of lawyers in the field of law on a professional basis with the use of legal means and methods within the limits of the forms established by law and distinguish the following characteristics:

- is carried out in the field of law (law-making (normative, legislative), law enforcement, interpretive activity, systematization, accounting of normative and legal acts), because practically every day there are a wide variety of life situations in which individuals, lawyers, in order to obtain a positive result, apply the norms of law and satisfy individual, social and public needs and interests;

- clearly regulated by law;

- is carried out by specially authorized legal subjects (lawyers) who possess legal knowledge, including acting on behalf of the state of Ukraine, within the limits of powers (rights and duties) determined by legal norms, ethical codes of lawyers, etc.;

- aimed at organizing the activities of legal subjects, including establishing the limits of the possible behavior of legal subjects, protecting against illegal interference by other subjects and obliging the guilty to restore the violated rights and apply measures of legal responsibility to them for the offenses committed;

- is carried out within the limits of the regulated terms and procedures (grounds or conditions for committing certain legal actions; a list of necessary stages, actions, operations, as well as the sequence of their execution; the procedure for recording the circumstances of the actions and their results; permissible consequences of legal actions, etc.) [13, p. 52].

According to the spheres of implementation, legal activity is divided into legal practical activity and legal scientific activity. Legal practical activity is a system of conscious and voluntary actions of lawyers within the limits of the powers (rights and duties) established by the norms of law with the use of legal means and instruments, which are carried out within the limits of the law and have legal consequences [13, p. 53].

In addition to the general features inherent in legal activity, legal practice also has certain special features that reflect its uniqueness, in particular:

- is associated with constant work on legal texts (laws, court decisions, scientific literature), the objectivity of lawyers in their professional activities, the use during their implementation of such professional categories as guilt, causality, responsibility, etc.;

- refers to law-making (establishment, change or cancellation of legal norms, which is expressed in the preparation and adoption of normative legal acts), legal interpretation (legal concretization), legal

implementation (in the forms of compliance, implementation, use of legal norms) and legal application (preparation and adoption of an individual legal decision in a legal case based on legal facts and specific legal norms);

- is expressed in legal actions and operations – purposeful, planned, which require professional and legal skills, abilities, methods, training, technical equipment, etc.;

- involves obtaining a result using legal means and various methods, the occurrence of legal consequences or the creation of conditions for actions, the performance of which determines such consequences [13, p. 54-55].

O.F. Sakun includes such elements as typical elements of legal activity:

- programming of search, verification and evaluation of factual information, which is carried out in compliance with the freedom of choice of work methods;

- search for legal information, its availability, information saturation of the performed work;

- legal assessment of the facts presented or found, based on the formal certainty of the work being performed;

- selection of legal norms and obtaining a legal opinion as a manifestation of the appropriate degree of creative independence in solving legal cases and legal tasks;

- conducting negotiations within the legal framework, presentations in courts and other bodies, mediation in conflict resolution, which does not exclude the appropriate level of risks;

- preparation and execution of legal documents in the form of decisions, references, proposals, development and justification of positions, which provide for the appropriate pace and continuity of work performance, involvement of technical means;

- control over the process and results of someone's activity, controllability and responsibility of one's own activity, etc. [11, p. 798-799].

From the above, it can be seen that the indicated signs and elements of legal activity can be projected onto legal aid as one of the types of practical legal activity.

According to the Law of Ukraine «On Free Legal Aid», legal aid is defined as the provision of legal services aimed at ensuring the realization of human and citizen rights and freedoms, protection of these rights and freedoms, and their restoration in case of violation [14].

By legal services, the legislator understands the provision of legal information, consultations and clarifications on legal issues; drawing up statements, complaints, procedural and other legal documents; representation of a person's interests in courts,

other state bodies, local self-government bodies, before other persons; ensuring the protection of a person from prosecution; providing a person with assistance in ensuring the person's access to secondary legal assistance and mediation [14].

Conclusions. It seems that the legislative definition of legal aid does not reflect the full essence of this concept, since it is not enough to define legal aid only as the provision of legal services. It would be appropriate to approach the consideration of the concept of legal aid both from the point of view of legal

activity and from the position of legal service, since legal aid as a process flows and occurs as a legal activity of a qualified subject (attorney or specialist in the field) and is expressed externally in the form of legal service as a result of practical legal activity.

It can be concluded that the study of the concept of legal aid and consideration of its various components represent an important research link that ensures the development of the mechanism of obtaining and providing legal aid to individual and collective subjects.

List of references:

1. Наливайко В.С. Поняття і значення правової допомоги в Україні. *Юриспруденція: теорія і практика*. 2009. № 2. С. 18-19.
2. Кельман М.С., Мурашин О.Г., Хома Н.М. Загальна теорія держави і права: Підручник. Львів: Новий світ. 2000, 2003.
3. Бірюкова А.М., Гончаренко С.В. Щодо проекту закону України «Про правову допомогу», розробленого Міністерством юстиції України: Зауваження і пропозиції. *Адвокат*. 2004. С. 21-25.
4. Бесплатная юридическая помощь. URL: <https://nads.gov.ua/dostup-do-publichnoyi-informaciyi/bezoplatna-pravova-dopomoga>
5. Цивільний кодекс України від 16 січня 2003 р. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>
6. Милитчук М.Д. А все-таки адвокатські об'єднання можуть бути платниками єдиного податку. *Адвокат*. 2004. № 2. С. 30-35.
7. Рішення Конституційного суду України у справі за конституційним зверненням громадянина Солдатова Д.І. щодо офіційного тлумачення ст. 59 Конституції України та ст. 44 КПК України від 16.11.2000 р. *Вісник Конституційного суду України*. 2001. № 9. С. 24-30.
8. Наливайко В.С. Поняття і значення правової допомоги в Україні. *Юриспруденція: теорія і практика*. 2009. № 2. С. 21-26.
9. Кримінально-процесуальний кодекс України: Наук.-практ.коментар / За заг. ред. В.Т. Маляренка, В.Г. Гончаренка. 3-є вид., перероб. та доп. К.: Юрисконсульт, КНТ, 2006.
10. Конституція України від 28 червня 1996 р. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
11. Скакун О.Ф. Теорія держави і права. Харків, 2001. 840 с.
12. Гусарев С.Д. Юридична діяльність: методологічні та теоретичні аспекти. К.: Знання. 2005. 375 с.
13. Курс лекцій з юридичної деонтології : навч. посіб.; за заг. ред. І. А. Логвиненка, І. Л. Невзорова. Харків : ХНУВС, 2022. 184 с.
14. Про безоплатну правничу допомогу: Закон України від 02.06.2011 року. URL: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>

Личко В.С., Мельник О.В. ДО ПИТАННЯ ПРО ПОНЯТТЯ ПРАВОВОЇ ДОПОМОГИ

У статті досліджуються поняття і види правової допомоги. Проаналізовано теоретичні підходи до визначення поняття правової допомоги, її характеру та природи, а також співвідношення поняття правової допомоги з такими поняттями як «юридична допомога», «правові послуги», «юридичні послуги».

Окреслено наступні особливі ознаки юридичної діяльності: зв'язок з постійною роботою над юридичними текстами, об'єктивністю юристів у професійній діяльності, використанням під час її здійснення таких професійних категорій, як винність, причинність, відповідальність тощо; відношення до правотворчості, правотлумачення, правореалізації та правозастосування; вираження в юридичних діях та операціях – цілеспрямованих, планованих, які вимагають професійно-правових навичок, умінь, прийомів, підготовки, технічної оснащеності тощо; одержання результату за допомогою правових засобів і різних способів, настання юридичних наслідків або створення умов для дії, виконання яких обумовлює такі наслідки.

Встановлено, що законодавче визначення правничої допомоги не відображає повної сутності цього поняття, оскільки недостатньо визначати правничу допомогу лише як надання правових послуг. Доцільно було б підходити до розгляду поняття правничої допомоги як з точки зору юридичної діяльності, так і з позиції правової послуги, оскільки правничу допомогу як процес перетікає і відбувається як юридична діяльність кваліфікованого суб'єкта (адвоката або фахівця у галузі) та виражається назовні у вигляді правової послуги як результату практичної юридичної діяльності.

Зроблено висновок, що вивчення поняття правової допомоги та розгляд її різноманітних складових представляють собою важливу дослідницьку ланку, яка забезпечує розвиток механізму отримання і надання правової допомоги індивідуальним та колективним суб'єктам.

Ключові слова: правничу допомогу, юридична діяльність, практична юридична діяльність, правова послуга.