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Right on a Legal Aid as a Guarantee of Child's Constitutional and Legal Status

The article deals with the concept of the constitutional and legal status of the child and its structure. The peculiarities of the right to legal aid as a guarantee of the constitutional and legal status of the child, as well as the place and role of the right to legal assistance in the system of guarantees of the child as a whole are revealed. The constitutional right of the child to legal aid is defined as a normative legal guarantee of the legal status of the child, an element of its legal protection. The scientific-theoretical principles and practical proposals aimed at improving the regulatory and legal regulation in the field of providing legal assistance to the child, based on the peculiarities of its legal status, are substantiated.

Keywords: legal status of the person, legal status of the child, constitutional and legal status of the child, child, right to legal aid, free legal aid, guarantee, legal guarantee.

As proclaimed in the Preamble to the Declaration of the Rights of the Child of November 20, 1959, the child, due to her physical and mental immaturity, needs special protection and care, including proper legal protection both before and after birth. In all circumstances, the child should be among those who are first to receive protection and assistance (Principle 8). The right to legal assistance as one of its main elements plays an important role in the legal protection of the child. The constitutional right to legal aid is a guarantee of the legal status of the child, creating conditions for the proper realization, protection and protection of the rights and freedoms of the child. Particular importance is attached to the right to legal assistance as a guarantee of the rights and freedoms for vulnerable categories of children, such as children with disabilities, orphans, children deprived of parental care, children who have acquired the status of internally displaced persons, children who have been in difficult life situations etc. Taking into account the

economic, political and social conditions in which the Ukrainian society is currently, the state has the duty to ensure the proper conditions for the implementation of the unlicensed right to legal assistance to all children in need of legal assistance.

Some aspects concerning the right of a person to legal aid were researched in their works by such scientists: O. Bandurka, E. Bova, T. Bartholomew, S. Dobryanskyi, A. Dzhuska, V. Isakov, S. Kalinuk, V. Kopeichikov, V. Kotyuk, N. Khmelevskaya, V. Laughter, V. Lichko, T. Omelchenko, P. Rabinovich, Yu. Shramko, O. Skakun, M. Stamatina, V. Tatyos, T. Vilchik, V. Zaborovskyi and others. However, despite a number of studies that relate to the right of a person to legal aid, there remain issues that need to be studied. Particularly relevant is the analysis of this right as a guarantee of the constitutional and legal status of the child, taking into account the peculiarities of its status.

Currently, legal literature has different approaches to determining the legal status of a person. According to A. Kolodiya and A. Oliynka, the legal status of a person is a legally established position of a person and a citizen in the modern society and the state, which is enshrined in normative-legal and individual-legal acts [1, p. 137]. In turn, Yu. Todigi determines the legal status of the individual as a legal status of the individual, which reflects his actual position in relations with society, state, and other people. This concept has a collectible, universal character and combines the legal status of a citizen, foreigner, stateless person, refugee [2, p. 150].

Depending on the typological or individual characteristics that have individuals, as subjects of law, normative legal acts, which provide for statuses, and completeness, legal statuses are divided into: general (constitutional), special (generic, species), individual (personified) [1, p. 135–136]. The general legal status is provided by the constitutional law for any person or citizen.

The constitutional and legal (general) status of a person and a citizen plays the role of basic, source for all other industrial statuses, forms the legal basis for the implementation of rights and freedoms, taking into account legal personality, guarantees and responsibilities [3, p. 79]. In legal literature, there are different views on the structure of the constitutional and legal status of a person. Commonly accepted elements of the constitutional and legal status of a person are: 1) legal norms, which determines the status; 2) fundamental rights, freedoms, legal interests and responsibilities; 3) legal

personality; 4) legal principles; 5) citizenship; 6) guarantees of rights and freedoms; 7) legal liability; 8) the legal relationship of the general (status) type [2, p. 153].

In most modern studies, the legal status of a child is considered through the prism of the general legal status of a person: either as a subcategory, or as a consequence of the legal status of a person and a citizen, taking into account age restrictions. In this context, the legal status of a child should be understood as a set of rights and obligations, fixed by the state in legal form [3, p. 79]. In foreign studies, the concept of the legal status of a child is often considered as an ethical and political rather than a purely legal category, although it still refers to the legal rights of the child [4, p. 53]. We believe that one of the most successful definitions of the legal status of a child is the definition proposed by N. M. In Kreesta, in particular, the legal status of a child is a system expressed in the values of natural law and the rules of positive law, guaranteed by the society and the state of subjective legal rights, responsibilities and responsibilities of a special subject of law – a child [5, p. 18–19].

From a legal point of view, the child acts as an independent subject of law. From the analysis of international legal and domestic legislation, one can conclude that the peculiarity of the legal status of children is that, on the one hand, they do not enjoy all the rights of adolescents, and on the other hand, they are endowed with specific rights related to their age, family situation, etc. This peculiarity necessitates the adoption of special rules for the protection of children based on the principle of the priority of the rights of the child [6, p. 95]. For example, in the UK (England), the legal status of a child is not considered in the context of the legal status of a person, due to which he is carefully thought out and detailed [3, p. 81].

In the overwhelming majority of the Constitution of Ukraine, the status of a child is an integral part of the general human status of any person. This allows us to speak about the guarantees of equal protection of human rights, regardless of any signs, including age. However, the specifics of the legal status of the child is generally recognized, indicating the need for special, special legal protection of the child, due to psychophysiological and social characteristics of children's personality [3, p. 76]. It should be noted that the child is a participant in a wide range of social relations, which may be covered by various branches of law, and therefore its legal status

can be characterized from the point of view of the constitutional, legal, civil law, administrative-legal, criminal-legal status, etc.

The child has general (constitutional), branch, special (generic) and individual legal status. Emphasizing the traditionally general, or constitutional, status of a child, V. Abramov emphasizes his particular conditionality through the identification of constitutional rights of adult citizens and children, and therefore it would be more appropriate to characterize the constitutional basis of the rights of the child [3, p. 79]. It is the constitutional status of the child that is decisive for other, derived statuses of the child. Under the constitutional and legal status of the child most often understand the set of rights, freedoms, responsibilities of the child and the guarantees of their implementation, established by constitutional law, namely, the Constitution, laws and other regulations [3, p. 81].

One of the latest scientific studies devoted to the analysis of the constitutional and legal status of a child is IVV's work. Voloshina, in which the constitutional and legal status of the child is defined as the legally established position of the child in society and the state, which is regulated and protected by the system of norms and principles of law, which are laid out in the Constitution of Ukraine, international and other constitutional-legal acts, and consists of legal personality, principles, rights, freedoms and responsibilities, as well as guarantees of their implementation [3, p. 81]. We believe that the proposed definition successfully reflects the most important features of the constitutional and legal status of the child.

It is worth noting that the scholars' views on the inclusion of the institute of citizenship and the institution of responsibility in the constitution and legal status of the child remain the controversial. However, we support the position of I. Voloshina, which does not attribute these institutions to the elements of the constitutional and legal status of the child. First, citizenship serves as the basis for the formation of the legal status of a person, and is not an independent element of it; and secondly, it should be considered in conjunction with the peculiarities of the legal relationship between the child and the parents or the persons who replace them. This is due to the fact that according to the general rule, the citizenship of children is established according to the citizenship of parents or persons who replace them, in accordance with the Law of Ukraine «On Citizenship of Ukraine» of January 18, 2001. With regard to the institution of responsibility, it has special features concerning children, since in

certain circumstances the child can avoid any responsibility for his actions, and this institute is not a mandatory element of the constitutional and legal status of the child [3, p. 83].

A child is a person in its various aspects: a person, a citizen, a foreigner, a stateless person, etc. In accordance with national law, a child is a person under the age of 18 (adulthood) if, under the law applicable to her, she does not acquire rights of an adult before.

It is interesting to note that the Preamble of the Convention on the Rights of the Child establishes that the child is considered to be not only a born human being, but also a human being in the womb of a mother, that is, a person undergoes two stages: a person is conceived and a person born. The rules of international law in accordance with the Constitution of Ukraine are part of the national legal system, however, the Constitution does not provide for the rights of the child to his or her birth.

The problem of the legal status of the unborn child in general in legal science is primarily related to the right to life. In modern science there are positions of scientists who consider the constitutional right to human life as an inalienable, arising from the moment of the birth of life. Thus, the beginning of the right to life can be considered a 6-week period from the moment of conception, when the embryo can remove the encephalogram of the brain and recognize the minimum level of consciousness of the latter [3, p. 207]. By supporting adherents of the embryonic concept and taking into account foreign experience (in particular, the Czech Republic, Slovakia, Germany, France), as well as taking into account the peculiarities of the legal personality of the child in domestic civil law (Art. 1222 of the Civil Code of Ukraine), we can speak the language of legal protection as conceived, and the birth of a child, and hence legal aid as one of the important elements of such protection.

Under the current conditions, the problem of ensuring the legal status of the child, including the still unborn child (conceived, censorship), remains relevant. In accordance with national legislation, the legal protection of the conceived child is carried out within the framework of maternity and paternity protection. Therefore, speaking about legal aid for a conceived child, we are talking about legal aid to a pregnant woman who acts in the interests of protecting the rights of her unborn child. However, a pregnant woman can act and not in the best interests of the child. For example, as a result of conscious immoral behavior (drunkenness, drug addiction, etc.)

endanger the life and health of the child conceived, thus creating the preconditions for violating the rights of the child born. In this case, the right to legal aid may act as a guarantee of the legal status of both conceived and born of a child. Considering that, in accordance with the Constitution and sectoral legislation, the legal status of a child is determined from the moment of his birth, the right to legal aid is an inalienable natural right of the child arising from her birth. Even a newborn child in modern society may need legal aid to exercise the right to a name, citizenship, privileges (for certain categories of children), etc. and protect their rights through legal representatives (parents, guardians, etc.). At the same time, lawful representatives can represent the interests of the child in court and other bodies, apply for legal assistance, including a professional lawyer, to the relevant subjects of its provision in order to implement and protect the rights of the child. In the situation of violation of the rights of children by parents, guardians, trustees, etc., the bodies of legal assistance in the child can act as bodies and services for children, police and other, determined by law.

The Constitutional Court of Ukraine has determined that the content of the right to legal assistance is guaranteed by the Constitution of Ukraine the possibility of an individual to obtain juridical (legal) services, essentially – a guarantee of realization, protection and preservation of other rights and freedoms of man and citizen, and this is its social significance [7]. Also the feature of the right to legal aid is its dual nature: in terms of content it is a human right, in essence, a guarantee.

The rights and freedoms of the child form the basis of its constitutional and legal status, and the effectiveness of the implementation of rights and freedoms depends on the level of their guarantee. Different interpretations of the guarantees of human rights are proposed in the theory of law. For example, P. Rabinovich under the guarantees of rights and freedoms understands such phenomena that promote the implementation of human rights, provide their protection and protection [8, p. 23]. In turn, S. Lysenkov and A. Taranov defines the guarantees of the rights and freedoms of man and citizen as conditions, means, methods, which ensure implementation in full and comprehensive protection of the rights and freedoms of the individual. The concept of «guarantee» covers the whole set of objective and subjective factors, aimed at the practical

realization of rights and freedoms, to eliminate possible obstacles to their full or proper implementation [8, p. 555].

Guarantees are classified into specific groups on different grounds: a) in scope: domestic (national), international; b) by way of presentation: simple, complex, mixed; c) depending on the legal status of the individual: general, special, individual. At the same time, the distribution of guarantees for socio-economic, political, ideological and legal (legal) is taken as the basis [9, p. 11]. However, as some scientists point out, socio-economic, political and ideological conditions alone do not yet ensure the realization of the rights and freedoms of the individual. Actually guarantees they become only due to the legal form and organizational efforts of the state and society [9, p. 11].

According to K. Volyns, guarantees of the rights and freedoms of the person – a set of specific means, which have a legal, mandatory character, through which the most complete and comprehensive possible for the effective implementation, protection and protection of the rights and freedoms of the individual is possible. The main purpose of legal guarantees as an integral part of the mechanism for the provision of rights and freedoms is to create equal opportunities for all and for all to acquire, implement, protect and protect the rights and freedoms [10, p. 30–31].

At the same time O. S. Mordovets defines these as guarantee system of legal means of protection and the protection of human and civil rights, pointing with it the fact that the main duty of the state is to ensure the individual right to judicial protection and other protection methods not prohibited by law, and the right to obtaining qualified legal aid [9, p. 13].

Depending on the methods and place of consolidation of legal means, the definition of the procedure for their implementation, the forms of their protection and protection, legal guarantees are divided into constitutional, international legal and sectoral [9, p. 13–14].

Position of colony defining legal guarantees, as stipulated by constitutional norms and principles, of legal conditions and means of realization of rights, freedoms and responsibilities of a person and a citizen. Among them, the Constitution of Ukraine stipulates such conditions and means as the guarantee of constitutional rights and freedoms and the impossibility of their cancellation or restriction; guaranteeing their judicial protection (Art. 55); the right of everyone to know their rights and

duties (Art. 57); not the reciprocal effect of laws and other normative legal acts in time (Art. 58); the right to legal assistance, including the activity of the advocacy (Art. 59); the presumption of innocence (Art. 62) and others [1, p. 271].

Constitutional and legal guarantees by their nature are legal norms that make it possible to exercise rights and freedoms in life, that is, constitutional and legal guarantees – this is provided for by the Constitution of Ukraine and other laws a special system of legal norms, principles, conditions, requirements and legal methods and means of providing, realization, protection and protection of human and civil rights and freedoms with a view to their practical realization [11, p. 29].

Constitutional and legal guarantees are endowed with specific features that make it possible to separate them from other institutions of constitutional law: expression of the degree of freedom, equality and justice; systematic; fundamentalism; permanent character; significance; state security; versatility; priority; universality and individuality. They are closely linked with the guarantees of other branches of law and social norms, from which perfection and degree of observance of the result of the maintenance of constitutional and legal guarantees depends [11, p. 62–63]. The indicated signs of inherent and the right to legal aid as one of the constitutional guarantees.

T. Zavorotchenko proposes to divide the constitutional and legal guarantees of the rights and freedoms of man and citizen into two groups: 1) normative-legal guarantees; 2) organizational and legal guarantees. Normative-legal guarantees include a set of legal norms, through which provides implementation, the order of protection and protection of the rights and freedoms of the individual. Normative-legal guarantees are also divided into general and institutional [11, p. 63]. It is to the legal-legal guarantees that the person has the right to legal assistance.

In turn, V. Pogorilko, Yu. Shemshuchenko and V. Evdokimov notes that normative-legal guarantees include, in particular, the rules-principles of material and procedural nature, legal liability, legal obligations, etc. Thus, to the norm-principles of procedural nature, these scholars refer to the principle of the right to legal aid [12, p. 30–31]. If we consider the process in its broadest sense (not only as judicial or criminal), but the person as a participant in such a legal process, then we can talk about the procedural nature of the right to legal aid.

According to I. Voloshina, guarantees of the constitutional and legal status of a child in Ukraine is a collection of formalized, interrelated and consistent, general social and special legal, international and domestic means, conditions and methods that are intended to ensure the actual implementation of the constitutional and legal status of the child in public relations in Ukraine. Academician distinguishes between social and special legal guarantees of the constitutional and legal status of a child in Ukraine. The general social guarantees of the constitutional and legal status of a child in Ukraine are a set of formalized, interconnected and consistent means, conditions and methods that ensure the actual implementation of the constitutional and legal status of the child in certain spheres of social life (political, economic, social, cultural, etc.). At that time, special legal guarantees should be understood as a set of formalized, interconnected and consistent means, conditions and methods that ensure the actual implementation of the constitutional and legal status of the child in the field of law and other areas of public life that are regulated and protected by law [3, p. 151–152].

Investigating the legal status of minors, N. Ortynsk defines the legal guarantees of the rights of minors as a means of material and legal and procedural (organizational) nature, which are intended for the implementation and protection of the rights of minors enshrined in the constitution and legislation. The complex of general legal guarantees for the legal status of juvenile scholars considers both legal and legal guarantees, on the one hand, and legal and organizational (or institutional) legal guarantees – on the other [13, p. 215–216]. Thus, the child's right to legal assistance in the system of legal guarantees is a normative legal guarantee of the constitutional and legal status of the child.

It should be noted that the right to legal assistance is not only an internal guarantee of ensuring the rights and freedoms of the individual, but also an international legal guarantee of the accessibility of justice and the right to a fair trial provided for in a number of international legal acts on the protection of human rights. In the understanding of the European Court, the right to legal assistance is a prerequisite for the existence and defining component of the broader scope and meaning of the right of access to a court guaranteed by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The specificity of the right to legal aid as a guarantee lies in the fact that it promotes, creates conditions for the proper realization and protection of other rights, freedoms and guarantees of a person. In some cases, a person can not fully exercise his rights without taking advantage of the guaranteed state's right to legal assistance. It is also worth mentioning about duties, because a person can apply for legal information, advice, etc. in relation to its main responsibilities. Thus, the right to legal aid is at the same time a guarantee of the proper fulfillment of his duties by a person and a citizen. In this regard, the right to legal assistance as a guarantee includes the following specific features: universality, since it concerns the realization and protection of all human rights and freedoms in various spheres of public life; procedural orientation that manifests itself in ensuring the legal capacity of each person to exercise and protect their rights as a participant in the legal process (in its broad sense); Mediation – acts as an intermediate link in the realization and protection of the person's other rights and freedoms.

With regard to such a special category as children, the right to legal assistance is also a guarantee of the proper performance of the duties of parents, children replacing them, guardians, etc., and also contributes to the prevention of child crime and crimes against children (through legal training, providing legal information, consultations, etc.).

Highlights certain peculiarities of realization of the right of the child to legal assistance, in particular, it can be both active and passive. At the same time, based on the provisions of national legislation, it is mainly passive because it is carried out through legal representatives. In our opinion, the child needs to be given more opportunities in the independent realization of the right to legal assistance in accordance with its psycho-physiological development, since the concept of the child is characterized not only by physiological signs of maturity (in particular age), but also by psychological and social characteristics, which is characterized by individuality. According to part 2 of Art. 10 of the Law of Ukraine «On Free Legal Aid», an application for the provision of free legal aid in respect of children shall be sent or submitted to their legal representatives. That is, in accordance with domestic legislation, to apply for legal services, which constitute legal aid free of charge, namely the provision of legal information, consultations and explanations on legal issues, etc. (Art. 7), a person who has not

reached the age of 18 (if there was no acquisition or giving of age in the cases provided by law) can not. A similar situation arises with the implementation of the child by such legal services as protection, representation and others that constitute secondary legal aid (Art. 18).

Thus, children who are in difficult living conditions (connected with violence and abuse in the family, the evasion of parents, persons who replace them, from fulfilling their duties towards the child, etc.) must persuade their parents or others persons who are their legal representatives and whose actions they require protection, apply to the appropriate legal aid offices or centers for the provision of free secondary care. Of course, this situation is paradoxical and reduces the value of the right to legal aid as a guarantee of the realization of the rights, freedoms and protection of the child.

According to SS Breus, the provisions of part 2 of Art. 10 of the said Law should be worded as follows: «Appeal to provide one of the types of legal services provided for in part 2 of Art. 7 of this Law concerning children are sent or submitted by their legal representatives or the child from the time of reaching the age from which she is entitled to apply for the protection of her rights and interests directly to the court independently» [14, p. 35] (from 14 years old, in accordance with part 4 Art. 152 of the Family Code of Ukraine).

Taking into account that the Law of Ukraine «On Free Legal Aid» is currently the only special law that regulates the scope of legal assistance, then, according to the logic of the law, its provisions concern both the right to legal aid, which is provided at the expense of state funds (free of charge), so and at the expense of a person.

According to Art. 32 of the Civil Code of Ukraine, a person aged between fourteen and eighteen has the right to independently manage his earnings, scholarship or other income, independently enter into a contract of a bank deposit (account) and dispose of a deposit made in his name (in cash on the account). And these rights make it possible for an underage person to pay for the services of a professional attorney or a lawyer who will provide the legal assistance he needs. Therefore, on the basis of this position, the proposal to independently apply for legal aid to minors from 14 years of age is logical, in particular, when it comes to such a form as a professional legal assistance provided by lawyers or other lawyers.

According to part 2 of Art. 3 of the Law of Ukraine «On the Protection of Childhood», the state guarantees all children equal

access to free legal assistance necessary for the protection of their rights on the grounds and in accordance with the procedure established by law regulating the provision of free legal aid. In addition, in accordance with clause 3 of Art. 152 of the Family Code of Ukraine, a child has the right to apply for the protection of his rights and interests to the guardianship and guardianship body, other bodies of state power, bodies of local self-government and public organizations. The mentioned institutions act as subjects of providing free legal aid to the child, and the legislative instruction to reach a child of a certain age for access to them, as we see, is absent. Taking into account the individual peculiarities of each child's development, age is a relative criterion for correct understanding and perception of reality by a child. Therefore, we believe that the child has the right to apply for free legal aid (in person), as well as a professional legal guardian, in order to protect his rights or their implementation, regardless of age. In this case, an individual approach by the legal aid providers is important to each individual case of the child's appeal for such assistance.

Thus, the provisions of part 2 of Art. 10 of the Law of Ukraine «On Free Legal Aid» should be worded as follows: «Appeals to provide one of the types of legal services provided for in part two of Article 7 of this Law concerning children shall be sent or served personally by a child or its legal representatives». The provisions of Part 1 of Art. 18 of the said Law as: «Appeals to provide one of the types of legal services provided for in part two of Article 13 of this Law shall be submitted to the Center for the provision of free secondary legal aid...». In addition, part 2 of Art. 18 to be worded as: «Appeal for the provision of one of the types of legal services provided for in part 2. 13 of this Law relating to children are served personally by the child or by his legal representatives...».

Consequently, taking into account the peculiarities of the legal status of the child, it is important that the child's legal aid is based on the principles of gratuitousness, accessibility, necessity and quality. The guarantee of these principles rests with the state. In addition, civil society plays an important role in ensuring the right of the child to legal assistance. Thus, the right to legal assistance to the child as a legal guarantee of its constitutional and legal status requires proper provision from the state and society.

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Право на правову допомогу як гарантія конституційно-правового статусу дитини

Розглянуто поняття конституційно-правового статусу дитини та його структуру. Розкрито особливості права на правову допомогу як гарантії конституційно-правового статусу дитини, а також роль цього права в системі відповідних гарантій. Визначено конституційне право дитини на правову допомогу як нормативно-правову гарантію правового статусу дитини, елемент її правового захисту. Обґрунтовано науково-теоретичні засади та практичні пропозиції, спрямовані на вдосконалення нормативно-правового регулювання у сфері надання правової допомоги дитині відповідно до особливостей її правового статусу.

Ключові слова: правовий статус особи, правовий статус дитини, конституційно-правовий статус дитини, дитина, право на правову допомогу, безоплатна правова допомога, гарантія, юридична гарантія.