

## GENESIS AND PROGRESS OF THE RIGHT TO LEGAL AID

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### **Abstract**

The current article explains and throws light upon factors that caused to emergence of concept of legal aid as constitutional right; reveals what the main stages it has passed within its progress and how it has been improved; describes peculiarities and types of the legal aid depending on certain historical epochs; forecasts trend of future improvement of the right to legal aid.

**Keywords:** legal aid, free legal aid, lawyer, logograph, constitution, human rights.

The right to legal aid, which finds its direct determination in Art. 61 of the Constitution of the Azerbaijan Republic is one of the basic and inalienable rights of the person and the citizen. Considering its importance, and also substantial essence, it is difficult to overestimate the importance of the specified constitutional right for all mechanism of ensuring constitutional rights and freedoms of the person and the citizen. At the same time, the special attention is deserved by a complex research of historical aspect of genesis and development of the right to the qualified legal aid.

One of the important components, which determine the level of comprehensiveness of different research of the legal phenomena and processes, is, first of all, the resort to their sources. As constitutional rights and freedoms of the person and citizen in general, the right to legal aid, have the long history.

Among scholars, the researching features of realization of the right for legal aid, it is worth to mention V. B. Isakov, D. A. Kerimov, A. E. Kozlov, O. E. Kutafin, E. A. Lukasheva, A. A. Mishin, A. P. Movchan, S. V. Polenina, Yu. I. Stetsovsky, Yu. A. Tikhomirov, B. N. Topornin, V. I. Chervonyuk, B. S. Ebzeev, M. V. Yarovaya's works and many other. At the same time separate aspects, including historical, emergence and evolutions of the right for legal aid, still require special attention.

It should be noted that the reference to historical prerequisites of emergence and development of the right for legal aid, first of all, allows to solve a number of problems that has theoretical and methodological aspects: first, to establish factors which have affected the specified constitutional right, that is have caused its emergence and evolution; secondly, to find out what main stages it has passed in process of the development and as at the same time has changed; thirdly, to reveal features and types of his realization in concrete historical stages of development and their legal systems; fourthly, to predict tendencies of further development of the right for legal aid; and lastly, as a result, it is deeper to learn essence of this subjective right. At the same time, the above objectives display also a degree of relevance of this research.

As D.A.Kerimov fairly claims, out of the historical context connecting the present phenomena with those phenomena which preceded them, as well as with those which will arise on their basis in more or less remote prospect it is impossible to learn this modernity. And it is quite natural as "in society, there are always remains of the past, a basis of the present and rudiments of the future. Any modern phenomenon or process has the roots in the past which through the reflection in the present is directed to the future" [1, p.100]. Having extrapolated the above directly to researched by us the subjective right, it should be noted that the last can not limit itself to a state which would reflect only real the moment of his existence as the relationship of cause and effect in the historical development of human right on legal aid will be in that case lost.

Genesis and evolution of any subjective rights and freedoms of the person and citizen including the rights for legal aid, it cannot be investigated without reference to documentary historical and legal achievements of mankind, that is to written sources of the rights of the different people, in various historical epochs. The analysis of such sources of the right needs to be carried out in the logical sequence of their emergence, considering a certain historical periodization.

Of course, at early stages of development of a human civilization the main instrument of regulation of human relations, the custom had an inherent moral character. For example, already in the most ancient times the people of Southeast Africa (Gafars, Bechuan, Zulus), in Ancient India, Ancient China the first manifestations of rendering legal aid arose. It was provided by relatives, friends, neighbours, and fellows' villager of the parties who disputed in a judicial proceeding. Certainly that the specified categories of persons had a very little general with the concept "human rights activist" in the true sense of this word, they were not considered as experts [2, p.12]. It should be mentioned also about judicial system about which in the true sense this word, during the specified period (it is about the period of existence of a primitive-communal system) it is possible to speak very conditionally, legal proceedings were conducted, as a rule, by elders of tribes, leaders, referring to the same customs, ceremonies, traditions.

So to speak, the remote manifestations of a legal aid, take place in the I millennium BC in Ancient Babylon. In the period of the New Babylon monarchy (the end of the 7th century BC - the second half of the 6th century BC), taking into consideration the additional functions of priests which they owned in legal procedure, it is possible to come to a conclusion that priests gave the legal aid (mediated) to the parties of legal procedure. They collected, and also brought to trial documents which the parties handed them for confirmation of the claims, helped to execute judgments and etc [3, p.88].

It should be noted that for a long time as well in Turkey there were scientists-experts of the Islamic right (mufti) to whose duties giving legal recommendations, consultations to disputing parties belonged. That is, the persons performed functions of legal advisers.

Other, subsequently the right analyzed by us acquires broader content. It is known that the category of persons who were called "interpreters of the sacred right" could be involved in the judicial criminal trial at the period of emergence and development of the Athenian state. The explanation to the persons wishing to prosecute the criminal (as a rule, it were victims) how it needs to be done, was their main obligation. That is the victim could get legal advice necessary to him. Over time, during the blossoming of the Athenian statehood (the 6-5th centuries BC), in the same judicial criminal procedure, there are persons which can already give legal aid not only to the victim, but also the person which is brought to legal liability. At the same time, these persons were divided into two categories - logographs or, in other words "writers of things" and sinegor, that is "the helping speakers" [4, p.6].

The first one proceeded a little the second in the emergence at the time, however subsequently logographs were gradually forced out by sinegor. Logograph could not satisfy quite the need for judicial protection of that time [5, p.19-20]. As they directly were not involved in the trial, and only wrote the composition of judicial speeches for claimants and defendants, in the last there were difficulties on their studying by heart. Also, the logography suited only for accusatory and claim speeches and could have very limited and imperfect application to speeches for the defence and remarks. As the logograph could prepare for disputing parties the claim or accusation in advance, but it wasn't able to object the prosecutor or the claimant, without knowing in the accuracy what proofs will be provided by them in court, it could not foresee all arguments of the opposite party with reliability to confuse them before they are stated.

Considering stated above becomes clear that logograph could not replace oral speeches. Moreover, as truly noted by Sineokiy A.V., protection assumptions, at least, in criminal cases, began to require as well simple justice. That is, it confirms awareness by society already of that time of need of the objective, impartial relation to the person which is only accused of crime

execution and whose guilt has not been proved judicially yet. And there were sinegor which already personally provided a direct legal aid (protection) to accused of legal procedure by preparation and declaration for them court speeches, thereby promoting the same justice.

A feature of the activities of defenders stated above who provided a legal aid in Athens of that time was the fact that their activities were more connected with oratory, but not with jurisprudence. In the specified context it is pertinent to quote the statement of the famous Roman teacher of eloquence Mark Fabia Quintilian (approx. 35 g - approx. 96 g): "The judge listening to us with pleasure almost already trusts us" [6, p.409].

With emergence and existence of Ancient Rome (8th century BC - 5th century AD), especially at later stages, the legal aid comes to the qualitatively new phase of the development. It is considerably filled in the substantial relation, and also diversified in an expression form. It was generally provided by professionals. Generally, one may say, that the understanding of the right of that time for provision of a legal aid more similar to his modern understanding.

First of all, it is necessary to focus attention that during this historical period there is a written right. Having addressed to the texts of the main Roman Law, in particular to such as Twelve Tables (mid-5th century BC), Guy's Institutions (143 AD), Digesta Justiniani (530-533 AD), it is possible to find a provision, specifying existence of institution of a legal aid in society of that time, which at the same time reflect these or those forms of its manifestation, its characteristic features thereof.

In particular, in Ancient Rome legal scholars who performed a professional activity on rendering legal aid were conditionally divided into three main categories, upon a purpose of these activities: cavere (to constitute new claims and transactions), agere (to process case in court), responderere (to give answers). The first of the specified types of legal activities that is "cavere" meant activities of lawyers on rendering legal aid in the form of creation of claims, transactions and wills. The formulas of deeds, claims which were quite often receiving names of the creators were so developed. Concerning the second, it should be noted that "agere" was implied as activities of the lawyer on conducting matter at court, where the last undertook functions of the party in the process. These activities took place to be both in civil, and in a criminal trial. Special significance in Ancient Rome was attached to a question of ensuring legal aid to the person brought to trial. At the same time defenders were divided into three types: advocati, laudatores, patroni. And, the third form of rendering legal aid in Ancient Rome - "responderere", was expressed in the statement of opinion of the legal adviser at the request of individuals.

Considering requirements concerning article's volume, we would not stop in detail on the characteristic features of the provision of a legal aid in Ancient Rome, and we will only note some, in our opinion, key provisions which are actually concerning the direct development of the specified right.

So, in Justinian Digests, in the First Book (Title XVI) it is specified that the pro-consul "shall provide lawyers to those who request it, mainly to women, either minor, or another vulnerable person or that who not in the right mind if someone requests it, and if nobody requests, then the pro-consul shall present the lawyer anyway. But if someone specifies that owing to influence of the opponent it cannot retain to itself (himself) the lawyer, then for the sake of justice, it is necessary to him with the lawyer" [7, p.182-183]. Considering this provision, it is possible to state that at the level of the law to less-protected segments of the population, and also the right to the lawyer for rendering legal aid was guaranteed to persons which possessed the smaller amount of legal personality (to women, minor, sick, etc.).

In the Third Book, in particular in the Title III "About procurators and defenders (De procuratoribus et defensoribus)" in one of the provisions it is said that in case of absence of the defendant in judicial session, legal aid shall be provided to it. At the same time, the public advantage of such provision is emphasized: "if any absent accused can be accused, then it is fair and there corresponds to an established procedure the assumption of the one who will speak for

him and with defending his innocence". In the period of the late Roman Republic and the Roman Empire, free participation of the lawyer was guaranteed to needy citizens of Rome. And on criminal cases participation of the defender was mandatory. If the party had no defender, then the pretor appointed such defender. For refusal of the lawyer from "defending by appointment" could easily expel it from the association [8, p.30].

It is impossible to ignore the *hospitium privatum* institute existing in Ancient Rome which protected property interests of the strangers coming to Rome. It was that the Roman citizen has become a patron of the stranger who was put in the client's position, gave the last a legal aid, making deeds in his interests, protecting his interests before the Roman court, etc. At the same time, a patron acted not as the stranger's representative, and as the defender of his interests, on its own behalf. The conscientious attitude of the patron to the assumed obligations was provided with the sacral right: the perfidious patron was to the highest punished: it appeared fateful to a revenge of gods - *sacer esto*, and therefore became out of the protection of the law [9, p.75]. Thus, not only citizens of Rome, but also the person who were strangers could use the right to a legal aid. Moreover, this right was exercised both within criminal and within civil processes.

During the existence of the feudal states, the right to a legal aid was not mentioned not much in literature. At the same time, it is possible to draw conclusions on features of the implementation of this right, proceeding from the analysis of the legal status of persons which directly gave a legal aid at the appointed time. As we know, the Institute of the legal profession was the most widespread and, respectively, his representatives are lawyers.

For example, in France till 12th century an obligation of lawyers were usually carried out by clerical persons. In the 12th century of a representation of clericals in secular courts were prohibited that promoted emergence of professional lawyers in secular courts [10, p.487]. Since the end of the 13th century, the legal profession in France begins to be exposed to a legislative regulation. So, in 1270 there were well-known "St. Louis Establishment" which put the first bases of the French judicial system and legal proceedings. According to the decree by the King from the 1274 year lawyers functioned at courts. Since the 1344 year lawyers were divided into defenders and advisers. At the same time, Catholics, persons subjected to church punishment, monks could not be lawyers [11, p.40].

It should be noted that in the 13th century in the French kingdom for the first time there was such an official as the prosecutor, one of the main functions of which originally was a rendering legal aid to the claimant and defendant in civil cases. At the same time, the prosecutor was appointed, generally to vulnerable.

In Prussia, since 1781, the attempt was made to establish institution of legal profession as the public position: rendering legal aid to the parties was assigned to members of courts as a part of which the special members - "assistants" receiving a salary from the state were allocated for this purpose [12, p.616]. Further "assistants" were replaced by the commissioners receiving the royalties from persons, addressing to them; a procedural law of commissioners was expanded, but all of them continued to be considered as officials of the judicial department.

In Germany the Regulations on Legal Profession from July 1, 1878, were the document regulating provision of legal aid. The lawyer independently prepared the case, acted in proceedings, participated in the execution of judgments.

In England, for example, the Institute of legal profession arose rather early, at the same time it used quite broad self-governance [13, p.524]. Lawyers who rendered legal aid divided into two main categories: the barristers, who were engaged mainly in acting at court and attorneys and solicitors - the intercessors on cases, who were engaged in the preparation of these cases for judicial review. The highest category of lawyers was constituted by the sergeants who had some special rights. Let us note that from that people the judges of the supreme courts were elected.

Legal aid on civil cases during the specified period was given in England quite actively. As for the right of the defendant to protection, here the situation was worse. By William III's statute

of 1696, the defendant during a hearing of his cases "on high treason" was granted the right to invite the defender. Then the defender began to be allowed also in cases of felonies. At the same time quite long time the rule existed according to which it was forbidden to address to court with speech for the defence or counsel of the accused. In 1836 William IV's law eliminated all restrictions on rendering legal aid in criminal cases [14, p.11].

As Melnichenko R.G. fairly notes, although the situation with rendering a legal aid which satisfied needs of the society in the Middle Ages, it was unsatisfactory in its subsequent development. So to speak, afterwards, this institution gets the 'license' to render legal aid during establishment in some states where the constitutional system was functioning. At the constitutional stage, the quantitative elements of the right increased, and the right to a legal aid became defined in the majority of constitutions of the different states.

So, while researching the history of development of the right to a legal aid, special attention should be paid at the time of directly constitutional fixation of the subjective right studied by us in the relevant legislation of various countries of the world including in the Republic of Azerbaijan. Especially as disclosure of this issue will allow finding out to what generations these basic rights and freedoms of the person and citizen is necessary to refer.

It is known that as one of the first official constitutions were considered the United States Constitution of America (1787), the Constitution of France (1791), and the Constitution of Poland (1791). Concerning features of a legal regulation of constitutional rights and freedoms of the person and citizen in the specified sources of constitutional right, it is possible to note that the first two from the constitutions stated above, should be considered more progressive, as more attention in that documents is devoted to the rights and freedoms of the person and citizen including to the right to a legal aid.

In the United States of America's 1787 Constitution, which is the fundamental law, the right of the defendant to defence was defined. So, on September 25, 1789, the United States Congress of America proposed the first ten amendments to the United States Constitution. According to the Amendment VI "In case of any criminal prosecution, the defendant has the right... to the aid of the lawyer for defence" [15, p.149-150].

It is also necessary to note that in the United States of America in XVIII-XIX centuries legal aid was performed generally by lawyers who were divided into various specialities depending on a type of legal activities. One was engaged in acceptance of cases and preparatory work, others carried out obligations of legal advisers, the third - only acting at court.

According to item 9, Chapter 5 "About judicial authority", Constitutions of France (as of September 3, 1791), "defendant cannot be refused of the attorney" [16, p.167].

Also French Declaration of Human Rights accepted by the resolution of the French National assembly on August 26, 1789, enjoyed human right and the citizen were considered as the first generation of the rights, in particular Article 14 contains a provision according to which "citizens have the right to establish independently or through the representatives need of taxes, to agree on its free collection, to monitor its use and to determine its share, the size, a payment procedure and duration" [17]. That is, considering the content of the quoted provision, it would be logical that there is a conclusion about forming and fixing at the end of the 18th century of the institution of representation of legal interests of citizens of France in the sphere of the taxation.

Hence, it is obvious that in the first constitutions only one of the types of rendering a legal aid was defined, namely a right of defence of the defendant in the criminal process. It is possible to explain it with special importance and need of legal aid at a stage of detention of the person and bringing it to criminal liability. At the same time, it is necessary to understand that content of the right to a legal aid is much broader.

Regarding Constitution of the Republic of Azerbaijan and enshrined in its rules of law on a legal aid, it should be noted that proceeding from the analysis of provisions of constitutions which during this or that period acted on the territory of Azerbaijan (the Constitution of 1921, the Constitution of 1927, the Constitution of 1937, the Constitution of 1978 and the Constitution

of 1995 existing for today) it is possible to trace a certain evolution of this constitutional right, in particular a legal regulation of its substantial expression.

So, in the Constitution of the Azerbaijani Soviet Socialist Republic of 1937, in Art. 118 only the right of the defendant to defence was defined. The constitution of the Azerbaijani Soviet Socialist Republic of 1978, along with the right of the defendant to protection (Art. 170) also fixed a provision according to which for rendering legal aid to citizens and the organizations there is the Bar (Art. 173) functions. Moreover, in the specified article it was also noted that «in cases, stipulated by the legislation, legal aid is given to citizens free of charge».

The fact that the Constitutional Act 1991 of the Azerbaijan Republic "About recovery of the state independence of the Republic of Azerbaijan" as well granted legal aid to each citizen who is out of the territory of the Republic of Azerbaijan Republic (the p. 3 of Art. 18). It widened actually, even more, the substantial content of the subjective right researched by us.

Based on above-mentioned points, it is necessary, to sum up. The right to a legal aid traces the roots back to an extreme antiquity. Before being created, filled with content which is in conformity with modern understanding of this subjective constitutional right it underwent long, difficult process of the evolutionary changes caused, first of all, its comprehension by the person of the fact that without proper regulation of this right positive development and existence of the person in society and the state where the system of legal values dominates is impossible. The emergence of the right to a legal aid, in particular, legal defence against accusation in court, to its standard fixing in hand-written sources of law was promoted by aspiration of a man towards the justice. Among the most ancient and widespread institutions on rendering a legal aid, it is necessary to consider institution of the legal profession which originates in ancient Greece and Rome.

The interrelation of this right, actually its development, with the development of systems of law in the different countries of the world, in particular, their jurisdictional processes (civil, criminal, etc.), interrelation with the mechanism of ensuring protection and protection of the rights and personal freedoms is undoubted. Granting the defendant of a right of defence was one of the first types of implementation of this right. However subsequently its content considerably extended, especially with the development of constitutionalism in some countries of Europe and the USA. Also, considering all aforesaid, it should be concluded that the right to a legal aid should be obviously referred to the first generation of the rights and freedoms of the person and the citizen.

In the Republic of Azerbaijan at the constitutional level, the right to legal aid that has been analyzed by us should be regarded to the first half of the XX century. Of course, the most comprehensively, considering the constitutional provisions stated above, it is necessary to consider the right to a legal aid established in Art. 61 of the current Constitution of the Republic of Azerbaijan. Here the special emphasis on receipt of qualified legal aid is given. At the same time, such aid in the cases provided by the law is given free of charge, at the expense of the state. Generally, enhancement of the mechanism of providing the right to a legal aid, improvements of its effectiveness, especially forming of a standard basis and system of a free legal aid in the Republic Azerbaijan, for today, is the primary function of public authorities, scientific, and also various public organizations.

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