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THE EVOLUTION OF LEGAL ASSISTANCE

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The article reveals the evolution of the legal foundations of legal support in the countries that gained independence in the post-Soviet era, as well as its socio-political and ideological antecedents based on the example of Armenia. Particularly, it is shown, that in the Soviet state legal system, the attitude regarding the advocacy, at least as a part of the state structure, have not been completely revised, but is accompanied by new justifications.

On the other hand, we discussed the problem that formation of an advocacy called to guarantee the right to a fair trial receives obstacles from the so-called "state mentality".

In particular, an advocate is perceived as a litigant who defends criminals by all means, therefore a state is not obliged to "excessively" cover the needs of free legal support.

The article thoroughly discusses the prerequisites for the evolution of legal assistance/legal support, especially the factor of legal culture, clear positions are expressed relating the issues arising from the scientific and practical dimension, and for overcoming the existing problems, and a number of legislative recommendations are offered, reference was made in a form of predictions.

Key words: *Legal assistance, advocate, fair trial, public defender, advocacy, advocacy secret, principle of competition, evolution*

In the context of outlining the directions of the formation of legal culture, what is of key importance is the structural and procedural basis on which the subjective human rights are brought into existence, in particular, what kind of role in their system is assigned to the advocacy called to provide legal assistance. In all post-Soviet countries, a cautious attitude towards the institutions of legal support to people has been openly observed in the activity of the state government, which is explained by the fact that in authoritarian systems that do not have stable traditions of democracy, they still do not have a clear and adequate idea of the practical role of non-state structures for the protection of human rights, the latter is considered as a sector operating outside of state control and providing unrestricted assistance to criminals, and accordingly, an atmosphere of mistrust prevails towards the latter.

The authorities of the newly established independent states see a strong threat to their power, a counterweight, in structures of that nature, therefore, formally remaining within the framework of democracy propaganda, in practice they either do not apply at all to enshrining the legal foundations of such structures or clearly obstructing their formation, significantly slowing down the whole process. It is not by chance, that the formation of the mentioned legal foundations in Armenia is also related to the late period, which we will discuss below.

The problem also acquires additional complications in connection with the question that in the environment of officials with a completely Soviet legal and political culture, it is extremely difficult to adequately understand the place and role of legal support institutions in the political system as well. Basically, the

various trends and interpretations regarding this issue, in our opinion, can be conditionally divided into two groups:

a) Advocacy is called to support the judiciary and

b) the fundamental task of advocacy is the protection of the client's rights. Let's note in advance that both of these approaches are not sufficiently scientific and are highly vulnerable in terms of emphasis, content, and imperativeness of questioning.

In this research, we did not limit ourselves to revealing the role of advocacy in the context of post-Soviet legal and political preconditions, but equally, take into account the need for a complex analysis desired to ensure the actual role of democracy in systems with stable traditions of democracy.

At the same time, we consider it necessary to emphasize that the starting point of scientific research concerning advocacy is perhaps limited to providing legal assistance to a person, while the most significant aspect is ignored without radically reviewing the foundations of the latter's relationship with justice and law enforcement agencies, the mission of legal assistance to a person will remain unfinished. Advocacy, also as an independent structure, must be endowed with the components of independence and immunity characteristic of the aforesaid bodies, be able to guarantee the true independence and unfettered professional activity of the representative of his community, the lawyer.

In general, giving great importance to the complex research of the components of the human rights system, we cannot ignore recording that the judgments and evaluations expressed in the sources of domestic jurisprudence regarding the mentioned components are not always distinguished by the necessary systematicity, with adequate disclosure of the actual place and role of a specific component, including setting standards for competition between rights. Ultimately, the same fundamental rights cannot have the same legal value and degree of protection. The fact that the mentioned rights are enshrined in the same source of law, the Constitution, does not mean at all that they are of equal value, in particular, the freedom of assembly cannot have the same legal and political value and level of protection as the right to life, etc.

Concerning the mentioned approaches, first of all, we consider it appropriate to present some initial judgments and conclusions, the justifications of which will be discussed below, slightly deviating from the traditional research methodology:

– Supporting the judicial power, which is mainly manifested by supporting the interest of justice, is not essentially in conflict with the protection of person’s rights by providing him legal support. Separating the above-mentioned tendencies from each other or opposing to each other has no reasonable justification. This question is precisely addressed in Opinion No. 16(2013) of the Advisory Council of European Judges and the Advisory Council of European Prosecutors “On the Relationship between Judges and Lawyers” “... the quality and effectiveness of judicial proceedings depend, first of all, on proper procedural legislation, as well as rules on essential aspects of civil, criminal and administrative proceedings. States must establish such provisions following Article 6 of the Convention. Judges and advocates should be involved in the process of developing such provisions, not for the benefit of both professions, but for

the benefit of fair administration of justice". Thus, professional, corporate interests are not an end in themselves, they must be unconditionally subordinated to the interest of justice. The professional characteristic of an advocate is that he supports the interest of justice by providing legal assistance.

– In the context of guaranteeing the right to a fair trial, it is considered adequate not to give preference to any of the mentioned approaches, but to prioritize providing legal assistance consistent with the realization of the right to a fair trial as a result of their harmonization. Underlying this conclusion is the rationale that legal support is more closely related to the right to a fair trial than to furthering the interests of justice.

– Advocacy as a structure should not be identified with any of the structures already defined by legislation, it is a structure with an independent status endowed with special public powers and may be granted the status of a legal entity under public law. It is not about recognizing a constitutional body endowed with public power, but about the status of a legal entity under public law, in which case being endowed with public power is not a mandatory condition. Accordingly, the Chamber of Advocates should be considered not just an autonomous non-state structure, but a system that fully guarantees the interests of advocates in public relations. In practice, the latter is mostly perceived as a tool for controlling the activities of advocates, including disciplinary prosecutions, while the latter has almost no real authority when criminal prosecution is carried out against the advocate. We believe that, along with the above-mentioned arguments, as well as to guarantee the unfettered activity of advocates at least to a minimum extent in countries that do not have stable democratic traditions, it is appropriate to grant the Chamber of Advocates the authority to consider petitions for consent to initiate criminal prosecution based on actions arising from the powers of advocates. In this case, it should be noted that the advocate has a greater need for protection from directed prosecution than the prosecutors. Moreover, the basis for this conclusion is also the moral and psychological atmosphere in which the advocate is not only considered a criminal defender of criminals but is also simply identified with the client he defends. Unfortunately, cases of beating the advocate directly in the police administrative building are also recorded[1].

– Legal assistance is consistent with the right to freedom of action, which means that it can be provided not only in prescribed ways but also in ways that do not conflict with the Constitution and laws and do not conflict with the rights of others. Of course, the advocate has a dual status, in particular, the latter acts not only as a private person, but also exercises obvious public-legal powers, but this cannot at all oblige the advocate to exercise only the powers established by the Constitution and laws. Accordingly, part 1 of article 5 of the Law "On Advocacy" stipulates that advocacy activities are carried out "by all means and methods not prohibited by law".

Let's make only one significant reservation in this regard: the constitutional norm of free action defines at least three components: a) a person is free to do everything that does not violate the rights of others, b) it does not contra-

[1] In particular, the fact that on February 9, 2023, in the administrative building of the Erebuni Police Department in Yerevan, the police officers beat two advocates in the office of the police operatives who were carrying out their professional activities, especially for providing legal assistance to minors (link: https.//www.facebook.com/watch/?ref=tab).

dict the Constitution and laws and c) no one can bear duties that are not defined by law. Among the mentioned components, the legal precondition that a person is free to do anything that does not violate the rights of others needs further analysis. In particular, it is not legitimate to be guided by the primitive mentality that the use of rights should be unconditionally stopped in all cases if the rights of others are violated. In the case of such a simple and precise approach, the need to predetermine the priority of possible rules of conduct from the point of view of competition of rights is merely ignored[2].

– Guaranteeing the advocate's ordinary activity cannot be limited only to the rules of procedure and courtesy, because the institution of immunity from liability, intended only for judges, and partially also for prosecutors, practically makes the advocate vulnerable. Moreover, such guarantees are especially necessary in the case of government bodies and officials who still do not have stable traditions of democracy, and who do not adequately perceive the real role of advocacy yet. Only the fact that a high-ranking official, perceiving the advocate as an entity protecting criminals, calls on them to refrain from supporting the latter, is enough to at least enshrine the advocate's right to immunity from criminal liability by legislation. Moreover, this proposal can be considered realistic only if the right to revoke immunity is reserved for the Council of the Chamber of Advocates[3].

Several other jurists have researches on the need to review the bases of judicial or investigative actions applied to advocates, but I think it is necessary to put forward a more radical and realistic legal solution[4], which we referred to above. In many international legal documents, there is also fixed physical immunity of advocates[5], which is also important, but it is not enough to guarantee the normal activity of the advocate in the necessary dimension.

The theoretical and legal prerequisites for forming advocacy are perhaps determined by legal and political culture, in other words, purely political perceptions and expectations, as well as professional ones, especially constitutional-legal positions play a specific role. Finally, the character of regional interstate, often also universal international relations is of crucial importance, because the real possibilities of legal cooperation, including advocacy in inte-

[2] For a comprehensive survey of rights competition issues, see Michael Sachs, Basis of the General Doctrine of Fundamental Rights in Germany. Subjective public rights in administrative law, Yerevan, Tigran Mets, 2012, p. 15-28.

[3] This point of view is thoroughly researched by T.I. by Shakirov. International standards of independence and accountability of advocates, Shakirov T. R., Text of a scientific article on the specialty “Law”, link to the article: https://cyberleninka.ru/article/n/mezhdunarodnye-standardty-nezavisimosti-i-podotchetnosti-advokatov.

[4] See, for example ` **Nowak M**., Commentary on the U.N. Covenant on Civil and Political Rights. Kehl: N.P.Engel Verlag, 2005. P. - 383, 384. **Голованов С.С.**, Гарантии независимости и неприкосновенности адвокатов, Вопросы современной юриспруденции, 5(66), 2017 г., link to the article` https://cyberleninka.ru/article/n/garantii-nezavisimosti-i-neprikosnovennosti-advokatov, **Вайпан В.А**., Настольная книга адвоката: постатейный комментарий к Федеральному закону об адвокатской деятельности и адвокатуре. / В.А. Вайпан // - М.: Юстицинформ, 2017 г. - С. 98. **Демидова Л.А**., Адвокатура в России: учебник // Л.А. Демидова, В.И. Сергеев. - М.: Юстицинформ, 2016. - 569 с. **Суровова К.Ю**., Организационная деятельность адвоката: понятие и содержание / К.Ю. Суровова // «Адвокатская практика», 2016, № 5. - С. 26 and etc.

[5] This point of view is thoroughly researched by T.I. by Shakirov: “International Standards of Independence and Accountability of Lawyers”, Shakirov T. R., Text of a scientific article on the specialty “Law” Report to the aricle: https://cyberleninka.ru/article/n/mezhdunarodnye-standarty-nezavisimosti-i-podotchetnosti-advokatov.

gration activities, are outlined by those factors. In particular, it became evident that with the direct support and participation of Turkey, in the context of the criminal prosecutions and trials initiated by the Azerbaijani law enforcement bodies against hundreds of prisoners of war as a result of the 44-day war unleashed by Azerbaijan, as well as in the courts, is to talk about human rights protection activities in the case of the injured Armenians who appeared in the criminal defendant's chair, is already from the absurd genre.

And this is not a purely domestic phenomenon, it has already acquired a broad geography and has become a challenge for all humanity. Now, as briefly as possible, let me address the legal and political prerequisites of the establishment and evolution of domestic advocacy, which are directly related to the theses proposed by us above. I was lucky enough to be one of the committee members for the first bill in this area. The latter consisted of two other members: the President of the Bar Association Mr Misha Piliposyan and jurist Koryun Nahapetyan. Already on June 18, 1998, as a result of our developments, the Law "On Advocacy" was adopted, which was radically different from the Soviet legal bases in force until then. Our task was to make perceptible positions that were unusual for the mentioned period, the legality of some of which is contested even today, not only for politicians, but also for wide circles of jurists as well. Perhaps, I will single out the most important ones:

– firstly, back in 1979, the law of the USSR "On Advocacy" and the statutes of the Union republics of the same name, the advocacy as an independent structure was called to support: a) protection of human rights and legal interests, b) the implementation of justice, c) preservation and strengthening of socialist legitimacy and d) educating people in the spirit of respecting laws and caring for people's welfare, maintaining labor discipline, respecting the rights, honor and dignity of others, as well as the rules of socialist coexistence. As you can see, advocacy has been perceived in terms of public ideology, as an attachment of the party and state apparatus, especially the investigative and judicial system. Overcoming such intentions is not an easy task.

First of all, we tried to formulate the long-term mission mentioned above as adequately as possible, that is: "Advocacy is a type of human rights activity recognized by the Constitution and laws, which is aimed at realizing the interests pursued by the recipient of legal support by means and methods not prohibited by law" (Part 1 of Article 4 of the Law "On Advocacy"). I would like to mention that this wording was also fixed by the current law "On Advocacy" with a partial editorial intervention: "Advocacy is a type of human rights activity carried out by an advocate and is aimed at the implementation and protection of the rights, freedoms and interests of the person receiving legal assistance by all means and methods not prohibited by law" (Part 1 of Article 5).

Although this wording was maximally consistent with international legal standards and international best practices, in the case of formed stereotypes, it caused a great resonance both in the political and professional spheres. Many, especially the representatives of the judiciary and the prosecutor's office, expressed concern that advocates thus ceases to support the interest of justice, which is their primary mission.

Our explanation at the stage of public debates was basically as follows:

human rights activities by their nature cannot contradict the interest of justice if we understand this term adequately and do not unnecessarily equate it with the process of detecting a crime. The interest of justice is not a universal value, but is only one of the essential components of the fundamental right of a person to a fair trial, therefore, in turn, it is called to contribute to the guarantee of that right, not to prevail over the latter.

The mentioned approach, with a slightly different aspect, was again confirmed by the current law "On Advocacy": "The body conducting proceedings in criminal cases provides free legal assistance through the public defender's office in cases provided for by the legislation of the Republic of Armenia or international treaties, or if the interest of justice requires it" (Part 4 of Article 41). In other words, the existing law also prioritized to the unhindered exercise of a human right to a fair trial rather than the discovery process.

Let us add that not only the right to a fair trial but also the interest of justice does not in itself prevent the detection of crimes, otherwise, they obstruct their disclosure by illegal means, in violation of the principle of proportionality, which should be acceptable from the point of view of public interests as well. In all cases, the reinterpretation of the role of the advocate contributed and contributes to the professional growth not only of advocates but also of law enforcement agencies and courts, on the whole new incentive to be knowledgeable has emerged.

Another problem is the structural, institutional status of advocacy. By the way, in the text of the 2015 amendments to the Constitution, the norms on advocacy were included for the first time through the efforts of the Chamber of Advocates. Of course, the latter's expectations, moreover, with completely legal justifications, were much higher, while the political forces and the professional community were not ready to fully accept them yet, so it was possible to establish at least the following in the context of the constitutional right to legal assistance: "To provide legal assistance, advocacy activities based on independence, self-government and equality of rights of advocates are guaranteed. The status, rights and duties of advocates are defined by law" (Part 2 of Article 64 of the Constitution).

As we can see, this norm does not directly address the institutional status of advocacy but outlines its essence and status boundaries. In general, the question is often raised as to what the Chamber of Advocates is: is it a public organization with a special status, and if so, on what basis were the functions typical of public authority assigned to it? In the depth of these judgments, other questions of the exact nature are often raised: to which branch of government does the prosecutor's office belong: judicial or executive, are the control bodies not an independent branch of government, etc.?

I think we have to overcome some stereotypes in this matter. First of all, advocacy is now an independent, self-governing structure provided for by the Constitution, so in this case, we are dealing with a structure that has acquired status under the Constitution: thus it should be regulated not by a law, to reserve a status from an institutional point of view, but the status must be should be derived based on the Constitution. "... the status, rights and duties of advocates" (Part 2 of Article 64). It follows from what has been said that the structures provided for by the Constitution should not be subject to the so-called general rules of the register, but act under the power of the Constitution. In such cases,

it is necessary to register not the structure with constitutional status, but the latter's staff, which is necessary from the point of view of making the regular activity of the main structure uninterrupted and effective.

As for the prosecutor's office in the context of similar questions, the latter should not be imagined as part of this or that branch of government, but as an independent constitutional body serving the principle of separation and balance of power. Many Latin American countries have preferred not three, but four or even six branches of government with their primary laws, trying to consider controversial bodies as independent branches of government. Without referring to the legality of these approaches, let's just note that not all constitutional bodies must necessarily be involved in this or that branch of government, some of them are called to guarantee the balancing mission of the government, therefore, their way of working should not be openly related to the executive power, but try to remain within the limits of their autonomy set by the Constitution.

I find it expedient to briefly address the key issues of advocacy in Armenia, first of all, overcoming and filling gaps in the legislative foundations. First, it is welcome that advocates not only take the initiative to improve the legislation themselves but also have a vested interest in vetting the drafted bills. But even more valuable is the mission of bringing to life the truly complex and challenging culture of applying the law and the analogy of law from the point of view of overcoming the loopholes of the law. Unfortunately, there is still an unwarranted wariness of these very important institutions in state systems: as a rule, they only try to fill the gaps in the law by adopting new, large-scale laws, which leads to the unnecessary burden and loss of professionalism of the parliament and law-enforcement bodies[6].

Summarizing the judgments regarding the issues related to the selected topic, I present the following general conclusion:

The constitutional mission of advocacy cannot be limited either to legal assistance or merely to guaranteeing the supremacy of the interest of justice, because such extreme perceptions make the latter unnecessarily vulnerable, as a result of which neither goal is fully realized. Both the interest of justice and the right to legal assistance do not contradict each other, but complement each other and ensure the necessary harmony of these ideas, since both are to a greater or lesser extent meant to guarantee the right to a fair trial. The interest of justice does not imply an unconditional limitation of the right to a fair trial, on the other hand, the realization of the right to a fair trial is not possible without adequate protection of the interest of justice.

Thus, the right to a fair trial cannot be entirely consistent with the interest of justice, therefore, in the conditions of this relative competition, it is appropriate to reserve the preference for such criteria for fixing and realizing the right to a fair trial, which are more consistent with the fundamental values and components of both legal assistance and the interest of justice.

[6] I addressed this question in detail in the article entitled “Current Issues of Overcoming Legal Conflicts and Legislative Gaps”. “Collection of materials of the conference of the Faculty of Law of YSU”, 1(3) 2019, Ch. Editor: G.S. Ghazinyan. - S.: YSU Publishing House, Yerevan - 2020., pp. 5-26.

ԳԵՎՈՐԳ ԴԱՆԻԵԼՅԱՆ – *Իրավաբանական օգնության էվոլյուցիան* – Հոդվածում Հայաստանի օրինակով, բացահայտված է հետխորհրդային դարաշրջանում անկախություն ձեռք բերած երկրներում իրավաբանական օգնության իրավական հիմքերի, դրանց սոցիալ-քաղաքական և գաղափարախոսական նախադրյալների էվոլյուցիան: Մասնավորապես, ցույց է տրվել, որ խորհրդային պետաիրավական համակարգում փաստաբանությունն առնվազն պետական կառույցի մաս դիտարկելու դիրքորոշումները ոչ միայն ամբողջությամբ չեն հաղթահարվել, այլև ուղեկցվում են նորանոր դրսևորումներով:

Մյուս կողմից, անդրադարձ է արվել այն խնդրին, որ արդար դատաքննության իրավունքի լիարժեք երաշխավորմանը կոչված փաստաբանություն ձևավորելը խոչընդոտում են այսպես կոչված «պետական մտածելակերպի» դրսևորումները: Մասնավորապես, փաստաբանն ընկալվում է իբրև ամեն գնով հանցագործներին պաշտպանող դատավարական կողմ, ուստի պետությունը պարտավոր չէ «չափից դուրս» հոգալ անվճար իրավաբանական օգնության կարիքները:

Հոդվածում հանգամանորեն քննարկվել են իրավաբանական օգնության էվոլյուցիայի նախադրյալները, հատկապես իրավական մշակույթի գործոնը, ձևակերպվել են հստակ դիրքորոշումներ գիտագործնական հարթությամբ ծագած հարցերի, առկա հիմնախնդիրների հաղթահարման առնչությամբ և առաջադրվել են օրենսդրական մի շարք առաջարկություններ, ինչպես նաև կանխատեսումներ:

Բանալի բառեր – *իրավաբանական օգնություն, փաստաբան, արդար դատաքննություն, հանրային պաշտպան, փաստաբանական գործունեություն, փաստաբանական գաղտնիք, մրցակցության սկզբունք, էվոլյուցիա*

ГЕВОРГ ДАНИЕЛЯН – *Эволюция юридической помощи* – В статье на примере Армении, раскрываются правовые основы эволюции юридической помощи в странах, получивших независимость в постсоветский период, а также их социально-политические и идеологические предпосылки. В частности, показано, что в советской государственной правовой системе отношение к адвокатуре, по крайней мере, как к части государственного устройства, полностью не пересмотрено, и сопровождается новыми обоснованиями.

С другой стороны, была затронута проблема того, что формированию адвокатуры, призванной полностью гарантировать право на справедливое судебное разбирательство, препятствуют так называемые проявления «государственного менталитета». В частности, адвокат воспринимается как истец, защищающий преступников любой ценой, поэтому государство не обязано «чрезмерно» покрывать потребности в бесплатной юридической помощи.

В статье подробно рассмотрены предпосылки эволюции юридической помощи, особенно фактор правовой культуры, высказаны четкие позиции по отношению к вопросам, возникающим на научно-практическом уровне, преодолению существующих проблем, сформулирован ряд законодательных рекомендаций, а также выдвинуты некоторые прогнозы.

Ключевые слова: *юридическая помощь, адвокат, право на справедливое судебное разбирательство, общественный защитник, адвокатская деятельность, адвокатская тайна, принцип конкурентности, эволюция*