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The following issue is dedicated to the bright memory of the prominent representative of Georgian legal science, Professor Emeritus Guram Nachkebia

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The Importance of Free Legal Aid Service Quality Control and the Basic Difficulties Associated with it

Providing an effective system of free legal aid and constant care on improving the quality of the services provided by such a system is one of the most important challenges of government. How far, in terms of the documented results, has the Republic of Georgia progressed in this direction, compaired to a number of western and central European countries which have well-organized systems of free legal services at the national level, but does not have mechanisms focused on concrete and peractical challenges to the state-funded service control.

This article is dedicated to the importance of quality control to free legal aid systems. It explores several actual issues related to providing such quality control, about which there are significant differences of opinion both in practice and theory. In particular, it is still difficult to protect the confidentiality of communications between the legal aid lawyer and the client, while at the same time insuring the quality of the legal services, especially in cases where the problems with the quality of the services being provided requires removal of a particular attorney from the case, vis-à-vis the right of self-organization of the lawyer etc.

Key Words: Quality control, efficiency, compulsory protection, secured at the expense of the state, mechanisms, free, public attorney, rule and criteria.

1. Introduction

Unlike the Legal Protection Institute, which has very early formation and development stages[1] as a fundamental part of human rights protection, legal aid systems funded by state resources has exsisted for a relative short period of time. It is known that it was developed in the United States of America in the 19th century,[2] and slightly later under the international law, legal aid system developed in the form of the right to a fair trial.[3] In the 20th century, the right of free legal aid (in some cases obligations) for the persons accused of a crime has become an integral part of the Constitution in all democratic states.[4]

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1 Compare: The elements of legal protection, and the importance of the lawyer to protecting legal rights, were established in antiquity period, see e.g. Anton -Hermann Chroust, Legal Profession in Ancient Republican Rome, 30 Notre Dame L. Rev. 97 (1954). In Georgia development of what is now known as the Legal Protection Institute, began in the XIII century. At that time, the person serving as the trustee, guardianship and carefulness were referred to by the common name – "the Solicitor." See in detailed, *Akubardia I.,* Art of Protection, Tbilisi, 2011, 12.

2 See in detailed: Inter alia *Batlain F.,* Women and Justice for the Poor: A History of Legal Aid, 1863-1945 (Studies in Legal History), Cambridge University Press, 2015; *Essenburg T. J.*, New Faces of American Poverty, A Reference Guide to the Great Recession, ABC-CLIO, 2014, 464-466.

3 When we talk about the basis of state funded legal aid system in Georgia, one historical fact of particular interest noted by Davit Batonishvili, is that the solicitor was appointed for noble orphans from the circle of the nobility, that was responsible for the care of the orphans and their property, while, at the same time, taking into consideration of their interests. But because of, that the "Substitute Man", or the "Advocacy Insitute" is not confirmed with other sources, Iv. Sulguladze concludes that D. Batonishvili took the Institute which existed in other countries and provide their information to the Russian Society, In fact, even in that period in Georgia it was not known as the "Advocacy Institute". See *Akubardia I.,* Art of Protection, Tbilisi, 2011, 14-15.

4 *Kublashvili K.,* Basic Rights, Tbilisi, 2003, 26.

While second half of the last century mainly focused on the establishment of free legal aid systems and their organizational-legal arrangements, in this century, governments have put the importance of the quality of these legal aid services on the agenda. Indeed, modern challenges to human rights protection treat merely providing free legal services by democratic states only at the formal level as absolutely insufficient. This first simulates them to focus on the quality of these services and developing effective mechanisms to control that quality. The opinion of the scientific community on this issue, as well as the case law from the Supreme Court in the United States of America[1] (herafter referred to as the "U.S, Supreme Court") and the European Court of Justice (hereinafter "European Court"), is both solid and consistent. Secondly, mere agreement on the fact that legal aid provided at the expense of the State should be effective and must meet international standards, is not, in and of itself, sufficient to meet the challenges that must be overcome, because one of the main difficulties which must be addressed are found in the implementation process of the national legal framework and practices. Namely, it is still arguably a question of what criteria should be taken into account when evaluating the quality of legal aid and what kinds of legal "units of measurement" should constitute the best model of quality control function. This is problematic because the fairly high standard imposed on the confidentiality and privacy of the relationship between the lawyer and his client privacy, and on the need for the lawyer to have professional independence, provide impediments to "third parties" (i.e., other state actors) having sufficient and legitimate access to relevant information and processes which is needed in order to implement effective quality controls.

Due to the fact that at this time, research for this dissertation has reach only a preliminary stage of what is needed to fully explore this subject, the issues raised in it, including the discussion alluded to in the preceeding paragraph, will be presented in greater detail and scope in the final dissertation work. For example, according to the Research Limiting Character, it presently includes only a British Model review of Quality Control of Legal Aid, which will be presented more contently with greater legal analysis and compared to the models of some other countries in the context of legal analysis in the context of the Dissertation dissertation Survey.

In conclusion, the specific concepts and recommendations which are presented in this work, regarding the specific issue which will be reviewed will significantly improve the quality of free legal services in Georgia and increase public confidence towards the efficiency of this system.

2. Necessity of Quality Control of Legal Aid and General Issues Related to it

The necessity to control the quality of work being is an integral part of the activities of high-level management in any organization, the necessity and importance of which no longer are in doubt. What only remains controversial is the essence of control and planning the process of conducting it.[2] In the case of legal aid, the need for Quality Control of Legal Aid should be started naturally by discussing the importance of its effectiveness. In any jurisdiction, the basic precondition for effectice criminal legal defence is the legislative and constitutional structure itself, which, as a minimum, should correspond to the attributrive standards established by the case-law of European Court and the European Convention on Human Rights, as well as the standards of the European Union on the procedural rights of the defendant in criminal proceedings.[3] Naturally, we can not speak about the necessity of quality control with the same enthusiasm and meaning with regard to possible deficiencies which may exist with criminal defence counsel which has been retained by the defendant mutual private agreement (i.e., paid out of the defendent's own financial resources), because the standards of advocacy provided on the private origin

[1] It is important to note that one of the first states in which Legislation was enacted to regulate of free legal aid was the United States of America. Compare. *Suknidze N.,* How to make justice available for everyone, Part I, Tbilisi, 2003, 12.

[2] *Shubladze G., Mgebrishvili B., Tsotskolauri P.,* Basis of Management, Tbilisi, 2008, 111.

[3] *Cape E., Namoradze Z,* Effective Criminal Defence in Eastern Europe (Bulgaria, Georgia, Lithuania, Ukraine), Legal Aid Reformers' Network, Soros Foundation, 2012, 33.

are regulated by a labor market which is based on a competitive environment. Thus, any shortcomings in the quality of reprsentation (even when they are of a substantial character), cannot become the basis of international responsibility for Georgia (as a Contracting Party of the European Convention).

For the purposes of this research, the measures needed to be taken to improve the quality of free legal services, are of particular interest relative to Georgian legal reality. In the field of legal aid, the main priority of the reform of the criminal justice system in Georgia, is the need to insure the quality of the work.[4] Besides the "Plans described in the documents", in the practice of the common courts of Georgia we have already found a sad but notable precedent, namely when the Court (in other words - the State) on its own initiative removed the attorney who had been appointed for the defendant through the legal aid program because the attorney failed to observe the minimum standards for effective legal assistance during the trial.[5]

According to case-law of European Court of Human Rights, the right to free legal aid stipulated by point 3(c) of the 6th article of European Convention should be effective and the State is obliged to provide the Public Attorneys with the necessary legal leverages for implementing the quality protection.[6] At the same time, if a specific Public Attorney's actions are not effective, the State is obliged to provide the accused with an other attorney.[7] It should be emphasized that in this case, we are talking about the existence of a strong system and not about the individual defects revealed about the public attorney, because the European Court of Human Rights doesn't impose any responsibility on signatory States to remedy mistakes made by individual public lawyers. The public attorney, as the representatives of the independent and liberal profession, must have certain rules of regulation. The European Court of Human Rights declared that "the State can not be responsible on any mistake made by a public attorney appointed under free legal aid ... The States are obliged only to interfere in the issue if the failure of implimenatation of effective representation by the lawyer is obvious and the authorities are aware of this".[8] In the 20th Century, the Supreme Court of the United States adopted an almost a similar approach, based on the 6th Amendment[9] to the United States Constitution.[10]

Thus, the homogenous regulation of the issues related to the effectiveness of free legal assistance and the quality control should be sought in the perspective of developing a well-systemized mechanism (which, in parallel with the efforts of state institutions, is also the presented scientific research). It should also be noted that in science and practice there is no common position on that we can use as a guide to frame the principles and methods to determine the issue of effectiveness of legal assistance and the role of each legal subject in ththis process. "In practice it has also been proven that in the case of legal assistance for a lawyer it is difficult the defendant's effective representation on the background of the absence of instructions from the client and also when to the client's opinion is not clear for him/her - what does he think that is true or how he perceives the events".[11] Furthermore, there is no doubt that the primary criterion determining the quality of protection cannot

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4 Criminal Justice System Reform Strategy, approved by Criminal Justice Reform Interagency Coordinating Council at the 24th Meeting, 12th of April, 2017, 80-90. The document is available on the official web page of Ministry of Justice of Georgia, <http://www.justice.gov.ge/AboutUs/Council/240>, [24.05.2017].

5 Order of Tbilisi City Court №1/168-13 of the 21st of June of 2013. Court order is accessible in the Court Archive.

6 Goddi v. Italy, [1984] ECHR (Ser. A.), 35, *Kamil Öcalan v.* Turkey, [2006] ECHR (Ser. A.), 41.

7 Artico v. Italy, [1980] ECHR (Ser. A.), 33-34, 36.

8 Imbrioscia v. Switzerland, [1993] ECHR (Ser. A.), 275, Kamasinski v. Austria, [1989] ECHR (Ser. A.), 168; Czekalla v. Portugal, [2002] ECHR (Ser. A.), 65; Daud v. Portugal, [1998] ECHR (Ser. A.), 38; Lagerblom v. Sweden, [2003] ECHR (Ser. A.), 56; Ebanks v. the United Kingdom, [2010] ECHR (Ser. A.), 73; Orlov v. Russia, [2011] ECHR (Ser. A.), 108.

9 The 6th Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence."

10 See also, *Weaver R.L., Abramson L.W., Burkoff J. M.,* Hancock C., Principle of Criminal Procedure, 4th ed., 2012, 41-63.

11 *Cape E., Namoradze Z.,* Effective Criminal Defence in Eastern Europe (Bulgaria, Georgia, Lithuania, Ukraine), Legal Aid Reformers' Network, Soros Foundation, 2012, 47.

be the efficiency of the investigative or other procedural actions conducted by the public attorney, if during the initial stages there is no analysis of the protection strategy employed by the public attorney during that particular criminal case. This circumstance complicates the fact that each criminal case is very individual and the defense strategy should be assessed based on the specifics of that case. On the other hand, it is important that the quality of legal assistance should not be measured based on the "legal tastes" of a particular person which would become a source of arbitrariness, based on individualism.

In order to address the above stated problem, first of all it should be realized that the correct professional approach is that of a "Golden Interval," which on the one hand, will balance the obligation of the legal states, to remedy identified faults in the legal assistance provided with their resources, into the subject of its own responsibility, and on the other hand, to be dismissed from such duties of which imposition to the state institutions will gain in themselves the formal character.

One of the main postulates of the raised issue is the principle that the mechanisms of the quality control within the Free legal Services system should necessarily be conducted, as far as possible, based on detailed predetermined criteria. As the professional responsible for implementing quality control in particular cases, the Public Lawyer must exactly know which kind standards and assessment methods for monitoring and controlling will be used. Therefore, there should be an effective system of information retrieval and collection. All above mentioned conditions highlight the difficulty of the process.[12] Also, when the issue concerns the independent professional judgment of the lawyer in a case, it's very sensitive and almost imposibe for the relevant State Institutions (for example: Legal Aid Service) to have full access to the details of the case and the confidential communication between the Public Lawyer and the client, on which the former founded the defense strategy. However, to our view, international experience gives the proper means, taking into consideration the confidentiality of the attorneys and client relationships. Thus, it is necessary to develop a more efficient and transparent model, which, on the one hand, excludes the risks of increasing the international liability of Georgia as a signatory State of the Convention and, while at the same time, sharply increasing the level of society trust towards the institute of functional public attorney in the country.

Finally, the need for quality control is not limited by narrow legal meanings and adequate provision of free legal aid and to provide free legal assistance. Rather it has been given a decisive role along side the modernization of the organizational arrangement of the system, as well as raising the qualification of public lawyers and reaction upon other important challenges.

3. Perspectives of Establishing Effective Quality Control Mechanisms in Georgian Legal Space Based on International Experience

3.1 The Formal-Legal Side of the Settlement of the Issue

We should begin the discussion on the issue by determining, whose function includes establishment of the criteria and methods of quality control of legal aid and what kind of legal forms should be implemented by legislation in Georgia. This entails determining, as of today, what are the parameters of free legal services provided by the state budget of Georgia.

According to the Law of Georgia on Legal Aid,[13] the LEPT Legal Aid Service[14] is obliged to provide free legal assistance as guaranteed by point 3(c) of the Article 6 of the European Convention throughout the country. It carries out this service through the local branches composed by the regional principle.[15] In addition to local

[12] Compare *Shubladze G., Mghebrishvili B., Tsotskolauri P.,* Baiscs of Management, Tbilisi, 2008, 111.

[13] Law of Georgia on Legal Aid, Legislative Herald of Georgia №4955-Is, [19.06.2007].

[14] The service is not subordinates to any other state agency and is accountable only to the Parliament of Georgia.

[15] The detailed information on the structure and current activities of the LELP Legal Aid Service <www.legalaid.ge>, [24.05.2017].

organizational units, the central office functions within the service, in which one of the main units is the monitoring and analysis unit. The functions of the monitoring and analysis unit[16] are stipulated by the 10th article of the Regulations of Legal Aid Service and it mainly means monitoring the quality of service provided by the public lawyers and consultants working in the Service. In terms of legal techniques, regulations related to quality control will be approved by the decisions of the Legal Aid Council, which will be presented by the director of service according to the subparagraph "d" of paragraph 1 of the article 11 of the Law of Georgia on Legal Aid.

Even though, free legal aid is available in Georgia from the 17th of February of the year 2005 untill today, due to lack of quality control mechanisms, monitoring of the effectiveness of this service was not physically carried out until recently, which at least did not make it possible to say that Georgia was fulfilling the legal values guaranteed by Article 6 of the European Convention.

Thus, about eleven years after the formation of the Legal Aid System in Georgia,[17] on the 2nd of March of the year 2016, the Legal Aid Council (hereinafter - the Council) approved the procedure and criteria for assessing the quality of free legal services provided by the LEPL Legal Aid Service by adopting decision №39 "About Approval of the Rules and Criteria for Quality Assessment of Legal Aid provided by LEPL Legal Aid Service".[18] However, the present, disputes on its lawfulness are still ongoing in the courts. In particular, on the 21st of April of the year 2016, public lawyers employed at the Legal Aid Service filed a lawsuit in the Administrative Cases Panel of Tbilisi City Court against the Legal Aid Council challenging the Council's actions on the 2nd of March of the year 2016 approving decision №39, and requesting that the Court annul the Council's decision. At the same time, the applicants requested that the Court suspend decision №39 before making the final decision on the case.[19] As for the main side of the above mentioned administrative dispute, i.e., that the decision of the Council be annulled, the Court has not yet made a final decision on it as of the writing of this paper today, but that part of the claim asking for suspension of Decision was not satisfied by the First Instance Court,[20] although by the Verdict №3B/1045-16 of the 26th of January of the year 2017 of the Chamber of Administrative Cases of the Tbilisi Appeal Court, the first instance decision was cancelled and the Claimants' request was fully satisfied by suspension of validity of the Decision №39.[21]

In parallel with the above-mentioned litigation by part of public lawyers employed in the Legal Aid Service, on February 13, 2017 in the Constitutional Court of Georgia was presented a constitutional claim, No. 870, on the basis of which applicants disputed whether subparagraph "d" of paragraph 1 of the article 11 of the Law of Georgia on Legal Aid conformed with the paragraph I of Article 20 and paragraphs 3 and 8 of the Article 42 of the Constitution of Georgia. In particular the applicants contend, that the former, which authorizes the Legal Aid Council, when approving the rule and criteria for evaluating the quality of legal counseling and Legal Assistance provided by the Service, to determine the rules and criteria for assessing the quality of service provided by the lawyers of the Legal Aid Service, necessarily relates to the confidentiality of the relationship between the lawyer and the client. This, in turn, applicants contend will not only allow, but will obligate the lawyer to disclose the following information: (1) "Whether the client was informed regarding the strategy selected by the lawyer"; (2) "Taking into consideration the objective circumstances how timely and sufficient was the communication with the client during the detention / Before using the detention"; and (3) "How adequately the client was informed about the prospects of the case or their absence at all stages of the proceedings / development of the case (includ-

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16 Approved by the decision №20 of the 3rd April of 2015 of Legal Aid Council, <www.legalaid.ge>, [24.05.2017].

17 Reform of the free legal aid system in Georgia started in 2004 in cooperation with state, non-governmental and international organizations. Initially, the concept of reform was prepared. Since 2005, the commission has started implementation. See in detailed, <http://legalaid.ge/?action=page&p_ id=448&>, [24.05.2017].

18 See Decision №39 of the 2nd of March, 2016 of the Legal Aid Council "About Approval of the Rules and Criteria for Quality Assessment of Legal Aid provided by LEPL Legal Aid Service", <http://www.legalaid.ge/index.php?action=page&p_id=673&lang=geo>, [24.05.2017].

19 Order №3/3094-16 of the 5th of May of 2016 of Tbilisi Apeal Court, is avalible in the Archive of the Court.

20 Ibid.

21 Order №3B/1045-16 of the 26th of January, 2017 of Tbilisi Apeal Court, is avalible in the Archive of the Court.

ing the expected final result)".[22] The above mentioned claim will not be taken for a merits hearing by the Order №1/4/870 of the 7th of April of the year 2017 of the Consitutional Court.[23]

Given the fact that in-depth discussion of the Rules and Criteria of Quality Assessment of Legal Aid approved by the Legal Council goes beyond the scope of the subject of this article, its detailed consideration will be discussed at the next stage of the dissertation research.

3.2 Minimal Standards of the Quality Control

When it comes to the fulfilment of the obligations undertaken by the European Conventions of the signatory States, in this case, of Georgia, it is important to pay attention to the so-called principles of minimum standards. Namely, International Law imposes obligations on the Member States on the minimum requirements of quality of rights that is required by the principle of the rule of law in a democratic society and requires them to protect them strictly.[24] This approach is particularly relevant with regard to the right to the Effective Legal Aid guaranted under the paragraph 3(c) of the article 6 of European Convention, in view of the fact that the Public Attorney is the representative of the independent legal profession in Georgia, as well as in all countries of the world, and he or she does not aquire the status of a public official.[25] Considering this, the International law can not impose an unreasonably high standard to the Member States, even if deficiencies arise within the implementation of the legal protections provided at the expense of the State.

The quality of the Free Legal Aid, and the importance of its control in theory and practice, are discussed in two independent directions:

- The obligation of the Contracting State of the European Convention on Human Rights to provide at national level such institutional basis of legal assistance, which (at the very least) must defent the set minimum standards;
- The internal policy of a much higher standard than the minimum established by the International Law, which is strictly oriented on the high quality of the Free Legal Aid provided by the State and it constantly carries out monitoring by the rule established under the Law.

In order to identify the main differences between these two models at practical level, it is interesting to make the analysis of the key aspects of case-law of the European Court of Human Rights and the U.S. Supreme Court.

As it was noted above, the right to legal represntation guaranteed in the 6th Amendment of the Constitution of the United States of America, which implies the obligatory minimum standards of effectiveness in itself,[26] has repeatedly become the subject of discussion by the U.S. Supreme Court and, in terms of the development of law, quite interesting approaches have been established. In particular, the American experience is especially important in relation to the first component mentioned above, since it is clear how basic is the quality control of legal protections provided by public lawyers and, when defects are found, the standards which are imposed on the the responsible state.

Studying the cases decided by that Court, the precedent value has of those decisions been distinguished from the general type of appeals in which the applicants were appealing for protection of their rights while at the same time, the State was justifying the inefficiency of appointed public lawyers. Perhaps, at first glance,

[22] Constitutional complaint №870 of the 13th of February of 2017, <http://constcourt.ge/ge/court/sarchelebi>, [24.05.2017].

[23] Court order №1/4/870 of the 7th of April of 2017, < http://constcourt.ge/ge/legal-acts/rulings>, [24.05.2017].

[24] Compare Open Society Justice Initiative, Legal Aid in Europe: Minimum requirements under international law, 2015, 13, <https://www.opensocietyfoundations.org/briefing-papers/legal-aid-europe-minimum-requirements-under-international -law>, [24.05.2017].

[25] Within this research there was not able to find an example of different legal representations.

[26] *Weaver R.L., Abramson L.W., Burkoff J.M.,* Hancock C., Principle of Criminal Procedure, 4th ed., 2012, 40.

such factors may really inspire expectations, that in a similar situation, persons with similar characteristics will not be able to realize (or has realized) the effectivness of the legal services provided in a criminal case, because applicants' complaints were not explicitly shared with the Court, which was applied to any one of the following circumstances:

- Lawyer's age (Which means a very young age, as well as older remoteness);
- Inexperience (It is meant as a directly professional as well as its public understanding);
- Some kind of professional incompetence;
- Personal and/or emotional problems of the lawyer;
- Problems related to illegal use of alcoholism and/or narcotic substances;
- Problems related to being in conflict with the law (or when the lawyer appears to have a substantive legal conflict);
- Problems related to suspension or abolition of the lawyer's status by the entity that regulates the practice of law in the jurisdiction.[27]

The above-mentioned factors in American legal literature are referred to as extrinsic factors of possible ineffectiveness of legal representation, which was inculated in the judgement delivered by the U.S. Supreme Courtin the case of *United States v. Cronic*.[28] In the *Cronic* case among the circumstances that were proven were that the public attorney appointed by the state was quite young and inexperienced and that he had never participated in jury trial prior to Mr. Cronic's case. The applicant claimed that his lawyer's inexperience was the reason that why his lawyer requested only about twenty five days to get acquainted with materials of the criminal case and to prepare a defense. The Supreme Court of the United States of America has made it clear that any one of the above listed extrinsic factor cannot be considered to establish as an ineffectiveness of counsel argument if there is no indication of the particular incompatibility of the criminal case. Addressing professional inexperience in particular, the Court observed that any criminal lawyer can initiate the first steps in the preliminary stage of the first criminal proceedings, thus, this can not be considered as the defect of its any form.[29] This approach was strengthened relatively later in the cases of *Bell v. Cone* [30] and *Florida v. Nixon*[31] Cases. By comparison, it is especially interesting that in the case of Romania, where, in terms of staff policy, the authorities responsible for ensuring the Free Legal Aid, make special emphasis on the young public lawyers, which obviously does not mean that the management wants to employ unqualified and inexperienced public lawyers.[32]

In the opinion of the Supreme Court of the United States of America, the State at the systematic level must provide competence and equality of protection in the proceedings process and it should only be responsible for the inefficiency of free legal assistance when the institution at the national level is so imperfect that the system itself fails to provide a high standard of professionalism by the public lawyers. This attitude of the Court was more clearly demonstrated on the case of *Strickland v. Washington*, where the Court held that for the purpose of the 6th Amendment of Constitution of the United States, in order to consider criminal defense ineffective, the public lawer must have made the professional mistakes of such degree and quality, that the totality his activities on the particular criminal case, should not be perceived as the lawyer's and the Human rights defender's actions.[33] In the same case, the Court emphasized the importance of evaluation in conjunction with existing circumstances

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27 Compare, ibid, 41.
28 United States v. Cronic, 466 U.S., 648, (1984), 666-667.
29 Bazelon D.L., The Defective Assistance of Counsel, Vol. 42, 1973, 1, 18-19.
30 Bell v. Cone, 535 U.S. 685, (2002).
31 Florida v. Nixon, 543 U.S. 175, 190, (2004).
32 *Bard K., Terzieva V.,* Legal Services for Indigent Criminal Defendants in Central and Eastern Europe, Parker School Journal of East European Law Vol. 5, 1998, 17.
33 Strickland v. Washington, 466 U.S. 668, (1984).

and stated that one specific ineffective action, taken by the defence council could not be taken as a basis for considering the lawyer to be totally ineffective in the particular criminal case.[34]

It is noteworthy that American and European approaches to the inefficiency of protection are quite similar to each other. The classical example of the principles set out in *Strickland v. Washington*, can be summarized by the landmark case of the European Court of Human Rights - *Artico v. Italy*,[35] where the legal activities of the public attorney were not clearly perceived as suitable acts for the criminal defense attorney and most importantly, there were no quality control mechanisms within the state institutions.

Ettore Artico, who was convicted for simple fraud in the above-mentioned case, initially was represented by a lawyer he had privately retained (contracted). Later he requested that the Court of Cassation to provide him with free legal assistance, which was satisfied, but only after action on his motion was suspended for five months. One month later, the convict informed the Cassation Court that he had not been able to communicate the appointed public attorney so far and requested that the state to provide him with effective legal assistance. Arguing that the appointed public attorney had failed to provide him with effective representation due to the attorney's deteriorating health condition, the applicant categorically requested that the Court remove an ineffective defender and appoint another lawyer. His request was not granted and, moreover, he was advised to withdraw his own application to have the state appointed lawyer removed. Since the convict was not even allowed to drop the ineffictive defender during the merits of the case, he considered that his right to effective representation had been violated.

When the case reached the European Court of Human Rights, it agreed with position of E. Artico and recalled that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[36]

The Court pointed out that Article 6, paragraph 3 (c) of the Convention refers to the word "aid" and not "appointment", which in context suggests, that the fact of appointment of a lawyer in the case does not create the presumption of effective legal protection, even because "after the lawyer is appointed on the case, he may die, be seriously ill, to avoid the fulfillment of the rights and obligations for a long period of time"[37] etc. In this particular case, the Court found that the applicant had not received any benefit from the lawyer appointed by the State during the conduct of the criminal proceedings.

In conclusion, it should be noted that *Artico v. Italy*, the Court found a violation of Article 6 § 3 (c) of the European Convention on Human Rights, as the State did not respond to the full legal imputation of the public attorney, especially considering that the client had repeatedly called the problem to the attention of the trial court, such that the State was fully informed about the situation.

This decision was made in the 1980s, although case law has not yet tested the standards set in the period, these approaches have been fully shared in the cases discussed in 1993-1994, such as *"Imbrioscia v. Switzerland"*,[38] *"Stanford v. the United Kingdom"* [39] and others.

There is also the special case of *Kamasinski v. Austria*, wich stands in contrast to case of *Artico v. Italy*. Namely, in this case the Austrian state has shown institutional readiness to respond to the ineffectiveness of free legal aid. The applicant expressed dissatisfaction with the public attorney appointed for the first time by the state because he could not properly speak the English language, which made it impossible for the applicant to communicate with him. This circumstance was taken under consideration by the relevant state institutions and

[34] It is noteworthy that the trend of evaluation in combination with the factual and legal circumstances also includes the case-law of the European Court of Human Rights, particularly when the issue concerns a possible violation of the right to a fair trial under Article 6 of the European Convention by national institutions of any Contracting State. For example: inter aliaBendenoun v. France, [1994] ECHR (Ser. A.) 61; Efisio Pisano v. Italy, [2001] ECHR (Ser. A.), 23-24.

[35] Artico v. Italy, [1980] ECHR (Ser. A.).

[36] Ibid, 33.

[37] Ibid.

[38] Imbrioscia v. Switzerland, [1993] ECHR (Ser. A.), 41.

[39] Stanford v. the United Kingdom, [1994] ECHR (Ser. A.), 28.

the lawyer was immediately removed the case review. Kamasinski complained about the subsequently appointed public attorney, in particular, claiming that the lawyer did not personally visit him to provide him with legal advice and that the lawyer delt with issues via telephone.

The applicant claimed that the public attorney did not find the evidence that would support his acquittal of the charges being brought by the prosecution and that he did not present the defense witnesses in a court hearing.[40] In this case the applicant's legitimate dissatisfaction was taken into account and the attorney was removed from the case based on the grounds of inefficiency. Finally, as a result of the Austrian state's fair reaction, the applicant was appointed a public attorney who visited the prisoner in prison and filed a complaint to the court on a request for the lawlessness and reduction of the sentence imposed on his client. He also provided Kamasinski with a translation of the judgment in his own language.

As we see, the basic similarity and the distinction between the above two legal proceedings is that in both cases the actions (or rather inactivity) of the appointed public lawyers proved to be ineffective in the protecting their clients. In the case of *Kamasinski v. Austria*, Austria as a signatory State to the Convention, has had a fast and adequate response mechanism, which, in this case, resulted in the dismissal of the ineffective public attorney from the criminal case. When the case reached the European Court of Human Rights, it considered the quality control mechanism in terms of minimum international standards.

The Court explained that "the issues related to the implementation of the defense are essentially the sphere of relations between the accused and the lawyer, regardless of whether the lawyer is appointed, based on personal funding or in the legal aid scheme".[41] Consequently, the request for interference in the implementation of free legal aid guaranteed by Article 6 (3) (c) is only to occure when the fact of ineffectiveness of a legal aid attorney is obvious and prominent.[42]

Thus, the experience of European and American analysis shows that the international standard related to the quality of public attorneys of the State and the control mechanisms which are utilized is very cautious and focused on the fact that the states should simply "sponsor" the adversarial process and ensure fair trial. On the other hand, when we talk about protection of minimum standards of free legal aid, the international practice does not consider the specially organized, separate normative act, as mechanism of quality control, the practical use of which may serve as an independent organizational unit equipped with special functions. In this case, it is sufficient that States could ensure the appropriate persons with accessibility of early legal services and timely removal of an ineffective public attorney from criminal case.

3.3 Means of Quality Control in Respect of Completed Criminal Cases (Maximum Standard)

In contrast to the above cited cases, where the public advocate's ineffectiveness was reacted by the state within current legal proceedings (e.g., *Kamasinski v. Austria*), the monitoring of completed cases is far less reasonable and is less problematic in legal terms. In the framework of this research, on the one hand, we will generally review the type of existed international experience on completed criminal cases, in terms of quality monitoring and on the other hand, we will discuss the related Georgian perspectives.

In the previous subsection, we discussed the bases that are established by international standards and experience that are protected by civilized legal states as a positive obligation. However, it is evident, that the minimum standards regarding the modern challenges of human rights protection in democratic society are very superficial and insufficient. In recent years, the developed countries have strongly advocated the tendency to establish free legal aid quality control mechanisms that are not limited to taking care of minimal standards. In

[40] Kamasinski v. Austria, [1989] ECHR (Ser. A.), 66.
[41] Ibid.
[42] Ibid.

those countries, the state should not stand before international responsibility. The essence of international law for the member states of the Democratic World is that it establishes basic standards, but international organizations express active support to member states in order not to satisfy the established minimum standards and provide high quality justice to the public at national level.

Nowadays, there are successful models in different countries, which help the states to carry out free legal services control, with regard to completed criminal cases. However, it should also be noted, that monitoring of the completed cases is not the only way to achieve the goal and there are also other ways to monitor the ongoing cases. For example, based on legislative regulations specifically set out in Israel, the Public Defender's Office regularly checks the efficiency of public lawyers' service by attending trials. It also has a legislative leverage to remove a public lawyer from a case.[43] In Slovakia, the court has the right to remove an inadequate public lawyer from the ongoing case, while the Bar Association is responsible for the early accessibility of free legal aid in Poland. Furthermore, the Prosecutor's Office and the Court are obligated to detect the ineffectiveness of the public attorney and to inform the Polish Bar Association.[44] According to the Polish Disciplinary Court, a public attorney appointed on a criminal case, should obligated to diligently to carry out his or her duties, as is the lawyer who is hired by the client.[45] These methods of quality control are undoubtedly effective, but they are more sensitive in respect with defending the principle of professional independence of lawyers, which issue will be discussed in the next chapter.

As for the monitoring of the completed criminal cases, which Georgia actively strives to implement, is mainly carried out through the computer program (Case Managmant) and the full responsibility is imposed on a specially created organizational unit - the Monitoring and Analysis Division. As a developed country, the United Kingdom has a very interesting and successful experience in the field of monitoring on the completed cases.[46] The existing system implies full access to the cases by the monitoring entities after the proceedings are completed and their assessment according to the following stages:

- Early accessilability of legal assistance to a protected person;
- Frequency and results of the communication with the client;
- Criminal proceeding at the investigation and court trial stages;
- Proceedings at the first instance, appeals and cassation stage;
- Human rights protection activists at the penalty execution stage (possible removal of sentences).

As it relates to individual criminal case, the object of assessment is the stage that has been undertaken within the specific legal proceedings. The selection of cases, subject to monitoring, shall be conducted with respect to each public attorney, based on the random sampling principle and the key criteria will presented by the following legal issues:

- How perfectly did the public lawyer own the information contained in the case materials;
- How effective legal advice was given by a public attorney to a defendant at the relevant stage of the proceedings;
- How adequately was an organized defense strategy related to a particular charge;
- Whether a public lawyer has joined all essential legal opportinities prescribed by law to provide effective

[43] *Hacohen M.,* District Public Defender for Jerusalem, Israel's Office of Public Defender: Lessons from the Past, Plans for the Future, 2002, 4.

[44] *Hermelinski W.,* Country Report: Poland, Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe, Parker School Journal of Est European Law Vol. 5, 1998, 1-2, 7.

[45] *Suknidze N.,* How to Make Justice Available to Everyone, part I., 2003, 98-99.

[46] *McCormack N.,* Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind, and Double-Blind Reviewing (February 7, 2009), Law Library Journal, Vol. 101, №59, 2009, <https://papers.ssrn.com /sol3/papers.cfm?abstract_id=1339227>, [24.05.2017].

protection (to obtain evidence, to abolish the arguments of the prosecution side and so on);

- How qualified is a public attorney to draw up legal documents;
- How rational and adequate was expanses of state resources in respect of a specific case;
- And etc.

In the case of sharing of British experience, the above criteria must comply with each country's own legislation and practice on the internal level of individual specificity.

As a result of the amendments made on 13 December 2013 in the Law of Georgia on Legal Aid, it was determined, that the Legal Aid Council should approve the Rule of Quality Assessment and Criteria, by submitting the service director (Subparagraph "d" of paragraph 1 of Article 11 of the law). For the overall outcomes of the criminal system reform of Georgia, it is of highly important, that Georgia should not limited by providing only legal assistance consistent with the minimum international guarantees and to make a choice on a quality monitoring mechanism. Namely, to implement the monitoring system through the electronic program for completed criminal cases. Also, there are exceptions to legislative leverage on timely response to the court's observations and revealed results on current criminal cases.

The logical question arises - what is the state's reaction toward the fact of ineffectiveness legal assistance, and so, what are the legislative leverages to prevent the state from preventing such a situation? For the vizualization, let us consider the case, when in the format of absent legal proceedings, based on Article 45 of the Criminal Procedure Code of Georgia, the wanted person has been appointed a public lawyer by the state under format of obligatory defence, who provides unqualified legal service. Article 60 of the Criminal Procedure Code of Georgia (hereinafter referred to as "CCG Criminal Code of Georgia"), which unites the excluding circumstances of the lawyer's participation in the criminal proceedings, does not envisage the possibility of removing public attorney from the case on the grounds of inefficiency. This mechanism is not included in the Law on Legal Aid or any other normative act. Accordingly, the situation in the legislative standpoint is quite deadly. In particular, if the quality control of the free legal assistance is carried out with the best method, there is no legal leverage to remove the public attorney from the case based on national legislation. This can only be justified by formulated grounding, on the basis of the ECHR's case-law.

Based on the foregoing, it is expedient to add subparagraph "m" to the Article 45 of the Criminal Procedure Code of Georgia, which will grant the Court and/or investigative body with the authority, to remove a publicly appointed attorney from the criminal proceedings in cases of obviously inefficient legal service, based on the solicitation of the parties or on the cleint's own initiative.

4. The Basic Difficulties Associated with the Professional Independence of the Public Attorney and the Quality Control of Legal Assistance

In order to accurately identify the issue in this chapter, we should note at the outset, that when we speak about the professional independence of the lawyer, it is not only a possible that there will be disproportionate interference in the control process of quality of legal assistance. The issue is also problematic in the following areas: Under the current Criminal Procedure Code, how the lawyer is "free" from the defendant in the sense, to be independently liable for the quality of performed free legal services. How much is the lawyer provided with a sufficient way to self-organize by the current law?

Thus, the issue should be discussed in two independent directions:

- If there is a risk that the public attorney should blame the client in his/her professional ineffectiveness in case of dishonesty and declare that he/she has been restricted in a range of actions, the implementation of which would give protection much higher quality;
- To what extent and means is the subject of the authorized legal aid quality control entity able to find

the information which is protected by the confidentiality of the relationship between the lawyer and the client.

It would not be an exaggeration to say that these two issues are some of the most difficult tasks in the field of modern administration of free legal aid. Numerous international and local conferences have been dedicated to these issues over the past few years.[47] It is practically impossible to introduce mechanism adapted to the fundamental values of effective legal aid quality control system and law of human rights without a practical understanding of thes issues.

The difficulty of the above mentioned issue (which can be called the problem of overriding the poor quality protection to the client) is that in contrast to the regulations set out in the Criminal Procedure Code of February 20, 1998, the Criminal Procedure Code of 9 October 2009 unreasonably strictly limits the extent of attorney's professional independence in respect with criminal cases. In particular, in accordance with Article 44 § 1 of the Criminal Prosedure Code of Georgia, "the lawyer shall not be entitled to act against the defendant's *instructions* and interests." This legislative novelty, which, at first glance, may only be regarded as the subject of legislative techniques, has practical consequences. It creates conditions where a defendant with high intellectual capacity often not only corrects the basic procedural documents drawn up by the attorney, heor she also asks for substantial changes to its content, and / or makes other remarks in respect to the activities of the lawyer which are related to advocacy activities.[48] Accordingly, no matter how strange it sounds, the performance of the lawyer's activities, and/or the quality of procedural documents produced by him/her is not always a product of the professional independence of the lawyer. As a result, it is difficult to obtain an objective picture of the the quality of the legal protection provided to the client, including the quality of procedural documents, the professional skills of the particular attorney, and the degree to which the attorney was acting in good faith. In addition, such an embarrassing reservation in the legislation, which is related to the possibility of issuing a "instructions" by the defendant toward his or her own lawyer, does not adhere to the general jurisprudence of the legal practice and justice system. Obviously, if there is a dispute between the lawyer and the client about the representation, the fact that the starting point of the attorney's activity is a good legal goal for the person to be protected, should not be the basis for the dispute. The attorney should be focused on protecting the defendant's best interests, but the use such terminology as is found in Article 44 § 1 of the Criminal Prosedure Code, is more appropriate for regulatory supervision of prosecutorial activities. This legislative shortcoming is especially problematic in relation to the activity of public lawyers, because due to the specific nature of mandatory defence, they do not have the right to terminate the relationship even with the most disturbed defendants and have to carry out a quality service that may not meet demanding standards in the monitoring conditions.

For example, if we look at the example of EU countries, we'll see that the procedural legislation requires from the lawyer to represent the legal interests of a person under the protection, but does not make the conclusion that the defendant is entitled to interfere with the direct guidance of the defense strategy in the planning of specific investigative and other procedural actions. For example, in accordance with Article 274 of the Criminal Procedure Code of France, the defendant has the right to choose an attorney to help him/her protect his/her

[47] For example, on October 30, 2009, International Conference in Sophia (Bulgaria) - Workshop of Legal Aid Network On the topic – "Promoting the reform of the free legal aid system in European countries, sharing experiences and discussing the possibilities of further cooperation", by the organizational and financial support of Open Society Justice Initiative (OSJI). On September 29, 2010, a Conference following the same format was held in Tbilisi - The next annual meeting of the Working Group on the topic – "Free Legal Aid Quality Assurance Mechanisms". On April 15, 2011, International Conference on Scotland (Great Britain) – "Organizational Arrangement of Free Legal Aid System", organized and financial support of the European Union project "Supporting the Rule of Law in Georgia".

[48] *Laliashvili T.,* Fulfilment of the Professional Functions of Defence Counsel, Criminal Defence Strategy and Personal Instructions of the Defendant, Anniversary Collection, Dedicated to Guram Nachkebia, ed. Todua N., Tbilisi, 2016, 104-109.

rights.[49] In accordance with Article 99 of the Criminal Procedure Code of Bulgaria, which is a special norm and unifies the range of an attorney's obligations, establishes that the lawyer is obliged to provide the accused with legal assistance and explain all the factual and legal circumstances in the relevant stages of the proceedings that are applicable for the defendant's sense of protection. It also requires the lawyer coordinate with the client in determining the main directions of protection.[50] In accordance with Section II of Chapter II of the Criminal Procedure Code of Finland, the defence counsel and the victim's lawyer must protect the legitimate interests of his/her client on the basis the good faith and best advocacy practice and for this purpose, must facilitate the outcome of the case.[51]

As we can see, in accordance with international practice, the first paragraph of the Article 44 of the Criminal Procedure Code of Georgia is more rigid and disproportionate, which in turn creates risks in two directions. First, when a public attorney may not be able to provide effective protection to a client, or when an unscrupulous lawyer is trying to impose a low-quality legal service on the defendant, they can avoid liability by declaring, that he/she was acting under the instructions of the defendant. The second risk raised specifically relates to the extent and means of entitlement of quality control entity of legal assistance is able to seek the information protected by the confidentiality of the relationship between the lawyer and the client.

The principle of confidentiality of the legal relationship of the lawyer and the client, in the form of imperative regulation, is strengthened in the following Acts:

- Code of Conduct for Lawyers in the European Union (Article 2.3);[52]
- GBA Code of Professional Ethics for Lawyers (Article 4)
- Law of Georgia on Advocates (Subparagraph "g" of Article 3, subparagraph "d" of paragraph 5, article 7 and paragraph 6 of the article 38);
- Criminal Procedure Code of Georgia (Article 38, Part 5 and Article 43).

The problem is a third party's access to this information, which is directly proportional to our identified problem. In some cases the legal community has an incorrect interpretation of the information subject to the professional secrets which the lawyer is required to protect (both the term and its legal substance). In the opinion of some lawyers, it means only the information, that the lawyer had learned during a private meeting (eg, during a visit to the penitentiary facility). There is also a different perspective held by other lawyers, which asserts, that in addition to the above, the details of identification and personal characteristics of the client is subject of confidentiality. It should be noted that both of these positions represent (not wrong but) an incomplete definition, as a special legislative act regulating the legal profession in Georgia - the Law on Advocates (Article 7) and the Code of Professional Ethics for Lawyers (Article 4) subordinates to the confidentiality obligation, all the information which was made known to the lawyer during his professional duties, or it would not have been known if he/she did not carry out the authorized activity to work on a particular case. The above acts provide only two possibilities for disseminating confidential information: 1. With the client's consent; and 2. When the defence counsel is inviting a third person (eg expert, interpreter) to assist him or her in order to effectively carry out professional duties. In this case, the lawyer is obliged to provide guarantees for non-proliferation of information disclosed to invited persons.

Thus, when there is a suspicion that the attorney blames the client for ineffective asistance, the only way for Legal Aid Controlling Entity to examine the claim is to apply to the defendant in a written or oral manner, to explain the purpose of the inquiry and the need to discuss his or her relationship with the lawyer. In this way it will be possible to find out from the defendant authenticated information about the lawyer's claim which are

[49] Criminal Code of France, <http://www.legislationline.org>, [24.05.2017].
[50] Criminal Code of Bulgaria, <http://www.legislationline.org>, [24.05.2017].
[51] Criminal Code of Finland, <http://www.legislationline.org>, [24.05.2017].
[52] <http://www.ccbe.eu/documents/professional-regulations>, [24.05.2017].

blaming the client. However, this method is not effective, since, if the defendant denies the information provided by the lawyer for the Monitoring and Analysis Unit, being faced with two opposing but contradictory pieces of evidence, there will be no liability for the public attorney. Moreover, in accordance with the general principles of law, because of the lack of proof, the presumption of innocence will act in favor of the attorney's interests.

In addition to the above, we may consider the second method, namely how effective can a public attorney be imposed with a legal obligation to draw up a special record and to make defendant certify the authenticity of such cases, when the lawyer disagrees with the instruction of defendant in respect with the defence strategy and quality. In this regard, the issue is quite problematic, even if it is technically convenient. In practice, individuals who are often charged with criminal offense have refused to sign any kind of document, especially those with respect to the attorney, who the defendant perceives as being "state-appointed." In addition, such actions are totally unnatural and paradoxical in terms of trust building and confidence among the client and attorney.

Based on all the foregoing, the only correct and easiest way we find to solve this issue is to make relevant legislative amendments in accordance with Article 44 of the Code of Criminal Procedure and the lawyer should be dismissed from the direct instructions of the defendant.

5. Conclusion

Thus, in this work we tried to focus on all the theoretical and practical aspects which are relevant and actual in terms of efficient functioning of free legal aid quality control system. We also have discussed the measures to be implemented within the framework of the Criminal Justice System of Georgia, which should become the guarantee not only to protect the basic requirements prescribed by international standards, but also offer to beneficiaries objectively high standards of free legal services, tailored to the latest challenges.

Naturally, all of this can not be done without overcoming the complexity of systemic reforms and the fundamental analysis of a number of issues, therefore, we have tried to meet several key issues, which are especially problematic, on the one hand respecting the professional independence of lawyers, and on the other hand, in terms of interaction with the quality control of the free legal services.

On the basis of this, we can draw some key provisions about modern approaches to the issues raised in the survey and the different views for the solution of the problems which have been identified:

1. There are two types of issues concerning the scope of the control of quality of legal aid: (1) The State shall maintain the protection of minimum standard of international experience and / or (2) Not to be limited by provision of the basic needs and introduce the best possible effective legal system based on modern concepts of quality control;
2. It is recommended the combination model of the control of quality of legal assistance, which will monitor both ongoing criminal cases (in relatively small doses), as well as on the completed cases through a special electronic program;
3. It is recommended that Article 45 of the Code of Criminal Procedure be amended to add a sub-paragraph "m", which grants the Court the authority, to remove the attorney from a criminal case in cases of obvious ineffective legal services, based on the motion of the parties or at the Court's own initiative.
4. It is also recommended that the legislature enact amendments in the Criminal Procedure Code of Georgia, which will free the lawyer from the [absolute] obligation of obedience to the person the lawyer represents, and which, on the one hand, precludes the public attorney being held liable in cases where he can not be held responsible for the above objective circumstances and, on the other hand, it will erase the harmful practice of blaming the client in inefficient protection by the lawyer.

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