



## **Trial Monitoring Report**

# **Judiciary and Human Rights**

**Tbilisi 2009**

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## Introduction

The following report has been prepared with the support of the Eurasian Partnership Foundations within the project framework – Trail Monitoring in Georgia. The Project aim is to increase transparency and public credibility towards judiciary in Georgia. Within the project framework, the group of journalists conducted 20 journalistic investigations; lawyers studied approximately 50 cases and conducted trail monitoring. The mentioned report covers monitoring results, analyses it and provides recommendations.

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According to the Organic Law of Georgia on General Courts, “every person has the right to protect his rights and freedoms through the judiciary. The Judicial system shall be independent from the rest of the governance branches; it shall carry out its function through courts.

Judges shall be independent and bound only by the Constitution of Georgia, international covenants, treaties and laws. State bodies and bodies of self-governance, state institutions, public and political unions, state officers, legal and private entities are prohibited from infringing court independence.”<sup>1</sup>

In Georgia a reform of the judiciary started on June 13, 1997 when the Parliament of Georgia adopted the Organic Law on General Courts. The reform aimed to implement the principle of the division of power which is endorsed by the national Constitution and also to establish an independent judiciary to ensure balance among the branches of state authority.<sup>2</sup> Unfortunately, this reform did not produce the results that the reform had envisaged. Numerous problems accumulated in the judicial system and brought negative results.

A new phase of reform in the judicial system started in 2005. A new concept of the reform was elaborated and new priorities were set out.

This report shows important legal and political events and events involving judges and how these events influence accountability, effectiveness and independence of the judiciary. The report defines aspects of court independence where a setback was observed; it also shows where the reform failed or where the reform influenced the situation insignificantly in this field. Our conclusions and analysis are based on investigations by journalists that were carried out in 2008-2009 in Georgia and also on articles by journalists, which were prepared during these investigations by journalists. About 100 interviews were taken from attorneys, representatives of non-governmental organizations and state bodies during the investigations by journalists.

We hope that the analysis of the Georgian judiciary will help to fill in the gaps and improve the practice in the judicial system.

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<sup>1</sup> Organic Law of Georgian on General Courts was adopted by the Parliament of Georgia on 13.06.1997

<sup>2</sup> See more on the website of Supreme Council of the Ministry of Justice of Georgia <http://hcoj.gov.ge/?l=2&i=60>

## Positive Trends in the Reform

There were several important positive steps made in the course of the reform:

- The situation has become better in terms of maintaining order in court hearings. The Organic Law of Georgia on General Courts introduced the position of a bailiff to maintain order in general court houses and to support the unrestricted implementation of justice. The mere presence of bailiffs with uniforms in court houses created a better environment there;

One of the indicators of the improvement of mechanisms in the struggle against corruption in the judicial system is the provision of social guarantees to judges. Judges received a mere 30 GEL salary per month before 1999; there had been no technical equipment for the effective and flexible administration of justice in court houses. It was difficult to struggle against corruption in this situation. Now the minimum salary of the judges of general courts is 1,550 GEL and the maximum is 4,100 GEL. The salaries of the general court administration officers and supporting staff were increased as well. The minimum salary of the court administration officers before 2007 had been 70 GEL and the maximum – 250 GEL. After January 1, 2007 the minimum salary has become 140 GEL and the maximum – 1,250 GEL.

- The existence of speedy justice by qualified judges is essential for restoring violated human rights. A functional judiciary and the introduction of effective mechanisms of administration, improvement of the rules of court proceedings is important for achieving this goal. New forms of proceedings were introduced in the course of the judiciary reform which reveal the reasons for delay in the adjudication of cases. Important amendments were introduced to legislation regarding procedure. In particular, the procedures for adjudicating cases became simpler; judges got the opportunity to use flexible and effective legal mechanisms to avoid delay in hearing cases;
- Much attention is paid to the improvement of the technical equipment in court houses and therefore, to provide better working conditions to judges and court administration. The court houses were in bad conditions before the reform. In the course of reform court houses were renovated and court rooms were better furnished.

## Problems regarding Court Independence

It is a problem that judges fail to be impartial in their verdicts. During our trial monitoring we ascertained that judges mostly render independent verdicts in civil cases but they subordinate to the pressure from the executive branch of government and the prosecutor's office when it comes to administrative and criminal cases. Independent court decisions in criminal cases are an exception rather than a rule. This allegation can be proven by the very small number of acquittals and the verdicts that mostly match the request of a prosecutor.

The problem of frequently using detention during pretrial investigation still is observed. The monitoring shows that the hearing by the judge of the prosecutor's motion is a mere formality because the judge follows the demand of the prosecutor's office either way. In fact, the court is just a public notary because the only role it has is to endorse the decision of the prosecutor's office. Judges do not adjudicate cases independently.

The court and the prosecuting body are obliged to start adjudicating the case on pretrial stage from the least restriction necessary and only later discuss using a more severe restriction against a suspect. Pretrial imprisonment must be used as a last resort and only when other more simple means are ineffective. The Georgian practice and the analysis of court decisions show that courts often rejected these rules. Often, courts impose the burden of proof on the defense and uphold the request of the prosecutor without protest and without adjudicating the case in detail.

This can be proven by several examples which will be given later. In fact, there are very few instances when the court made the decision other than the one demanded by the prosecutor's office. This can be considered a violation and rejection of the law and the principle of fairness.

**According to current legislation, a bail shall be transferred to state treasury's account only after the court files a verdict that the suspect must pay the bail. According to Criminal Procedure Code, the judge is authorized to uphold fully or partially a prosecutor's motion about pretrial proceedings or free the accused before the trial.**

The example we provide here shows that the prosecutor made the accused pay the bail before the judge adjudicated the prosecutor's motion to require bail:

### **Case of Zaza Lazashvili and Giorgi Chakvetadze<sup>3</sup>**

Officers from Gurjaani district police department arrested Zaza Lazashvili and Giorgi Chakvetadze on July 22, 2009. The prosecutor charged them for hooliganism. According to criminal case materials, Lazashvili and Chakvetadze insulted Nika and Natia Jgharkavas. On July 24 investigator Zakaria Kikilashvili applied to Gurjaani District Court with two motions which had been agreed with prosecutor Giorgi Kokiashvili. One motion was on releasing Lazashvili under bail of 5, 000 GEL in pretrial period and the second one was on releasing Chakvetadze under bail of 3, 000 GEL also in pretrial period.

Mother of the detainee Zaza Lazashvili, Anna Lazashvili paid 5, 000 GEL for the criminal case N 023090294 at Gurjaani branch of the People's Bank on July 24. 3, 000 GEL was paid on the same day for Giorgi Chakvetadze as well. The payments can be confirmed by receipts. The parents of the detainees paid the abovementioned bails after having negotiated it with prosecutor Giorgi Kokiashvili.

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<sup>3</sup> See more on <http://www.humanrights.ge/index.php?a=article&id=4101&lang=en>

On July 24 Gurjaani District Prosecutor's Office cancelled its request to the court to bail Zaza Lazashvili and submitted a new motion to the court later. The prosecutor's Office requested imprisonment of Zaza Lazashvili. However, the mother of the detainee had already paid 5, 000 GEL as a bail.

Anna Lazashvili claimed that Ilia Otarashvili, the head of the Investigation Division of the Gurjaani District Police Department demanded to imprison her son instead of bailing. She also alleged that Ilia Otarashvili had personal problems with Zaza Lazashvili because of their business activities. "Ilia Otarashvili had Poker Club in a hotel building in Gurjaani. My son had same business in Gurjaani and Otarashvili considered him to be his business rival. Ilia Otarashvili threatened my son several times with creating problems to him and finally he succeeded," Anna Lazashvili.

Judge at the Gurjaani District Court Shalva Mchedlishvili discussed the motions of the investigator Zakaria Kikilashvili at 2:10 pm on July 25. He bailed Giorgi Chakvetadze with 5, 000 GEL and sentenced Zaza Lazashvili to two months of imprisonment.

Before having declared the decision, during the adjudication of the motion, Noshrevan Kelekhsashvili, Lazashvili's attorney stated that his client had already paid 5, 000 GEL but the court did not pay attention to this. The judge did not pay attention to how and why the accused Lazashvili had paid a bail before the court would have adjudicated the bail motion.

A bail is paid only under the subsequent court decision. The court decides according to the graveness of the crime and financial conditions of the accused.<sup>4</sup> This directly indicates that the court adjudicates upon pretrial proceedings formally and is placed under the pressure from the prosecutor's office.

### **Case of Bidzina Sepiashvili, Spartak Saltkhutsishvili<sup>5</sup>**

On January 4, 2009 junior police Leutenant Davit Khizanishvili and police Colonel Nugzar Menteshashvili, both investigators of Gurjaani District Division of Ministry of Internal Affairs were patrolling near so-called "Grandfather's Garden" in Gurjaani at about 19:00 p.m. Drunken Bidzina Sepiashvili, Spartak Saltkhutsishvili and Giorgi Otiashvili were walking opposite the way where the patrol police officers were standing. Sepiashvili and Sakhltkhutsishvili decided to obstruct public order and therefore, approached police officer Davit Khizanishvili and assaulted him. Khizanishvili tried to defend himself but Spartak Saltkhutsishvili grabbed him from behind, tied him and started beating Khizanishvili in face and body. Police officer Nugzan Menteshashvili said several times during the incident that they were police officers but the assaulters did not pay attention to this. They continued beating Davit Khizanishvili. Consequently, he received severe body injuries. The police officers were resisting the assaulters for 10-15 minutes. Then citizens applied to a police department to stop assault against the two police officers, - reported Vakhtang Ruadze, a detective-investigator of Gurjaani District Division of MIA.

Investigator Vakhtang Ruadze charged Bidzina Sepiashvili and Spartak Saltkhutsishvili under Part II of Article 353 of the Criminal Code of Georgia. This article covers the following crime: resistance to a police officer or an official aiming at hindering, stopping or changing the course of implementation of his duties which is to maintain public order, also forcing a police officer or an official using violence or a threat of violence to commit an illegal act.

In this case Davit Khizanishvili who is in fact a village Velistsikhe District representative was not obliged to maintain public order on the alleged crime scene and he was not doing it. It is not indicated in the case materials what kind of public order Khizanishvili was maintaining.

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<sup>4</sup> See Criminal Prosecure Code;

<sup>5</sup> See more on <http://www.humanrights.ge/index.php?a=article&id=3485&lang=en>

The prosecution motioned two months of pretrial imprisonment for the detainees. The ground for this motion was a possibility of coercion on witnesses from the accused side, hiding or continuing their illegal activities.

Besides, the courts do not even examine the severity and amount of a prosecutor's office motioned pretrial detention period and do not put it in accordance with the law. We mean rejection and violation of Part II of Article 168 of the Criminal Procedure Code of Georgia by Georgian courts. According to this article, court is obliged to take into account severity of a charge and an accused's amount of property when making a decision on bail and on the amount of bail. The example given below proves the information given above (however, there are many similar facts in the court practice).

### **Case of Giorgi Jikuri<sup>6</sup>**

Giorgi Jikuri is a third-year student from Dusheti district. He lived at his aunt's house in Tbilisi. The police arrested him on October 22, 2006 near the Railway Station when he was buying a mobile phone.

**An Extract from Giorgi Jikuri's Interrogation Record (case # 063127):** "I left my aunt's house at about 12:00 noon on October 22, 2006 and went to a bazaar near the Railway Station. I intended to buy a mobile phone and was looking for a proper one. A stranger approached me and offered to buy a mobile phone which he promised to bring in half an hour. He also asked to pay 20 GEL in advance. I trusted him and gave money because he left his ID card to me. As soon as this person left, several police officers came up and arrested me."

Giorgi Jikuri was searched on the detention scene. However, law enforcers could not find anything interesting except for money and student's certificate. The house of his aunt, Elza Jikuri, was also searched where police could not find a mobile phone either.

On October 18<sup>th</sup>, 2006 a person named Giorgi Berikashvili reported to the Mtatsminda-Krtsanisi Police Department that he had lost a mobile phone "**Motorola V3**" with the identification code **IMEI – 355537-00-446719-9** (a mobile phone's individual code) on October 17, 2006 and reported the lost phone the next day. The police looked for that telephone first in the pocket of Jikuri and then at his aunt's place.

On October 20, 2006 a person named **Ilya Rogava** reported to the Tbilisi Main Division of the Ministry of Internal Affairs that he found a mobile phone on a staircase at the Philharmonic Building on October 20. He wanted to know whether the phone was stolen and he could buy it.

One paragraph from the testimony of Rogava is particularly interesting: "I know who purchases stolen cell phones in Tbilisi. It is near the shopping mall Pasazhi. I am ready to cooperate with the investigation regarding the issue."

According to case materials Rogava started to cooperate with the investigation based on the following plan: He went to a bazaar near the Railway Station with Berikashvili's "Motorola" and offered Giorgi Jikuri to buy it. He was recording their conversation. Police officers were standing close and waiting for Jikuri to buy the stolen phone so that then they could arrest him.

This secret audio-recording was inserted into the case materials as convincing evidence. L. Darakhvelidze, investigator at Tbilisi Main department of Internal Affairs and M. Tsiklauri, prosecutor at Tbilisi Prosecutor's Office wrote in the solicitation (27/7-4-) to G. Shavliashvili, chairperson of the Collegium of Criminal Cases at Tbilisi City Court that "crime committed by Jikuri is confirmed by an interrogation record of the victim; testimonies of witnesses, records of personal search and audio-video recordings."

**The court upheld the motion of a prosecutor on imposing bail on Giorgi Jikuri but instead of 100, 000 US Dollars which was requested by the prosecutor, the court verdicted paying 100, 000 GEL bail.**

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<sup>6</sup> <http://www.humanrights.ge/index.php?a=article&id=3477&lang=en>

Giorgi Jikuri who is only a student, was obliged to pay 100 000 GEL within 14 days according to the verdict.

Giorgi Jikuri's case is interesting because we assume that it is a part of a bigger operation during which 9 persons were detained in several days. All of them were charged for purchasing or selling a stolen mobile phone. All 9 were ordered to pay 100, 000 GEL bail and sentenced to approximately 1-1 and a half year of imprisonment. All nine stories are completely similar.

### **Mukhrovani Case<sup>7</sup>**

The story of a failed coup begins on May 5, 2009. The Ministry of Internal Affairs of Georgia [the "MIA"] publicized video footage on the alleged mutiny. According to this footage in the morning of May 5 the Mukhrovani battalion declared its disobedience. The soldiers had the tanks reved up and the battalion was on a high alert.

Gia Ghvaladze, the former head of a special task force of the Ministry of Defense (in the 1990s) and Koba Otanadze are in the video and they are talking about the organization of the mutiny.

According to the Ministry of Internal Affairs, the mutiny was agreed upon with the "Russian circles" (they received both instructions and money from Russians) and at a minimum aimed at disrupting the NATO military exercises and at a maximum aimed at organizing a full-scale military 'mutiny' in the country. Law enforcement officers arrested most of the suspects on May 5. The persons suspected of having organized the mutiny however were arrested later in the late night of May 20.

According to the MIA the special operation activity was organized to detain the alleged organizers of the mutiny on the Tianeti Highway close to Tbilisi. The MIA informed that Gia Krialashvili, one of the suspects, died in an exchange of gun fire during the special operation activity. A forensic autopsy was carried out on the body of Gia Krialashvili while Otanadze and Amiridze were taken with serious injuries to Gudushauri Hospital. They were charged on May 21 in the hospital.

Before the suspects were arrested, the law enforcement officers detained family members of the suspects. On May 12, a week after the alleged Mukhrovani Mutiny, Nugzar Otanadze, the brother of the suspect Koba Otanadze, was sentenced to two months of pretrial detention charged with resisting the police.

On May 20, 2009 the special task force arrested Jimsher Otanadze; another brother of Koba Otanadze, and Gulo Daridze, Jimsher's wife and their 19-year-old son Giorgi. All in all, the law enforcers detained 11 relatives of Koba Otanadze. The police released Jimsher Otanadze and his family members without filing any charges against them.

The Ministry of Internal Affairs publicized the information that Gia Krialashvili, one of the suspected organizers of the Mutiny, died during the exchange of gun fire as mentioned above. His wife later told the print media outlets that the body of her husband did not have bullet wounds. She thinks that it is suspicious that his head was swollen a day after his body was brought home.

Most of the mutiny suspects were charged under Articles 315 and 316 of the Criminal Code of Georgia. It is noteworthy that article 316 deals with a crime committed only by one leader who grabs power illegally or displaces the military equipment illegally. Military equipment can be displaced by a group of soldiers under the order of a leader. Therefore, equipment displacement is a group crime. In this case 9 persons were charged under this article. This is when Article 316 does not deal with a group crime. Therefore, it is illegal to charge Khokhashvili under this article.

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<sup>7</sup> <http://www.humanrights.ge/index.php?a=article&id=4071&lang=en>

On June 2 Khokhashvili's attorney applied to the Tbilisi City Court to free his client from pretrial detention on bail. The case materials made 21 books. The attorney submitted the motion on bail at 11 a.m. The court verdict on inadmissibility of the motion had been ready by half past 5 the same day. Apparently, the judge was very quick to read 21 books in such a short period of time. Judge Goginashvili who ruled on the motion wrote in the inadmissibility verdict that "he read the case materials." The judge was obviously lying because it is impossible to read, even to look through 21 books in 6 hours. It was obvious that the judge rejected the motion without studying the case. The verdict was appealed in the Investigation Collegium of Court of Appeals. The Investigation Collegium left the decision of the court of first instance.

This example and many other ones prove that the court neglects imperative demands of law in terms of pretrial proceedings. Motions from prosecutor's office are often upheld without having normally adjudicated them and the courts impose burden of proof on the defense to prove that this or that measure should not be used against an accused. This is against the law.

## “Legalizing” the Prosecutor’s Office as a part of the Judiciary

Judges often render verdicts based on plea bargain agreements without adjudicating a criminal case comprehensively. This raises suspicion regarding independence of criminal proceedings and judiciary. Such agreements are in practice verbally agreed with the accused himself and defense is only involved often during signing official plea bargain agreement which contradicts the law on plea bargain agreement. Plea bargain agreement usually envisages the payment of large sum of money in exchange for easing of charges.

Initially when plea bargain agreement was introduced, there were two funds where the money from the agreements was transferred. The funds were not transparent. Now the money from plea bargain agreement is sent to the Ministry of Finance. The amount of money that the accused pay in the frames of plea bargain agreement is secret.<sup>8</sup>

Plea bargain agreement envisages the possibility of rendering a verdict in a case without adjudicating the case comprehensively. The plea bargain agreement is signed by a prosecutor and an accused. With this agreement we see a prosecutor as:

*A prosecutor* himself who investigates the case, collects evidence, imposes charge and starts criminal prosecution;

*A judge* who defines measure of punishment for an accused, decides upon lifting criminal penalty from an accused and presents this decision to the court for the endorsement;

*An attorney*: a prosecutor can request that the court decreases, diminishes or partially abolishes punishment.

Hence, court has in reality two choices: do the job of a public notary and endorse the plea bargain agreement without adjudicating the case comprehensively; or refuse to accept the plea bargain agreement which has not been observed so far.

The Georgian model of plea bargain agreement left judiciary without any function. With this model law enforcers received leverages for persecuting citizens and using unrestricted authority of using violence against citizens, thus, ignoring law. This allegation can be proven by following:

Prosecutor can request pretrial detention for any suspect. The legal practice shows that this demand is upheld almost always.

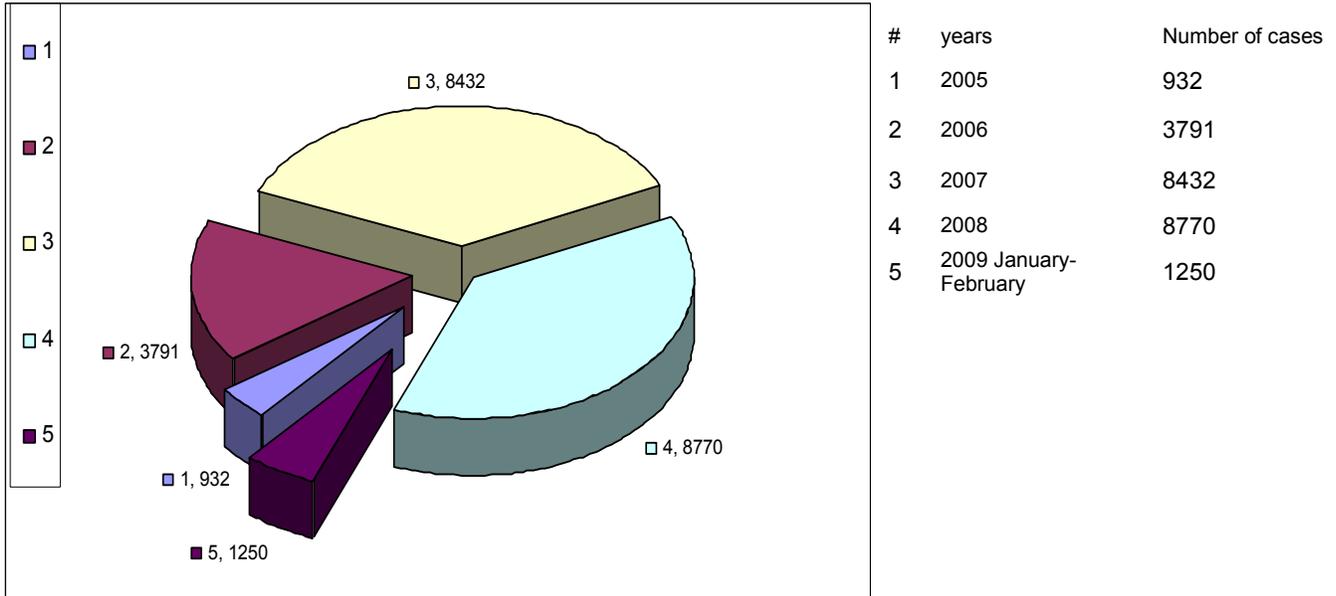
It might take years to adjudicate a case in all three instances of court (first instance, appeal court and Supreme Court). A prosecutor might force an accused to agree on a plea bargain agreement under the conditions that are profitable for the prosecutor by saying that if he does not agree on plea bargain agreement he might stay in prison for years;

- This can be evidenced by legal practice which shows that most of criminal cases end up with plea bargain agreement. [

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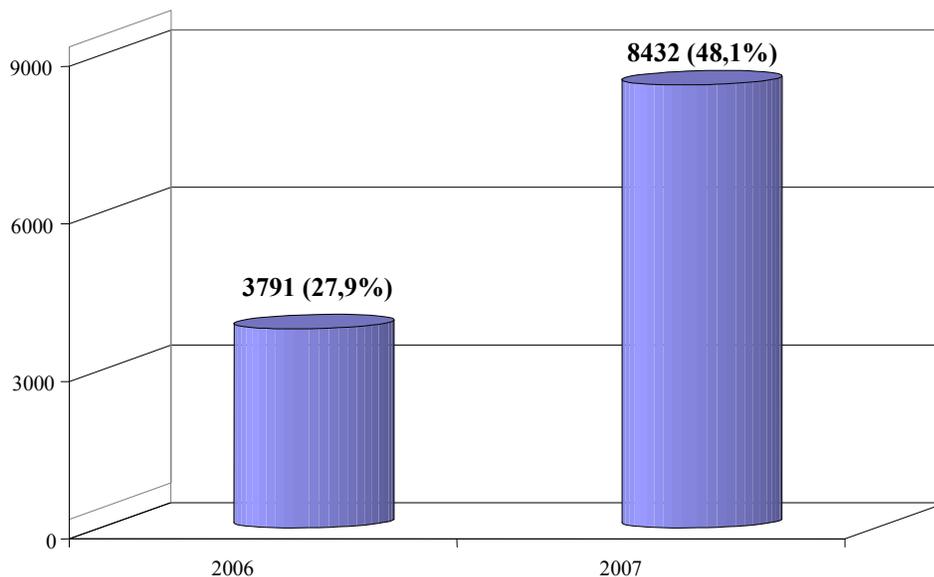
<sup>8</sup> Letters OL-635, OL-636 of Human Rights Centre

According to statistic information provided by the Chief Prosecutor's Office within the Ministry of Justice, in 2005-2009 (January-February 2009) a plea bargain agreement was made in 23,175 cases.<sup>9</sup>



In 2005- 2009 (including only January – February 2009) 64,217 cases were submitted to general courts out of which 23 175 ended up with plea bargain agreement which is 36 % of all cases submitted. The comparative analysis of 2006 and 2007 data shows that the number of plea bargain agreements has increased.

Cases on which verdict of a plea bargain agreement was filed in courts of first instance ( percentage from all cases)



**The Plea bargain agreement which was introduced in Georgian legal system in 2004 places the Georgian citizens in unequal conditions. Judges and prosecutors can sign or cancel plea-bargain according to their own sympathies or other motivations.**

<sup>9</sup> The Human Rights Centre's report on Plea Bargain

This can be evidenced by two examples:

### **Case of Giorgi Chikovani<sup>10</sup>**

According to the prosecutor's office's bill of indictment, Giorgi Chikovani, an operative employee of the Rapid Reaction Unit of the Adjara Autonomous Republic's Main Department of the Constitutional Security Department, rushed into the house of S.Ts. on August 28 and brutally raped her. "Chikovani called Ts. several times on the phone and offered sexual intercourse.

The woman turned off the phone and hoped that Chikovani would not bother her again and then went to bed. Chikovani then decided to break into the woman's house and rape her. He had put on a mask, climbed up the fourth floor and entered the house by a balcony. He removed the mask, threatened the woman with knife but despite this she continued to refuse on sexual intercourse. Then he brutally raped her. He also beat the victim, which then resulted in a brain concussion; her lower jaw was broken as a result, and both her eyes were bruised. Giorgi Chikovani overcame S.Ts. with greater force and raped her," reads the bill of indictment.

Although, Chikovani was charged for having committed a particularly grave crime, the state prosecutor and Chikovani signed a plea-bargain agreement at the end of May 2008.

### **Case of Tabagua<sup>11</sup>**

Citizen Zaur Gonashvili was abducted and taken to the Pankisi Valley; he was injured in the process. Merab Tabaghua was the organizer of the abduction. However, the prosecutor proceeded to sign a plea-bargain deal with him and the accused was released on a bail of 30, 000 GEL. However, initially when the attorney of the accused requested the bail of 50 000 GEL, the court refused under the supposition that Merab Tabaghua would interfere the investigation. Nevertheless, later plea-bargain was arranged and he was released on a bail of 30 000 GEL, as mentioned above.

### **X Case<sup>12</sup>**

A person stole 151, 2 GEL- cost fuel. The prosecution considered the stealing a serious damage because it exceeded 150 GEL. A plea-bargain agreement was signed with this person. According to the agreement, the person had to pay 10, 000 GEL and spend four years in prison. He was obliged to stay in prison for two years and a half and if he behaved well in this period, he will be released under condition for the rest of the sentence term.

These examples show that conditions for making a plea bargain agreement is vague and not precise. On one had a person who stole 151 GEL-cost fuel had to pay 10, 000 GEL and on another hand another person who abducted and wounded a person – 30, 000 GEL for freedom. A victim is not protected since he does not have any guarantees that a criminal who tried once to kill him, will not try it again.

According to the practical application of a plea bargain agreement we conclude that the crimes which cannot fall under a plea bargain agreement should be defined.

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<sup>10</sup> <http://www.humanrights.ge/index.php?a=article&id=2850&lang=en>

<sup>11</sup> <http://www.humanrights.ge/index.php?a=article&id=2850&lang=en>

<sup>12</sup> <http://www.humanrights.ge/index.php?a=article&id=2850&lang=en>

It should be considered what the legal benefit is to make a plea bargain agreement on serious crimes.

*Here is the example of what happened to a judge who did not uphold a prosecutor's request:*

### **Case of Giorgi Gogichaishvili<sup>13</sup>**

The Supreme Council of Justice of Georgia initiated administrative proceedings against Giorgi Gogichaishvili, a judge of Telavi District Court. Judge Gogichaishvili did not satisfy a motion of the Kakheti Regional Prosecutor's Office several days ago and filed a verdict of 20, 000 GEL bail on Kote Kapanadze instead of sentencing him to 2 months of pretrial detention which had been motioned by the prosecution.

Later, the Kakheti Regional Prosecutor's Office appealed the order at the Tbilisi Court of Appeals and requested to annul it. The Court of Appeals upheld the request and also sentenced Kote Kapanadze to 2 months of pretrial imprisonment.

Procedurally, the Supreme Council of Justice launches disciplinary proceedings against a judge based on a complaint submitted to the Council. The Council keeps the information about the disciplinary proceedings against a judge confidential.

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<sup>13</sup> <http://humanrights.ge/index.php?a=article&id=3948&lang=ge>

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Creation of a new Criminal Procedure Code was envisaged by the judicial reform which started in 2005. It was hoped that the new Criminal Procedure Code would change fundamentally the course of court hearings and the principles of adjudicating cases. It was thought that this reform would be the basis for the creation of a fair and effective criminal court system that would instill confidence in society (The draft Criminal Procedure Code has been adopted by the Parliament of Georgia in two hearings. It is not likely that changes will be introduced into the draft for the third hearing). Provision for a plea bargain agreement is included in the draft Criminal Procedure Code almost in the same form as is provided in the current Procedure Code. The provisions of the new Procedure Code increases the chance of using plea bargain agreement illegally due to these circumstances:

The draft Procedure Code covers a plea bargain agreement in its Chapter XXI. The difference between a plea bargain agreement in the current and draft Procedure Code is very little. However, there are several very slight differences :

1. According to the current Procedure Code, the court can suggest to the prosecution and the defense to make a plea bargain agreement before court debates on the trial . The new draft code does not say that. It only indicates generally that a court has the right to suggest to the prosecution and the defense signing a plea bargain agreement. The draft code does not specify when a judge can suggest a plea bargain agreement. So a plea bargain agreement can be agreed before a judge issues a final judgement;
2. Part IV of Article 6793 of the current Procedure Code prescribes that a court discussion about a plea bargain agreement shall be transcribed word for word in a court hearing on the record. The new draft code does not give such a prescription. This can be considered as a fault because a word for word transcribing creates a possibility to check the objectivity and fairness of a court discussion of a plea bargain agreement;
3. Part III of Article 6797 of the current Procedure Code states that the court judgment regarding whether to endorse a plea bargain agreement shall be reconsidered in accordance with the general rule if a new state of affairs is discovered. This provision is not contained in the draft Procedure Code;
4. According to the new draft Procedure Code, a prosecutor is not obliged to inform a victim that a plea bargain agreement was signed with an accused, though this was prescribed by Part I of Article 6788 of the current Criminal Procedure Code. This amendment seriously violates the interests of a victim. This amendment is only a part of the politics of the authors of the draft code which is to exclude a victim from the list of case sides. These are the four changes that will be introduced into a new Criminal Procedure Code concerning a plea bargain agreement. No gaps regarding plea bargain agreement were filled in with the new code. The legal and political context we have now in Georgia leads us to assume that plea bargain agreements will continue to be used with serious violations of constitutional and international human rights.] The problems we have discussed above will not be addressed by the new Criminal Procedure Code.

Apart from the problems mentioned above, there emerged a new and most important problem which stems from the “politics” of a new draft code. The new draft code increased the rights of the accused in criminal trials. Therefore, some changes have been made in a number of aspects of

criminal procedure—eg., m.g. a witness is not obliged to testify during a preliminary investigation, only during a trial. The current code makes it difficult for the accused to obtain evidence.

According to new draft code material obtained during preliminary investigation is not considered as “evidence” as such - evidence are the facts and information that are presented to and examined by a court at trial. Under the draft code interrogations may not be held and witnesses shall not be obliged to testify during the preliminary investigation. Accordingly, a preliminary investigation can be held without a comprehensive and objective investigation and study of the crime. The circumstances of the case can not be reproduced exactly during the preliminary investigation because a witness is not obliged to testify then.

Also when a plea bargain is before the court prior to trial a court does not have the right to study a case comprehensively or to interrogate witnesses to obtain additional pieces of evidence or to help the sides to obtain the evidence. Therefore, a judge relies only on the evidence that is presented by a prosecutor in a motion for a plea bargain agreement. The court does not examine that these evidence; it only checks whether the material was obtained legally (and there is no specific article in a chapter of the draft code on plea bargain agreements in which strictly defines an obligation to check the legality of material). This violates one fundamental criminal law principle which says that a court judgment, especially one which convicts a person must be based only on the evidence that is examined during a court hearing. In adjudicating a plea bargain agreement the court does not discuss and examine the evidence. Therefore, two problems might emerge: one – the prosecution might coerce an accused to plead guilty without having violated the law and force him to agree with the case materials which are not investigated comprehensively, plead guilty based on one-sided evidence and sign a plea bargain. For instance, this might happen if prosecution puts an accused in a hopeless situation, gives the accused false information and so on. It is possible that a person might be unable to protect his rights due to an incomplete defense and adversarial trial, might subordinate to the pressure from the prosecution and agree upon “convenient conditions” and term of imprisonment.

The second problem that might emerge is that the court might be deceived and interests of justice will be violated, for instance when a person claims to be guilty but in fact he is innocent. The court is deceived with the mere confession of a person and he is convicted for a crime he has not committed. Therefore, execution of justice will be hampered. This might be caused by the fact that for e.g. the defense did not find evidence proving the innocence of the suspect, the suspect created such a situation that his case is not adjudicated comprehensively and the evidence that are obtained prove his guilt. The fact that a plea bargain agreement is inconsistent with the other provisions of new draft procedure code increases the possibility that the prosecution will use a plea bargain agreement improperly which might not only violate the rights of the accused but also might result in the court making a mistake and thereby infringing public interests because justice would not be executed and a criminal would not receive proper punishment. It is possible that by making a plea bargain agreement, especially under this draft code, “Themida become blind” indeed due to bad practice and amendments to the law because there are gaps in law and also rules regarding plea bargain and amendments to the Procedure Code are inconsistent. This is unacceptable and contradicts the principle of a legal state and a fair trial which is prescribed by our constitution.

Apparently, we should not expect any positive changes in the future in this regard. This part of the reform might bring negative results.

## Transparency and Impartiality of the Judiciary

In July 2007, the parliament of Georgia introduced an amendment to the Law on General Courts on the third hearing. 117 MPs voted for the amendment and 18 against it. According to the amendment photo-video and film recording is forbidden in a court house and a court room. This was done to prevent provocations and staging performances in front of cameras and to support the adjudication of cases impartially. However, this decreased the transparency of proceedings and therefore decreased public confidence in the judiciary.

The representatives of the judicial system consider this amendment an important achievement. They think that “court hearings are held in a quieter environment after video recording was banned. They say that journalists attend court hearings but they do not have cameras with them but the people who regularly attended court hearings to stage a show there do not go any more and the situation has become calmer” and “this influences the court work positively.”<sup>14</sup>

However, this is not true: In a criminal case # 1/122-08, a defence motion to Court of Appeals to allow journalists to make audio recording of a court hearing was rejected by the court without presenting any grounds for the rejection. So a legal norm from Organic Law on General Courts<sup>15</sup> which says that the court (judge) allows audio recording on court hearings is a mere formality.

The law allows audio recording and making stenography on court hearings. However, a judge has the right to forbid the recording if he has reasonable grounds for it.

The abovementioned amendment limits the principle of publicity prescribed in Article 14 of Criminal Procedure Code. Each court hearing should be open and transparent. There are some cases when court hearing should be closed but even in cases of closed hearings, judgements should be announced publicly. A court hearing is public when a court hearing is recorded on video or on photos under a motion of a side which is interested in court hearing. Otherwise, there will always be a doubt in the society that the scenes that were publicized by the court are edited and do not show the reality.

Judicial transparency, publicity and contact with the society should have been main precondition for the success of the reform. Relations between court and the society should be vaster and multilateral. Society must know more about the judiciary. Society should actively discuss all changes of the judicial system. Society should feel that it is involved in the course of reform. Only then it will have sense of responsibility towards this reform.

### Case of Guram Sharadze<sup>16</sup>

Academician Guram Sharadze was murdered at the corner of Melikishvili and Shanidze streets on May 20 2007. He was shot three times and died on the place. The accident happened at about 8:30 pm and there were people in the street who witnessed it. Patrol policemen Levan Bochorishvili and Robert Paniev also were among them. The assassination of famous scientist was recorded by a video-eye installed on the building of Insurance Company “Aldagi” in Melikishvili Avenue.

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<sup>14</sup> <http://www.geotimes.ge/index.php?m=home&newsid=9333&lang=geo>

<sup>15</sup> Article 12 (4) of the Organic Law on General Court

<sup>16</sup> <http://www.humanrights.ge/index.php?a=article&id=3479&lang=en>

Court did not consider the video-recording from the camera installed on the Insurance Company "Aldagi" as a proof though it shows the murder of Guram Sharadze. The argument of declining the recording as a proof



was low quality of the video-recording for expertise. Nevertheless, the recording proves that the real murderer is completely different person from Barateli. The video shows the following: a man with grey hair, Guram Sharadze, is followed by a tall, athletic man with dark black hair who is completely different from Barateli. Barateli is short man of about 1, 65 meter while the murderer is over 1, 75 meter; he was taller than Sharadze. The man appears in the recording at 8:30:56 pm. He shot the man with grey hair at 8:31:28 pm. It must be noted that, in 32 seconds a car appears on the video that remains there until 8:34:46 pm. A man is getting out of the car who is speaking with another person who approaches him.

If the video-recording were a proof, it would reveal one more detail. Giorgi Barateli said in his testimony that he was walking in the street when he saw Guram Sharadze walking opposite him; and he even passed by him... and then..."I stopped for a while, then turned back, followed him and shot."

Tbilisi City Court, with Badri Kochlamazashvili as a chairperson, concluded the reason for Guram Sharadze's murder: He said that Giorgi Barateli shot Sharadze because the former had some argument with him. Guram Sharadze and his son, Giorgi Sharadze, created some problems in his personal life. Several years ago, Giorgi Barateli and Giorgi Sharadze were abroad together. Sharadze left Barateli there and arrived back to Georgia. Barateli had not planned the murder in advance. He made decision suddenly when he met Guram Sharadze in Melikishvili Avenue accidentally.

The court concluded the final reason for the murder based on Barateli's confession (also based on the testimonies of the witnesses mentioned above though their statements are full of contradictions). The confession of Barateli is not reinforced by valid arguments and there is one question that is still unanswered: Why did the court consider his confession as evidence?

There are witnesses who allege that Giorgi Barateli went to Giorgi Sharadze in Switzerland in 2000. It was planned that Barateli would be a cameraman for a documentary film on Noe Zhordania, the first head of the Republic of Georgia in 1918-1921 and he would be paid for his job.

Mamuka Barateli, Giorgi Barateli's brother and Roland Grikurov, Giorgi Barateli's uncle are the ones who confirm that Giorgi Barateli went to Switzerland to make the documentary film.

There is Giorgi Barateli's secret audio tape in the case, where Barateli names another reason for going to Switzerland: "I met Giorgi, his (meant Guram Sharadze's) son in 1996. We became friends, and then he invited me to Switzerland. He said that he had divorced his wife and wanted a friend beside him. So he asked me to visit him in Switzerland."

The fair trial should have found out if Giorgi Sharadze was really shooting a film on Noe Zhordania in 2000 or not; the court should have ascertained if there was a special project on making the documentary film and the project details, such as the salary of camera man if he was really included in the project. In fact the court could have contacted the Georgian Consulate in Switzerland that really had this information or could have found the former consul of Georgia working in Switzerland in 2000. Giorgi Sharadze was a culture envoy in the Georgian consulate in Switzerland and the consul would recall the projects Sharadze was implementing by all means. Contacting and interrogating the consul and the employees of consulate would give a clear view of Giorgi Sharadze's psychological conditions of that time. This is very important because Barateli is accusing Giorgi Sharadze of planning his (Giorgi Barateli's) murder in extremely fierce forms: cutting off kidneys and organizing their selling!

The court did not consider it necessary to find the person who introduced Giorgi Sharadze and Giorgi Barateli to each other. This person was mentioned in the statements of Giorgi and Mamuka Baratelis, sons of Guram Sharadze. Why did not the court wish to find this person? Would this person prove Baratelis' statements? Surprisingly Barateli's attorneys filed a motion of providing this person as a witness to the court. The court imposed the responsibility of presenting this witness on a trial on Barateli's attorneys. However, later attorneys refused on their motion alleging that they could not find the witness even though all his passport data were known. However, they did not present any piece of evidence, for instance their application on the information about the witness to a district police inspector that would prove that they were looking for the witness.

It is notable that the court did not pay attention to the testimony of witness Aleksandre Pirumov: "On May 14, 2007 Roland Grikurov, the uncle of Giorgi Barateli visited my house and brought Giorgi Barateli with him. He asked me to let Giorgi live in my house for a while. He explained that Giorgi's aunt was ill and he could not stand her being injected. I agreed to host Giorgi for a while. He was working for TV Company Rustavi 2 at that time. He used to leave house at 9:00 a.m. and come back at 3:00 p.m. I have never seen a weapon in his hands but I remember that he asked me once for a piece of cloth to clean something. At about 19:20 p.m. on May 20 someone called him and he left the house very quickly. He told me that he would be back soon. Giorgi spoke on the telephone in a loud voice and shouted at the person on the other end not to call to our house any more.

Who called Giorgi Barateli? Where did he go so quickly after the telephone conversation? The court did not ask these questions. This is very important issue because Barateli left the house several minutes before Sharadze was killed. Why and under whose order did Barateli move from his house before Sharadze's murder? Barateli left the house (between 7:00 pm. and 8:00 pm.) when Guram Sharadze left Public Library (he used to work till late evenings in the library as usual) and walked to his house on Chavchavadze Avenue. The period between the time when Barateli left the house, according to Pirumov, and the time when Sharadze was killed was enough for Barateli to reach the place where Sharadze was killed. Who brought Barateli to the crime scene and why?

### **Case of Gamtsemlidze<sup>17</sup>**

This is how the incident of May 8 is described in the case materials: On the night of May 8 Vakhtang Abuashvili and Levan Jinikashvili, patrols were patrolling in Vera district, Tbilisi. They noticed a BWM car that was driving fast. The police officers demanded that driver stopped. The driver did not obey. The driver was first driving to Chonkadze Street but then changed the rout to Zandukeli Street.

He clashed into a pavement border near McDonald's. The driver rushed out of the car and climbed on the roof of a nearby standing garage in the yard on 2 Zandukeli Street. The patrols (Abuashvili-Jinikashvili) followed the driver and when he rushed out of the car Abuashvili ran after Gamtsemlidze.

It is said in the bill of indictment that Abuashvili was suspecting that Gamtsemlidze was armed. Therefore, he took out his gun, charged it and then tried to arrest Gamtsemlidze. He shot a Makarov hand gun imprudently once. As a result of this Gamtsemlidze was shot in neck. The wound turned out to be deadly. Gamtsemlidze died before he was be taken to the hospital.

If Abuashvili had proved that he had warned the fugitive before shooting the judge should have accused him of not following the procedures prescribed by Part V of Article 13 of Law on Police. It is indicated in the law that "before using a hand gun a police officer shall give verbal warning about the usage of the weapon. A warning shot can be made if necessary."

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<sup>17</sup> <http://www.humanrights.ge/index.php?a=article&id=3517&lang=en>

Another interesting detail from Abuashvili's testimony, when Gamtsemlidze was caught in a deadlock and he could not escape, he returned and went to Abuashvili's direction with a gun in his hand. He said: "Suddenly Gamtsemlidze ran out of the impasse. He rushed to me. We had a sort of a fight. I grabbed his right shoulder with my left hand and made him turn. Now I was looking at his back. I again demanded that he surrendered. However, he continued resisting and tried to slip off. Suddenly I heard the sound of a gun shot. He stopped resisting and fell down."

Otar Teneishvili lives in one of the apartment buildings in the yard where Gamtsemlidze was shot at. During preliminary investigation he testified that when he heard shooting he rushed to the window. The crime scene was well lighted by lamp posts and he saw vividly a body lying in front of a garage. He said that the yard was so well lighted that law enforcers even wrote a protocol in this light without any problems on that night. Therefore, his testimony should be considered as convincing.

This is what Otar Teneishvili said in his interview: "I went to bed late that night. Had I hardly fallen asleep I heard crashing. I rushed to the window immediately. I saw two men running from McDonald's up to Zandukeli Street. Suddenly I heard a shot. One continued running and the other tried to climb up the garage roof; he walked a bit and then fell from the roof. I put my clothes on and looked into the window again. When I looked outside I saw that Gamtsemlidze was being dragged by three police officers to a dental clinic."

Teneishvili said the same on the court hearing but the prosecutor noticed some inconsistencies. He demanded that the first witness testimony was published. It turned out that Teneishvili said in his first statement that a person lying at the garage was slightly moving. He said he did not see the process of moving Gamtsemlidze from the place. He did not say in his first testimony that he saw police officers planting weapon on the garage roof.

You may think that Teneishvili testified in favor of the victim on the trial but you are wrong. In fact changing some details of testimony served as the ground for the judge to dismiss Teneishvili as a witness. Consequently, the victim's side lost the only witness.

According to Georgian legislation if a witness changes testimony on the trial the side of accusation or the side of defendant must file a motion to the judge to impose criminal liability on the witness. This did not happen in this case. The judge did not pay attention to the serious mistake of the investigation. According to Georgian legislation when a person is killed the crime scene is inspected by the prosecutor's office. However, in this case the crime scene was divided into two: the yard which was searched by the prosecutor's office and the garage roof which was inspected by the representatives of Ministry of Internal Affairs of Georgia. Why? Maybe because the representatives of the prosecutor's office refused to plan or hide the evidence but agreed to cover the MIA. In any case, Gamtsemlidze's sun glasses disappeared after the search. The investigator was only reprimanded for this nothing more.

When the judgment was declared the audience in the court room realized that the case was in fact settled in favor of the murderer. It is fair to say that two years of prison term for killing a person is very light punishment amid the zero tolerance politics that was declared by the president of Georgia against criminals. Vakhtang Abuashvili was sentenced to two years of prison and 2 years on probation which had been requested by Prosecutor Kote Nikatsadze. The court fully satisfied the prosecutors demand.

The crime qualification was disputable. Initially, the case was launched based on Article 114 (murder of a suspect by using excessive force during the arrest) of the Criminal Code of Georgia; However, then the case was qualified under Article 116 (murder with gullibility) of the Criminal Code.

The fact that the judge did not return the case for investigatory review has its justification: the current legislation does not allow a judge to return the case for investigatory review. However, the prosecutor has the right based on Part V of Article 446 of the Criminal Procedural Code of Georgia (the court had had the right of returning the case to the investigation for the revision before March 25, 2005 based on Part I and II of Article 452 of the Criminal Code of Georgia until the amendments were introduced. The experts say that this is a serious problem of current legislation because a judge is unable to return the case if a prosecutor does not want to.)

## Court Verdicts and Coercion

Despite constitutional and other legal guarantees, problems regarding independence of the judiciary, coercion on courts by a prosecutor's office and executive governance of courts are still observed. "A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law."<sup>18</sup>

Today in Georgia private property owners: shareholders, private persons and legal entities are trying to protect their property from the claws of the government but with little success.

*The following case reveals a government scenario on how to seize people's property:*

### Case of "Kalakmsheni"<sup>19</sup>

The case deals with the dispute over a multi-storied building in # 16 Vazha-Pshavela Avenue, Tbilisi. The parties to the dispute are JSC "Kalakmsheni" and Ministry of Economic Development. On December 19, 2008 the Tbilisi City Court granted a judgement in favor of the state and five stories of the building was assigned to it.

The Tbilisi City Court did not use the right of protecting private legal entity as it is envisaged in the law. According to the Article 19 of the Administrative Procedure Code of Georgia, the court could collect evidence based on its initiative if it considered provided evidence insufficient. It must be mentioned that only Administrative Court can enjoy this right and it is considered to be one of the most important achievements of the Georgian Legislation; it is guarantee for the protection of the private property envisaged under the Article 21 of the Constitution of Georgia.

It happened in autumn 2005. They delivered a letter signed by City Prosecutor to the board of the JSC based on which they requested the documentation regarding the foundation of the "Kalakmsheni" and some legal acts. The board of the "Kalakmsheni" was explained that they wanted to investigate the privatization process of the building that had taken place years before and Joint Stock Company had office now. Representatives of the prosecutor's office explained that criminal case was launched against former high-ranking officials of the Construction Ministry regarding this fact.

Nugzar Petelava was the chairperson of the Council of Supervisors of the JSC at that time; Lili Arobelidze was the director of the company. The investigators gave one day to them to collect all documents. The board provided the prosecutor's office with the documents on time. Despite that, before the prosecutor's office started the investigation it demanded (several times) that the JSC left the building immediately and to assign it to the state.

Nugzar Petelava died with heart attack next day of one of his visits at the prosecutor's office. The prosecutor's office checked all the details in privatization and could not find any violation. Later, the Law on Legalization of Property was enacted. The prosecutor's office called "Kalakmsheni" and reported the criminal investigation was dropped against the JSC and they could take the resolution. However, the JSC could not get the resolution yet; nobody gave it to them.

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<sup>18</sup> See the Constitution of Georgia and Organic Law on General Courts

<sup>19</sup> <http://www.humanrights.ge/index.php?a=article&id=3597&lang=en>

“Kalakmsheni” with its personnel-150 people-purchased 52, 8 % of the entire capital; that was more than half property. The rest of the property could not be sold because the personnel could not collect entire sum. Then, state sold the remaining 47 % at the auction (the auction was public). “Kalakmsheni” paid 247 000 USD for the upper building that was not small sum for the state budget.

Everything was done according to the law. The information about the privatization was announced in the newspapers “Mesakutre” and “Matsne”. The process was not closed as Jghamadze claimed in his letters.

There is one more document which is very interesting in the case materials: the reply of the Ministry of Property Management of Georgia to Guram Korkashvili, former chairman of the Council of Supervisors of “Kalakmsheni” which stated that 100 % of the JSC “Sakkalakmsheni” was sold by the state and it was owned by private person. It is strange why the court did not pay attention to this fact.

There is one document which raises many questions and which acted as a basis for the court decision; it is the resolution of the Ministry of Property Management passed on August 25, 1994. There are three variants of the document. Only one of them, a document kept in the archive of the “Kalakmsheni” has signature of Avtandil Silagadze, former Minister of Property Management. The second and third variants of the document are corrected and does not coincide each other; one of them does not have signature of Silagadze. It is astonishing that the court relied on one of these unsigned documents while passing the decision.

The signed resolution states that Committee of the Construction Cases shall use the five floors owned by “Kalakmsheni” for operative management. One of the unsigned documents, the one from the archive of the Ministry of Economics states: “Five floors (III-VII) owned by “Kalakmsheni” was assigned to the Committee of the Architect and Construction Cases for operative management without any payment.” The final phrase is also crossed.

Another disputable document relies on the resolution of the Collegium; it is so called division register which states that Guram Korkashvili, former head of “Sakkalakmsheni” assigned “his own five floors of the upper building” to Mirianashvili, former chairman of the committee of the architect and construction cases.

The case was being discussed for over one year at the court and three judges were changed meanwhile. Initially Lela Tsanava was a judge who prohibited the public registry to introduce amendments to the resolutions regarding the five floors. Tateishvili states that it was his request because there was a doubt the floors were supposed to be sold. The court did not satisfy the request. Tsanava led the trial to the main discussion and then she was appointed in Batumi court and Ilona Todua replaced her. She also conducted several discussions though when the parties were called to hear the judgement, it turned out that the judge was changed again and Dimitri Gvritishvili read the judgment without main discussion.

If “Kalakmsheni” wins the case in Strasbourg it will mean that the Georgian judiciary system has passed verdict against each citizen of Georgia.

### **Case of Lasha Chkhenkeli<sup>20</sup>**

Criminal Case N 089090030 was initiated at the Constitutional Security Department of the Ministry of Internal Affairs against 23-year-old Lasha Chkhenkeli, a security guard at the US Embassy. On March 22, 2009 he was arrested as a suspect. On March 25 Tbilisi City Court imposed a two-month preliminary detention.

The criminal case was based on the appeal of one Davit Zhghenti to the Head of the Constitutional Security Department dating March 17.

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<sup>20</sup> <http://www.humanrights.ge/index.php?a=article&id=3800&lang=en>

Zhghenti wrote in his appeal that he had known Malkhaz Gvelukashvili for a long time and has a close relationship with him. He had not seen him for a long time before the protest rallies in November, 2007 and since then they have been meeting each other quite often. Also very often they conversed on the phone. Zhghenti claimed that Gvelukashvili had called him on March 10 and informed him about the foundation of the new political party "National Alliance-Kingdom of Georgia."

At the trial on May 16 the attorney asked what investigation activities were carried out during the two months; Prosecutor Kobidze replied: "We interrogated the witness. The analysis of the phone conversations of the accused is going on. We have requested information about the money transfers from the commercial banks in Georgia. Expertise has been appointed."

The attorney also asked: "Did you interrogate a witness or witnesses? Who is a witness other than Zhghenti?" The prosecutor gave a delayed answer and said: "We have interrogated Davit Bregvadze... "and then he added: "no more witnesses have been interrogated".

Our team discovered who Davit Bregvadze is. He works at the MIA. He participated in the operations against Chkhenkeli and Gvelukashvili and supposedly he was questioned about that. Consequently, the he could not contribute anything to the investigation.

The attorney asked: "Have you singled out any other case? Or have you found any of the 3 000 people mentioned in case materials?" The prosecutor replied: "We have not found any other evidence or information about other people."

The crime for what Lasha Chkhenkeli is accused requires the judge, upon conviction, to sentence him to imprisonment from 17 to 25 years. Lasha is only 23 and the judiciary is responsible for all its activities and judgements in regard to him. The people will be very sensitive about the verdict. It is obvious from the current case materials that the current accusation is the result of a provocation. In the 21st Century innocent people should not be sacrificed to the state interests as was done in the 1937. It is different time and different government.

## **Rule of Law and Human Rights**

According to Article 7 of the Constitution of Georgia, the state recognizes and protects universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as the positive law in Georgia. All legal acts that deal with basic human rights and freedoms particularize these rules. According to Article 6 of the Georgian Constitution, an international treaty or agreement of Georgia, unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts. Based on this ruling of Constitution, the European Convention on Human Rights adopted on 1950 and its optional protocols and the case law of the European Court of Human Rights is recognized in Georgia. All abovementioned articles of Georgian legislation strengthen the principle of supremacy of and respect for law and human rights and fundamental freedoms. State bodies are obliged to follow law and respect human rights endorsed by law and the Constitution in their activities. The European Court of Human Rights has noted in numerous judgments that a state is obliged not to neglect fundamental rights and freedoms of a person even in cases of public interest and even when the case deals with an individual who is suspected of having committed a terrorist act.

It is an imperative demand of the Constitution and other legal acts that human rights and fundamental freedoms be prioritized. However, this has not been effectuated in Georgian reality so far. Often state bodies violate constitutionally guaranteed human rights and freedoms and courts which are obliged to eradicate injustice and ensure the rule of law, legalize these violations. There is one case from the recent practice of general courts which proves our allegation. This is the case against a Ukrainian citizen – Orest Bokhonko.

### **Case of Orest Bokhonko**

A thirty-seven-year-old Ukrainian man was arrested in Tbilisi International Airport at 11:00 PM on September 27. He arrived in Tbilisi from Kiev. Bokhonko testified that he intended to visit his friend Zaza Saminava in Senaki, western Georgia. Bokhonko said that the friend was supposed to meet him in the airport. Bokhonko said that a stranger met him at the exit and informed Bokhonko that Saminava was delayed for half an hour and led him to a room in the airport. 20 minutes later Bokhonko's Georgian friend appeared and they intend to leave the place by car. At that moment nearly ten people dressed in civilian clothes approached the men and pushed them down to the floor by force.

The police testified that Bokhonko was suspected of having purchased and transported internationally a particularly large amount of narcotics. Police officers from the regional department claim they withdrew the drug "Metadon" from the rectum of Bokhonko.

The law enforcement officers committed a crime regarding Bokhonko. Violations of the law during the investigation process were discovered at court hearings. The court should have assessed the evidence obtained by the investigation through breaking the law as invalid. However on June 18, 2009, the Tbilisi City Court rendered a verdict of guilty and sent Orest Bokhonko to prison for 23 years on June 18.

Preliminary investigation demonstrated that as a result of the search white powder in yellow polyethylene bag was removed from Orest Bokhonko. It is confirmed by the materials of the preliminary investigation (for example: conclusion of the expert, testimonies of the witnesses interrogated during the court investigation, (witnesses Samushia, Janashia, Ablotia, translator Diakob, K. Kodua). The white powder in the yellow bag was sealed up and given to the investigation as a proof. The investigation got rid of the yellow bag which was

the main proof. The bag was to be evidence from which it could be concluded whether it was withdrawn from Bokhonko. The abovementioned witnesses confirmed the information that the proof was gotten rid of (see testimonies of Samushia, Janashia, Ablotia, translator Diakob, K. Kodua). Getting rid of that yellow bag was a violation of the Article 323 Paragraph VIII of the Criminal Procedural Code of Georgia. That law states that every subject and document that was found during the search shall be introduced to the officials participating in the investigation and they shall be recorded in the search protocol. If it is necessary the subject shall be wrapped and sealed. In this particular case, the investigation got rid of the yellow bag. Under Article 7 Paragraph VI of the Criminal Procedural Code of Georgia evidence that was obtained through violation of the law is not valid.

Orest Bokhonko said at the trial that the law enforcement officers used force against him, insulted and degraded him. "Having failed to find anything on me, they demanded me to take off. I requested to invite witnesses at least an employee of the airport. In reply to my request they slapped me in the face. After that I was commanded to take off my trousers but they could not find anything. Then they commanded me to take off the underwear too. Finally I took off the t-shirt and they commanded me to lean forward. Then Kokhta put on rubber gloves, twisted my wrists and forced me to lean me forward I tried to escape them but other policemen joined them and I could not resist them... They were recording everything on video-camera. I was going to put on the trousers but they hit me on the chest... I tried to get up but they kicked me... Samushia sat on me; I tried to raise him but they started to kick me. Finally I fainted...I was taken to a cell. I could not sleep at night because of unbearable pains. I asked to call a doctor. He examined me and made an injection. He said I could have pains for some time because I had my rib broken." (See protocol of Bokhonko's interrogation). [

Article 12 Paragraph I of the Criminal Procedural Code of Georgia states everyone has the right to the inviolability, honor and dignity that are guaranteed by the Constitution of Georgia. Paragraph 5 of the same article states that "methods that will create danger for the life or health of trial participants shall not be used." Paragraph VII of the same article, as well as Article 286 (Paragraph IV) of the Criminal Procedural Code of Georgia stated: "a person shall not be threatened, physically assaulted, intimidated during an investigation. Medical experiment shall not be carried on the detainee or the convicted; or creating such conditions for the detainees that will damage the health of the detainee or degrade him/her."

According to the Article III of the Human Rights Convention issued on November 4, 1950, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Article 17 of the Constitution of Georgia states that "1. Honor and dignity of an individual is inviolable,

2. Torture, inhuman, cruel treatment and punishment or treatment and punishment infringing upon honor and dignity shall be impermissible." The right that is guaranteed by the abovementioned acts is absolute and supreme value that shall be respected by everybody particularly by the public official.

In the case "X vs. Germany European Court of Human Rights concluded that withdrawal of the narcotic substance from the detainee by a special probe was inhuman treatment and violation of the Article III of the Convention; consequently, the proof that was obtained through this method was found invalid by the European Court of Human Rights. Article 322 of the Criminal Procedural Code lists those places where the search can be carried out. Article 325 Paragraph I lists the places where personal search can be carried out: among them are clothes, personal things and on the body; however it does not allow the search in the body of a person. This search is envisaged under Article 350 of the Criminal Procedural Code of Georgia which aims to find something important on the body of a person. If the process is considered to be a search it shall be carried out by a doctor though it did not happen in this particular case. However, if we do not consider this fact, we should pay attention to the general requirements of the code. More precisely, the procedures that require the search of a bare body of the detainee is mentioned in the Article 354 (3) and it states that similar procedures shall be carried out by a specialist – doctor. Article 325 (4) does not envisage similar procedures and states that if a search requests the detainee to take off, it shall be carried out by the investigator or a specialist of the same gender. Despite that, the standard shall not be clarified separately, the code is a joint system and every standard shall be clarified in combination with other norms. The aim of the law is to protect the honor and dignity of a person though it was breached in Bokhonko's case because the search was not carried out by the specialist. Thus, principle of analogy shall be applied to and corresponding claimings of the

Article 354 shall be used in order to protect the rights of a person. The Analogy is expectable because it serves the legal aim of the procedure and creates better conditions for the suspect.

Consequently, if we consider this position, apparently, the narcotic substance was withdrawn illegally or since it was examination the place of the search was not anal channel of Bokhonko. Or it was illegal because the search was not carried out by doctor.

Witnesses as well as the accused completely and impartially described the investigation process. Bokhonko said at the trial that K. Kodua took part in the search. Witness Kodua said in his testimony that he was entering the room periodically though did not participate in the search; he did not sign the protocol either. Thus, he thinks his name could not have been written in the protocol and he did not sign it either. I think, this fact is violation - if the investigation and prosecutor think that observing the search procedure was not investigation activities, the witnesses and other people who were questioned during the investigation cannot participate in the proceeding. All of them were observing the search procedure and signed the protocols. Article 287 Paragraph III of the Criminal Procedural Code defines that the protocol of the investigation activities shall clarify the position and name of a person who carried out the investigation activities; also first or last name of people who participated in the procedure; Consequently, if a person participates in the investigation activities, if a person is a public official, or invited expert/specialist or a person who attends the investigation procedure (suspect, accused, witness) – they are considered to be participants of the investigation activities and there are no more legal status in the investigation activities. Consequently, Kodua should have had any of abovementioned status or he should not have been in the room at all. If you participate in the investigation process and do not sign the protocol, it is crime under Article 287 Paragraph III and VI of the Criminal Code of Georgia (protocol of investigation procedures), it is a blatant violation of the law because the Paragraph III of the Article requires the indication of the name of the participant and Paragraph VI requires every participant to sign the document. It is evident that the investigation purposefully hid the number of people who participated in the search that was uncovered at the trial (testimonies of Bokhonko and Kodua). I think, the testimony is insufficient to find out whether the Criminal Procedure Code was preserved. The protocol on detention states that Bokhonko was detained based on Article 142 Paragraph I – “a” of the Criminal Procedure Code which states that a person can be detained during committing the crime or soon after it was committed. In accordance with the Article 7 Paragraph I of the Criminal Procedure Code an office is a basis for criminal liability that is the offense envisaged in this Code. If we define the Article 142 (1”a”) of the Code word for word then we should use the abovementioned definition though it will contradict the law. Thus, detaining the person during committing the crime is a fact when a law enforcement officer personally witnesses the crime. Committing the crime, in accordance with the Criminal Code of Georgia, is an action that is envisaged under the Code. In this particular case purchase, storage and illegal transportation of narcotic substance is the crime envisaged under the Code. The law enforcement officers acted based on the operative information that means they supposed that Bokhonko had committed crime and after the search their doubt was increased. Consequently, the basis for the detention was operative information (because they personally witnessed the crime). People interrogated during the trial also confirm that they arrested Bokhonko based on operative information; they said the law allowed them to act so; however none of them could show us the exact article which entitled them to do so.

Article 142 of the Criminal Procedure Code of Georgia does not envisage similar rights. In accordance with Article 5 Paragraph I of the European Convention of Human Rights, Everyone has the right to liberty and security of person; no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. In addition to that, the basis for the detention supposedly was subparagraph “c” of the same article “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.” The number first requirement of this article is the basis of the detention that is envisaged under the national law (which was confirmed by decision of the Human Rights European Courts several times). In this particular case, the detention happened based on the operative information. However, the law does not recognize similar reason for the detention however if not so, if we consider that Article 142 (1”a”) of the Criminal Procedure Code of Georgia was basis for the detention there must be a serious doubt on committing the crime. Human Rights Court clarified the context of grounded doubt in its many judgments and said that serious doubt exists when a person, based on the information and claimings, could suppose that another person can commit a crime”; the European Court also said that operative information cannot be the basis for

such doubt. Thus, detention of Bokhonko was completely illegal and it shall impact the legality of the evidence obtained as a result of this detention.

Here, the trial detention law has been broken according to the 145 article of Georgia's Penal Code. In addition, they used violence despite the fact that the person did not show the resistance and did not run. Despite the fact about 3-4 men knocked Bokhonko down and beat him with legs (his injured body proves this fact). Besides, according to the second part of Article 145 detainee should be taken to the police department immediately. They took Bokhonko to the unknown room in the airport building and not in the police department or other penitentiary office, as the law demands and they continued to violate him and insult his dignity.

One more violation of the law is the fact that despite the fact that Bokhonko demanded several times to report to Ukraine Embassy about his detention, they did not do this. According to article 138 article of the Criminal Code, the prosecutor and investigator are obliged to inform the detainee's family about his detention during 5 hours and according to the third part of this article, if the detainee is the foreign country's citizen, this state's embassy should be informed. This is the imperative demand of the law, which was not done. The Ukraine Embassy first received this information on 3 October, 2008. this is a breach of the law, which influences the detention and then its actions' legality. In the court Ablotaia was a witness, who announced that they did not inform the embassy, because Bokhonko had not asked them.

According to the facts mentioned above, this detention was illegal and groundless, 111 article of the Penal Code clarifies that all the facts are groundless proofs. The facts which are made by the breaking law are doubtful and it should not be discussed as ground proofs to confirm the charges officially. According to Article 132 article of the Penal Code each proof should be estimated with its dependence with Criminal Case and all the proofs gathered to confirm his charge should be quite enough. According to the 5 part of the 7 article of the Criminal Code, breaking of Georgia's Constitution and Criminal Code assumes legal responsibility and according to the 6 part, the proofs which are made by breaking the laws have no juridical power. The proofs should not be grounded, because at the trial it made known that the facts have been collecting by breaking the law. According to the 5 part of the 132 article to confirm person's charge it is necessary to collect grounded proofs and according to the 40 article of Georgia's Constitution and 10 article of the Pinal Code, all the doubts which are not confirmed with grounded facts of the law, should be decided by detainee's side. According to the fact that they did not have grounded proofs that Bokhonko has been committed criminal offence of the 4 part "a" 262 article and 3 part "a" 260 article of the Pinal Code, on the ground of 132(1) and 496(3) articles of the Criminal Code, Orest Bokhonko should be released, because they did not have enough proofs.

### **Case of Ratishvili<sup>21</sup>**

Everything started shortly before the protest demonstrations in November, 2007 when law enforcers found a suspicious phone-number (+995 99) 39 88 ... (we do not name the full phone number because of journalistic ethic, though law enforcers do not keep the number in secret) in the case file initiated against Gia Meladze. On October 24, 2008 Tbilisi City Court issued an order on surveillance to the phone number for two months. The motive for the order was revealing drug-dealers who supplied Gia Meladze with narcotics; supposedly the owner of the phone number was one of the dealers. Merab Ratishvili was the owner of the phone number.

Law enforcers listened to his calls since October 24 till 10:00 pm of October 26. They recorded total 33 phone-calls but got interested only in two calls from one phone-number; there was 40-minute interval between these calls; the motive for selecting these calls was word "sugar" that is used as a code-word instead of narcotics.

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<sup>21</sup> <http://www.humanrights.ge/index.php?a=article&id=3590&lang=en>

Another solicitation of the attorney to the court was invitation of Gocha Dzasokhov to the trial as a witness. However, he was not called to the court. Neither our investigation team found him. He disappeared on the next day of Ratishvili's detention. His phone-numbers are out of coverage area.

Employees of the sugar-factory in Agara could not tell us anything about him; supposedly Dzasokhov has left Georgia. It is strange why the court did not consider it was necessary to find out his location; maybe they already knew that Gocha Dzasokhov could not tell anybody-neither to the court nor to other interested people-about his conversation with Ratishvili about sugar. Of course we do not claim but just say that court might have cooperated with those people who wanted to assure people that "sugar" meant narcotics in the conversation of Ratishvili with his friends. The court also assisted those people who supported Gocha Dzasokhov to disappear.

The court did not reply to the main question: whom did Ratishvili converse with during suspicious phone-calls? Who is the person who was asking Ratishvili for "white and sweet powder" of Subotex? The court did not want to investigate this fact. They did not satisfy the solicitation of the attorney to request the information from MagtiCom about the author of suspicious calls to Ratishvili. So, a person was charged for drug-addiction but court did not interrogate the people who contacted him. What was the motive for the court to accuse Ratishvili for drug-addiction and to issue an order on listening to his personal mobile-phone? The court could not confirm the usage of code-word and the authors of this word.

Despite the solicitation of the attorney, court did not notice anything suspicious that one of the districts of Tbilisi, Ortachala was indicated in the official address of the subscriber's registration. An ID of Georgian citizen does not contain the name of a district because people are registered according to official addresses and not pursuant to their districts (like Vera, Kukia, Svaneti settlement, etc). Unfortunately, the judges did not have enough education to notice the mistake.

Attorney Raul Gamisonia applied to the court with one solicitation and like previous ones neither it was satisfied. Raul Gamisonia requested to estimate other numbers where so called Mishiko Ketiladze had called. It could assist the judges to find at least one real person who could help investigation to find the real owner of the phone number. That means, virtual Mishiko Ketiladze could become a real person. At least, somebody was really dialing the number of Ratishvili from anonymous phone.

Court did not consider it was necessary to estimate the person and it reinforced the doubt of the society which claims that law enforcement bodies artificially register so called control numbers with fabricated data on dead people; private companies always assist the law enforcement bodies in similar activities. The subscriber's card created by the "MagtiCom Ltd" demonstrates similar cooperation. Communication companies have guarantees of inviolability for similar activities and it can be illustrated from the trail of Ratishvili.

The court did not draw his attention to the fact that protocols on the detention of Ratishvili, and on the search of his car, flat and office are drawn up through violation. These protocols are not signed by witnesses and attorney though Ratishvili categorically demanded their presence. Besides that, the protocol is signed by less people than real attendants were during the search. For example, wife of Ratishvili, who was witness at the trial, recognized one of high-ranking officials from the SOD, who attended the search, but had not signed the protocol. The court did not consider her statement as a proof.

Court did not consider the evidence withdrawn during the search as illegal. The evidences were: narcotic substance "Metadon" in the prick in his car and the same substance from the pocket of his suit during the search in his house.

Court passed verdict on Merab Ratishvili on "usage and storage of particularly large amount of narcotics" so that the court could not prove the accused was drug-addict or not. The trial could estimate it through drug-test if they had appointed it. Similar test could show if a person is a long-term drug-addict or not. The attorney and the accused categorically demanded the judge to appoint the drug test. However, the judge considered the solicitation was groundless. Why? Nobody has right to ask similar questions to the judge.

The court should have paid attention to this detail because Ratishvili stated in his testimony that when he was ironed he felt two injections in his muscle; though he did not pay attention to this fact then until the investigation charged him for the usage of Metadon.

### **Case of Zurab Khorbaladze<sup>22</sup>**

Zurab Khorbaladze, head of section of the infantry section # 2 within the Infantry Battalion # 42, was charged for his arrival in Gori from Tskhinvali together with one part of disorganized army after intensive bombardment of Tskhinvali on August 9m 2008. Another part of retreated army (which later was joined by Merab Kikabidze, commander of battalion) deployed in the village of Variani in Gori district. Zurab Khorbaladze was accused for not having executed the order of Kikabidze on time and had not led the unit to Variani at the fixed time.

Lieutenant Giorgi Meskhi, another soldier of the same battalion, was charged for late arriving in Variani where his unit was deployed; in addition to that he was blamed for willful abandoning the permanent place of dislocation of his battalion in Vaziani after the war finished.

It is quite obvious from the first sight that activities for what soldiers are blamed are not equal.

After the preliminary investigation the case was sent to the court. It happened on September 11, 2008. The trial (plea-bargain) was held on November 6, 2008. Supreme body of the judiciary system had almost two months to study the case. After that time the court did not change anything in the charge suggested by the investigation and considered the activities of both soldiers illegal. But, the court did not agree the investigation with the qualification of the crime and considered the activities could not be qualified as deserting, but it was disobedience and sentenced both soldiers to three years imprisonment and imposed compensation.

It is still unclear why the court considered the preliminary investigation as complete and impartial while witnesses were not interrogated during the preliminary investigation; the mediations of attorneys on interrogating witnesses were not satisfied. The witnesses wanted to make testimonies that were quite different from other statements. As for the testimonies of witnesses, who were taken to the court by the preliminary investigation, did not indicate to any action that could obviously demonstrate the crime committed by Zurab Khorbaladze and Giorgi Meskhi.

Revaz Sisauri, attorney of Khorbaladze, requested interrogation of Mushkudiani and Torchinava, officers from Battalion # 42. Court passed verdict on Zurab Khorbaladze so that did not ask why the investigation had refused to interrogate suggested witnesses. Or what did Mushkudiani and Torchinava want to say to the investigation? Lasha Avaliani, attorney of Meskhi, requested to interrogate Chilindrishvili, Tsutskiridze, Pukasian and Kapanadze, corporals of the battalion # 42. They could confirm that Giorgi Meskhi had implemented the order of Kikabidze and arrived in Variani on fixed time. Court did not pay attention to the fact that investigation had not paid attention to the second mediation of the attorney of Giorgi Meskhi who requested interrogation of Lieutenant Abashidze. Lieutenant Abashidze had very important information to share with the court: On August 13, 2008 he discharged Giorgi Meskhi, head of unit, from the responsibilities in permanent dislocation of Vaziani for Battalion # 42. Meskhi had requested him permission to go to the funeral of Devi Chaduneli, a soldier from his unit who was killed during the war. At that moment Abashidze was attending to the duties of the head of HR management department instead of Lieutenant Memanishvili who was killed in Tskhinvali. Thus, where is crime here? Soldiers who were introduced as witnesses by investigation claim that since August 13 they had not seen Meskhi in the battalion for several days. If he, having taken permission according to the law, left the place of dislocation, should he be found guilty? We ask this question to the court.

The court did not pay attention to the fact that the investigation had not clarified how convincing Commander Kikabidze's suspicions were on deserting of two soldiers. How impartial was Merab Kikabidze? Did not he

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<sup>22</sup> <http://www.humanrights.ge/index.php?a=article&id=3504&lang=en>

have motive for personal revenge to his co-warriors? The soldiers could have had important information about disorganized commander of the battalion who fought in Tskhinvali. Attorney demanded to request archives of cell companies to withdraw conversations between the commander of the battalion and Khorbaladze. However, the investigation did not satisfy his request.

The court failed to notice that preliminary investigation could not find anything that could indicate to disobedience of Khorbaladze and Meskhi. Furthermore, testimonies of the witnesses are contradictory in most cases. For example, Amaghlobeli, a soldier who was sent to take Giorgi Meskhi and his unit to Variani, names completely different names and number of soldiers unlike Commander Kikabidze.

We drew up a table to demonstrate the contradictions between the testimonies.

<b>A.Amaghlobeli</b>	<b>M.Kikabidze</b>	<b>O. Beridze</b>	<b>G. Meskhi</b>	<b>Sh. Lobjanidze</b>	<b>J. Kajrishvili</b>
I took 7 soldiers: Abuseridze, Beridze, Chaladze, Lobjanidze, Rekhviashvili and two others.	Amaghlobeli arrived back with three soldiers (names are not mentioned)	We three people went there Abuseridze, Geladze and I	We went 8 soldiers there. Chilindrishvili, Tsutskiridze, Kapanadze, I and two others (I do not remember their names).	Three of us went there, Rekhviashvili, Chaladze and I	Chkheidze, Tskitishvili, Budurashvili, I and two more went there. (I do not remember the names of those two)

The table demonstrates one more detail-several witness cannot recall the names of all soldiers and says: “two others.” Who can claim that Giorgi Meskhi was not one of those unknown two?

Court left these questions without answers to the society. This is the court which was obliged to estimate the truth about the dignity of soldiers participating in the war. However, what is the truth that cannot persuade person in its existence? The accused soldiers are young men of 24-25 and after the war in August and trial in November 2008 they have learned one truth: Don't take weapon if it is not given by fair state!

### **Case of Aleksandre Tevdorashvili<sup>23</sup>**

Prosecution of members of political parties in Gori started with the detention of Aleksandre Tevdorashvili, originally from Tskhinvali, on March 15, 2009. Together with him in detention was Kakha Kareli from Tkviavi village in the Gori district and Tamaz Makashvili, a resident of Gori. According to detainees, the reason for each was to prevent people from joining the protest rallies on April 9. The reason for detention was having insulted, cursed and scolded policemen---surprisingly every activist of opposition parties started insulting the policemen simultaneously before the April 9.

Aleksandre Tevdorashvili spent the most time – 27 days ---in detention. He left detention on April 11; two days after the mass rallies had started. Kakha Kareli was detained on March 17 for 25 days. Consequently he left detention on April 11.

Tevdorashvili is an IDP from Tskhinvali, his relatives died during the war in August, his house was destroyed (the court fined such an impoverished person because of a groundless charge) and Tevdorashvili started to protest the activities of the government after the war. In February 2009 he managed to bring about 40 people from his village when the regional organization of the political party Democratic Movement for the United Georgia was founded.

<sup>23</sup> <http://www.humanrights.ge/index.php?a=article&id=3780&lang=en>

According to Article 261 of the Administrative Code a hearing on an administrative crime must be conducted at the scene of crime (in Tevdorashvili's case in the village of Karbi where he was declared a suspect) the policemen from the Gori Department of the Ministry of Internal Affairs decided to hear the case at Gori district court. The reason for their decision was the resistance of Tevdorashvili during detention. The policemen claimed he prevented them from drawing up the protocol on the crime and insulted law officers.

The case against Tevdorashvili has one incredible controversy: as the readers already have noticed Grigol Eluashvili acted as a witness in the court and testified against Tevdorashvili. In the second case, in the protocol of the trial, he is the attorney for Tevdorashvili and this document was the basis for the judgment prepared by the Judge. The protocol states: "Representative of the accused for the administrative crime – Grigol Eluashvili--has appeared to the court" (in fact the accused did not have any attorney; he was not allowed to have one). On the same page of the protocol (it has only two pages) the same person –inspector-investigator Eluashvili is represented in a way that seems comical-- he is mentioned there as an accused: "Grigol Eluashvili, accused of an administrative crime, is making the testimony at the trial" (this is copied from the protocol).

The court did not consider depriving Tevdorashvili of his car and taking it to the penalty yard in Gori was a crime committed by the policemen. There were 10 boxes of apple in the car and besides that the "law-offender" was fined 76 GEL for having the car stored at the penalty yard.

Article 249 Part IV of the Administrative Code of Georgia clearly defines those circumstances when an owner shall be deprived of a thing or a document—including a car. "In order to compel the offender to pay a fine imposed under Article 58 ' 2, Article 86 Part V and VI, Article 114 ', Article 153 ', Article 155 ' I, Article 155 ' II, Article 157, Article 190 ' and Article 193 [before the owner can be deprived of] the thing or car... a protocol shall be drawn up on deprivation of documents or things; or a corresponding note shall be made in the protocol on administrative detention."

Such notes/remarks have not been made either in protocol I or in protocol II. Furthermore, Aleksandre Tevdorashvili is not charged under those articles.

"According to the law, the protocol on an offence shall be drawn up on the scene. But if it is impossible, the policeman has to detain the offender, take him/her to the police station and draw up the protocol there. In the case of Tevdorashvili it was not necessary draw up the protocol at the police station because he did not resist the policemen while writing the protocol. The first protocol which was drawn up in the village of Karbi is complete and it is signed by Tevdorashvili. If the detainee was not against the protocol, why had he signed it? The policemen claimed the detainee threw away the papers. If it really happened the policeman should have made a special note in the protocol about the disobedience of the detainee," said Bakur Zurabashvili who started to protect Tevdorashvili later at the court.

This protocol was not shown at the trial at all. The judge passed judgment based on the second one which also is signed by the offender. However, the lawyers explained that the court did not have right to use this protocol because it does not indicate the place where it was written. According to Article 240 of the Administrative Code "The protocol on crime shall contain the date and place of the drawing up of the document..."

The judge opened the trial at 3:30 PM, 2 hours after the detention.

According to Article 260 of Administrative Code on the preparation of the crime for a court hearing: "While discussing the administrative crime the institution is entitled to discuss the following issues: 1) whether the case is within the competence of the institution; 2) whether the protocol and other documents on the administrative offence are correctly drawn up; 3) whether the participants in the case were informed of the time and place of the hearing; 4); whether additional materials necessary for hearing the case have been requested.

Judge Nino Kordzaia did not take into consideration that the protocol incorrectly had been drawn up and she did not request additional documents.

According to Article 8 of the Administrative Code, "The administrative offences shall be heard based on the strict demands of the law."

The court was obliged to find out whether Aleksandre Tevdorashvili was or was not an offender because according to the Article 40, Part II of the Constitution of Georgia "No one shall be obliged to prove his innocence. The burden of proof shall rest with the prosecutor." The court is obliged to carry out these activities. Part III of the same article states: "An accused shall be given the benefit of doubt in any event."

According to Article 42 of the Constitution of Georgia, "Evidence obtained in contravention of law shall have no legal force."

Aleksandre Tevdorashvili appealed to the higher court against the decision of the Gori district court. The Tbilisi Appeal Court discussed the suit of Aleksandre Tevdorashvili without hearing arguments and passed judgment 8 days later. The Appeal Court did not grant the appeal and the argument for their decision was the following:

"According to Article 25 of the Law of Georgia on Police every person and official shall obey the legal requests of a policeman. Preventing the professional activities of the policeman, insulting, degrading, threatening or resisting, violence or material, physical injuring of the policeman is punished by the Georgian legislation."

Nevertheless, which of the abovementioned crimes were found to have been committed by Tevdorashvili?

### **Case of Irina Khodoian<sup>24</sup>**

Irina Khodoian - ethnic Kurd and citizen of Georgia is defendant at the court. Ethnic Georgian Meri Inasaridze is the plaintiff. The issue of their argument is 7 sq. meters of the balcony in front of the flat owned by Irina Khodoian.

The house is located in Jambuli Street N 3, Tbilisi. Several steps lead a person into a small balcony; one part of it is privatized by Khodoian and it is supposed to be linked with the only room where the family has lived so far. The entrance door to the flat of the applicant Meri Inasaridze is made in the other part of the balcony. Meri Inasaridze thinks both families have right to use the balcony equally. However, during the recent 4 years the Khodoians have been trying to prove that the room is too small for their family; they used that room as a sitting-room and bedroom as well. After the neighbor locked the water-pipes and removed the sink in the common kitchen the family started to use their one room as a kitchen as well.

"There are four members in the family: my son; his wife; their one-year-old child and I," Irina Khodoian stated at the court "during four years we could not place our furniture in the room and used the balcony for it. When Meri Inasaridze appealed to the court I had not privatized the balcony yet. However, I warned the judge several times that the privatization process was under-way and I could provide them with necessary documents soon. Despite that the court passed decision in favor of my rival and Meri Inasaridze was allowed to use the common balcony."

It was 2007. Corresponding documents demonstrate that in parallel to the case-discussion the privatization process was still under-way. There are materials in the case that were mentioned to the judge several times by Irina Khodoian. The judge did not envisage the circumstances raised by the defendant side; did not wait

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<sup>24</sup> <http://www.humanrights.ge/index.php?a=article&id=3722&lang=en>

for the end of the privatization and on June 12, 2008 the court passed the verdict and banned Irina Khodoian to prevent Inasaridze from using the part of the balcony.

Several months after the court decision the privatization process ended and the abovementioned balcony was assigned to Irina Khodoian as private property (property agreement N1-10515) and it is confirmed by the extract from the Public Registry. According to the Article 183 of the Civil Code the ownership on the property can be estimated by the recordings at the Public Registry.

On June 24, 2008 Irina Khodoian appealed to the Appeal Court based on those recordings. She requested inviolability of her property though this process is still hindered.

Next, Meri Inasaridze appealed to the court. On August 22, 2008 Civil Case Collegium of the Tbilisi City Court started a new process. Inasaridze requested the court to annul the Notary Act based on which the balcony was property of Khodoian. Lawyer Nana Muradashvili represented Inasaridze at the court; Irina Khodoian was represented by Nino Lipartia, representative of the Human Rights Center. Judge Manana Meskhishvili is discussing the case.

The trial started through violation of the law. The case was launched based on the outdated articles. The point is that attorney of the applicant Meri Inasaridze prepared the suit based on the Articles 208 and 211 of the Civil Code (according to the Article 208, Part IV only isolated flat or part of the flat can be assigned into private possession; according to the Article 211 parts of the building that are necessary). The court accepted this suit although the Article 208 is completely changed and the Law on Property Ownership in the Residential House has come into force in the country. As for the Article 211 it is removed from the law and no other article has replaced it. I would like to underline that the amendments were introduced to the Civil Code on August 1, 2007. The court accepted the suit for discussion on August 22, 2008 that means one year after the amendments were made. It is enough time for even the worst judge to hear about those changes.

The court breached the Article 178 of the Civil Procedural Code of Georgia by discussing the case based on the outdated articles. According to the article the suit should provide the legal basis of the claiming. In parallel to it the Article 3 of the Civil Code of Georgia was breached which states that the law is losing its power if the new law replaces it.

The most unacceptable was that plaintiff Meri Inasaridze insulted Irina Khodoian's ethnicity during the trial. Irina Khodoian is a Kurd; the judge did not try to eradicate the discrimination during the proceedings. The court breached the right guaranteed by the Constitution based on which the state is entitled to protect the ethnic dignity of a person from the third person.

By similar action the court breached the Constitution of Georgia as well as Article 12 of the European Convention on Human Rights which states that everybody has right to enjoy the right guaranteed by the law without any discrimination regardless his/her sex, race, skin-color, national belonging, etc.

Final trial was held on April 6. The judge evidently took into consideration the involvement of human rights defenders and journalists in the case. At the final trial Irina Khodoian was not insulted on ethnic grounds. The judge did not satisfy the suit and consequently, the judge assigned the 7 sq. meters of the balcony to Irina Khodoian. Finally, the court made decision in favor of the defendant side.

## Case of Ivane Tamazashvili<sup>25</sup>

On June 15, 2009 law enforcement officers arrested Ivane Tamazashvili during the dispersal of the protest rally in front of the building of the Tbilisi Police Main Department. Tamazashvili was not informed of his rights or the reason for his detention either during his detention or in his cell.

The trial was short; the protocol was drawn up. The Judge of the Administrative Collegium of the Tbilisi City Court Miranda Eremidze found Ivane Tamazashvili guilty of the crime referenced in Article 173 of the Administrative Code of Georgia and fined him 400 GEL.

The court really did discuss the protocol and did hear the explanations of the parties, but could not discuss case materials and evidence since there was nothing against Ivane Tamazashvili in the case materials. Consequently, evidence against the detainee could not have been provided at the trial. The author of the administrative protocol, Avtandil Poladashvili, inspector-investigator of the Division III of the Gldani-Nadzaladevi district police department, was seen by Ivane Tamazashvili for the first time at the trial. The detainee saw Poladashvili who wrote the administrative protocol neither during detention nor at the police station. The lawyer Tsismar Oniani, the only witness to the fact, confirmed that she had not seen Poladashvili in front of the police station during Tamazashvili's detention. That means, the protocol was written by a person who had not witnessed the crime and had not interrogated the detainee either.

There is a list of evidence in Article 236 of the Administrative Code of Georgia which are necessary to find a person guilty. They are: witness testimony, photo or video-recording of the crime, other materials that describe the crime. None of the listed evidence is mentioned in the case materials. There is no witness who can confirm that Ivane Tamazashvili had blocked the driving lane of the street and he had not disobeyed the policemen. However, the video-camera installed at the entrance to the police station could have recorded the detention and the incident between Tamazashvili and the policemen. This recording could expose the guilt of Tamazashvili but despite the request of the defense the recording was not introduced in the court.

The judgment relied only on one circumstance – the protocol of inspector-investigator Avtandil Poladashvili which stated that Ivane Tamazashvili had almost “committed the crime.”

The author of the administrative protocol reported to the court that Ivane Tamazashvili resisted the policemen in Korneli Chaladze Street on June 15 2009 and did not free the driving lane as demanded by the law enforcement officers. The judge asked to clarify the demand of the policemen and inquired whether Tamazashvili had blocked the driving lane. The inspector-investigator replied that the policemen had demanded the detainee to free the driving lane that was nearly blocked by Tamazashvili together with other people (this phrase was written in the protocol after the attorney requested it). The judge did not ask Poladashvili what “the nearly blocked driving lane” meant, when policemen demanded Tamazashvili to obey their orders--whether he was in the driving lane and whether he had blocked the road with any technical or mechanic materials. The judge did not request Poladashvili to provide any evidence to prove that Tamazashvili had blocked the road.

Judge Miranda Eremidze did not ask any questions to Ivane Tamazashvili or to the only witness during the trial. When passing the judgment she did not consider the testimonies of Tamazashvili and his witness, and the video-recording provided by the defense. The video-recording demonstrated how the policemen beat rally participants without warning them about anything.

Under Article 173 of the Administrative Code of Georgia, Ivane Tamazashvili was found guilty of resisting or neglecting an order of the law enforcement officers. According to the article, in order to charge a person with the crime, two factual circumstances must be confirmed: existence of a legal order of law enforcement officers and disobedience to the order. The court had to find the existence of these two circumstances. The legality of

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<sup>25</sup> <http://www.humanrights.ge/index.php?a=article&id=4164&lang=en>

the policemen's order could not have been found because the Law of Georgia on Assembly and Demonstrating entitles citizens to come together in the street even in front of the police station. Law enforcement officers have no right to prevent demonstrators from enjoying their right. Furthermore they cannot order to disperse the rally. As for "neglect of the order", the judgment passed by Miranda Eremidze did not mention that fact that Tamazashvili had neglected or ignored the order of the policemen. According to Article 173 of the Administrative Code of Georgia only "neglect of the order" is an offense and not general disobedience to the policemen. It is completely obscure how the court found Tamazashvili guilty under Article 173 of the Administrative Code and how Tamazashvili could disobey the order of the policemen while they had not ordered anything.

The law of Georgia entitles the judge to decide which and how many proofs are necessary to pass judgment on the accused. Thus, the law trusts in the honesty and competence of the judge. Tamazashvili's case is one of those which cast doubt on the reliability of such trust.

### **Case of Vakhtang Maisaia<sup>26</sup>**

Vakhtang Maisaia is charged for cooperation with special services of a foreign country; obtaining and sending state secret information using codes. In particular, Maisaia is accused of sending "information about military, political and economic circumstances in Georgia and changes in the government, also information about the armament and military equipment being purchased by Georgia. In August 2008, during the Georgian-Russian war he was giving information about the amount and movement of Georgian military units and military equipment."

The law enforcers allege that Maisaia had access to secret materials because he used to work in the Georgian mission in NATO and still has contacts with high-ranking Georgian military officials. In 2004-2008 Maisaia worked as an advisor in the diplomatic mission of Georgia to NATO. At the beginning of 2008 he came back to Georgia and started scholarly work.

Maisaia's case put the principle of the universality of law under question. According to the Georgian Law on State Secrets, the information about "strategic and operative movements of armed forces, their mobilization, their placement on high alert and usage of mobilization resources" is secret. The court has to determine whether Maisaia was transmitting this information in his reports or not. However, until then the prosecutor's office must explain: why the prosecutor's office decided that only Maisaia's reports were suspicious while almost all media outlets were publicizing information about "strategic and operative movements of armed forces, their mobilization" and so on during military activities in Tskhinvali? For instance, TV Company Rustavi 2 publicized the names of the places where reservists were being mobilized on August 8.

Confession of crime does not mean that Maisaia is guilty. According to Georgian legislation mere confession of a crime by a suspect does not imply that he is guilty. Part 4 of Article 115 of Criminal Procedure Code of Georgia highlights that "confession of a crime by a suspect shall not be considered as a ground for charges against him or a verdict of guilty if the crimes is not proven by other evidence." What other evidence does the investigation have against Maisaia except for his own confession testimony and his 13 reports that are included into his case? We have information that the investigation does not have other evidence.

There are several suspicious circumstances that would be difficult to explain and use for the benefit of the suspect: Maisaia was sending information and analytic articles to the pharmaceutical company with a small code. Maisaia claims that he was doing so because Novartis wanted him to do so in order to avoid rival companies getting the information and in order to protect commercial secrecy. Attorney Natia Korkotadze claims that it is code ELPI. Everyone can download this code from the Internet. This was not the code that was particularly created for Maisaia as claimed by the law enforcers. This is a special code for zipping the files," said the attorney.

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<sup>26</sup> <http://www.humanrights.ge/index.php?a=article&id=4136&lang=en>

Experts explain that normally pharmaceutical companies do not use codes because they do not look for secret information (presumed reason for using codes) and do not compete in speed (another presumed reason for using codes).

In addition, it is necessary to find out why Novartis denies cooperation with Dolezhal, Iatsunskaya and Maisaia; why Bratislava University denies the allegation of Maisaia that Novartis was paying for Maisaia's tuition at the University (Bratislava University wrote to our investigating group that Vakhtang Maisaia was paying for his education at the University). Even if it is proven that Vakhtang Maisaia was cooperating with a foreign country it still needs clarification whether this country was Russia.

## Conclusions and Recommendations

Today, Georgian legislation protects rather well the independence of legal system, but a big portion of Georgian society, non-governmental organizations, public groups and individuals do not trust the judiciary and protest against the low level of judicial independence.

Violation of the principle of judiciary independence threatens the rule of law, human rights, the economic development of the country, the public integration process and citizens' safety, and causes the social situation to deteriorate.

- **Pretrial detention has become a norm in Georgia. Today there are very few court hearings which do not end up with pretrial detention of a suspect. We recommend to revise the “Zero Policy” of the government; It is not necessary to hold all suspects in pretrial detention, especially when they do not create problems for investigation;**
- **It is noteworthy that torture and inhuman treatment is frequent in pretrial detention cells. Despite the fact that NGOs often indicate this and present facts of torture and inhuman treatment to relevant institutions, very few police officers have been charged with torture and convicted under the Criminal Code of Georgia. This somehow indicates that there is a culture of impunity in Georgia;**
- **The analysis of cases shows that in most cases the court approves the plea bargain agreement without having adjudicated the case in detail and investigated many important issues. Courts adjudicate cases mainly in 1-2 court hearings. Cases are discussed on these hearings superficially and then the court endorses a plea bargain agreement. It is noteworthy that the court has never refused the prosecutor's office's motion to endorse a plea bargain agreement. They have always been approved by the court;**
- **Influencing court verdicts: the executive branch of the government and the prosecutor's office puts pressure on the court regarding administrative and criminal cases;**
- **Each court hearing should be open and transparent. There are some cases when court hearing should be closed but even in cases of closed hearings, judgements should be announced publicly. A court hearing is public when a court hearing is recorded on video or on photos under a motion of a side which is interested in court hearing. Otherwise, there will always be a doubt in the society that the scenes that were publicized by the court are edited and do not show the reality;**
- **Despite the fact that the Georgian Constitution encompasses a large number of civil rights and freedoms, including the right of an individual to apply to the court to protect his rights and freedoms, in practice the role of the court in protecting human rights remains inadequate – it is ineffective to seek assistance from court.**

There should be court independence in order to achieve justice in the country. Otherwise, there will be no stability and harmony in the country. An instable society either will overthrow the government or create such a situation that there will be no wellbeing and the government will not be able to work normally. Injustice is the source of chaos and instability!

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