



**A JUDGE'S AUTHORITY TO ASK QUESTIONS
DURING THE HEARINGS ON CRIMINAL CASES
WITH ALLEGED POLITICAL MOTIVES**

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INTRODUCTION

Criminal proceedings are carried out based on the principles of equality of arms and adversariality.¹ It is within the competencies of the parties to obtain, submit to the Court, and examine the evidence to support their positions.² On the other hand, the Court shall ensure equal conditions for the parties to support their positions and prevent the possibility that a neutral observer had a feeling that the judge supports either party of the dispute³. A judge shall ensure the conduction of a fair trial in due respect to equality of arms,⁴ otherwise, the “judge has no authority to take over the function of a prosecutor or a defense lawyer”.⁵

Despite the abovementioned, the “adversarial system allows flexibility”⁶ and in due respect to the principle of fair trial, a judge is entitled with some procedural authorities to comprehensively and impartially examine the case. In this regard, under Article 25 (3) of the Criminal Procedure Code of Georgia, a judge, may, after obtaining consent of the parties, ask clarifying questions if so required for ensuring a fair trial “that demonstrated weakened role of a judge”.⁷ In 2021, the Constitutional Court of Georgia declared the normative content of this norm unconstitutional.⁸ According to the judgment, restraining a judge from participating in the court hearing by asking clarifying questions contradicted the goals of the fair trial and fair judgment.⁹

Given the scarcity of scientific literature on this issue available in the Georgian language, the document at hand aims - through providing the analysis of the December 28, 2021 Judgment of the Constitutional Court of Georgia - to underline the advisability of exercising the judge’s authority to ask questions on the stage of evidence examination, in accordance with the standards set forth by the Constitutional Court of Georgia. Additionally, the document aims to underline the role of a judge and analyze the coherence of the judge’s engagement in the criminal proceeding at the stage of evidence examination in criminal cases with alleged political motives

¹ Criminal Procedure Code of Georgia, Article 9

² Constitutional Court of Georgia, Judgment №1/4/809 of December 14, 2018 on the case: Citizen of Georgia Titiko Chorgoliani v. the Parliament of Georgia, II-22

³ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-37

⁴ Gurieli A. “Scopes of the authorities of a judge as a mean to ensure fair trial in the criminal proceeding,” magazine: Law and World, N5, 2016, 46.

⁵ Chakvetadze G. “Role of a judge in the Georgian Criminal Procedure Code, which is based on the principle of equality of arms, review of the modern law N1(2), Davit Batonishvili’s Law Institute, Law Faculty of the Eastern European University, 2014, 32

⁶ Herbert D. Chkhaidze G, *Advocacy in the Criminal Proceedings for the Georgian lawyers*, edition by Meridiani, Tbilisi, 2014, 20

⁷ See: Akubardia I, Some aspects of the Georgian model of adversarial principle, German-Georgian Criminal Law Magazine, 2/2016, 13

⁸ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia

⁹ Ibid, II-58

with the constitutional principle of equality of arms, adversarial principle or/and the impartiality of the court.

METHODOLOGY

The monitoring project over the cases with alleged political motives is carried out by the Human Rights Center (HRC), based on the methodology of monitoring the court proceedings designed by HRC with experts' involvement, the purpose of which is to assess the compliance of the monitored court proceedings and domestic legislation with international standards of fair trial, and to identify and analyze alleged political motives and shortcomings in the cases.¹⁰

The monitoring of the court proceedings is carried out by 2 court monitors who received special training in court monitoring. To ensure a smooth monitoring process, special questionnaires were developed in the initial stage. After each monitored trial, the monitor lawyers analyze the information obtained during the trials. After reading and analyzing reports provided by the legal monitors, the legal analyst analyses the information and prepares analytical documents and public reports.

The monitoring of court proceedings is strictly based on the principles of objectivity and noninterference in the court proceedings. In parallel to that, in due respect to the independence of judicial bodies, HRC regularly provides the public, the media, and the parties to the proceedings with essential information about the court hearings and relevant findings.

1. EQUALITY OF ARMS AND ADVERSARIAL PRINCIPLE IN THE CRIMINAL PROCEEDING

The main purpose of the equality of arms and adversarial principle is to equip the prosecution and defense parties to the proceedings with equal rights and to separate their function from the judicial function.¹¹ This principle is one of the components of Article 6 of the European Convention on Human Rights, which is linked with the adversarial nature of criminal proceedings.¹²

The adversarial principle is the right of the party “to be heard” i.e. right of the party to obtain and submit evidence to the court,¹³ as well as the “opportunity to examine the evidence submitted

¹⁰ See: Monitoring of Court Proceedings of Cases with Alleged Political Motives (Summary Report, 2023) available at <https://rb.gy/gikq7> (26.10.2023)

¹¹ *Akubardia I*, Some aspects of the Georgian model of the adversarial principle, German-Georgian Criminal Law Magazine, 2/2016, 11

¹² *Brandstetter v. Austria*, no. 11170/84; 12876/87; 13468/87, 28 August 1991, §66

¹³ *Chokhmashvili K. Tomashvili T. Dzebniauri G, Osepashvili S, Pataridze M*, Evidence in the criminal proceedings “Open Society Georgia”, Tbilisi, 2016, 8

by the other party and comment on them”.¹⁴ “In parallel to that, [the parties have the right] to convince the court in the reliability of their arguments and influence the adoption of well-grounded, just, and fair judgment”.¹⁵ As for the equality of arms - in accordance with the assessment of the European Court of Human Rights - this principle, as one of the components of the right to a fair trial – implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* the opponent.¹⁶

In the adversarial system, a court, as a neutral arbiter “organizes, supervises, observes and controls examination of evidence to ensure fair and impartial trial in due respect to the adversarial principle and equality arms”.¹⁷ Thus, the court does not conduct an investigation independently - it merely assesses the evidence presented by the parties by considering the facts and makes a decision in accordance with the law.¹⁸ “Unlike the parties to the proceedings, a judge is not responsible for obtaining evidence. Moreover, the law prohibits them from doing so”.¹⁹

Some authors believe that supervision over the adherence to the principle of equality of arms and adversariality demonstrate the active - and not passive - role of a judge, whereby he/she, among others, “observes the process of the examination of obtained evidence, how lawful the process is and makes the decision after the assessment”.²⁰ In addition, it is important to take into account that “equality of arms and adversarial principle does not include artificial hindering of determination of truth in the criminal case”.²¹

1.1. Impartiality and Independence of the Court in the Adversarial Criminal Proceedings

Effective exercise of the right to fair trial depends on the independence and impartiality of the court.²² “The court is the guarantor of the principle of equality of arms”.²³ “The judicial system must be fair and transparent, free of any influences outside the rule of law”.²⁴ Effective respect

¹⁴ Surjin A, Chachukashvili L, Giguashvili A, Chomakhashvili K, Rules to Obtain Evidence and Lawfully Support Them, guidelines for the lawyers, Council of Europe, 2021, 16

¹⁵ Judgment of the Constitutional Court of Georgia No 2/13/1234,1235 of December 14, 2018 “Citizens of Georgia Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia,” II-75

¹⁶ *Bulut v. Austria*, no. 17358/90, 22 February 1996, §47

¹⁷ Surjin A, Chachukashvili L, Giguashvili A, Chomakhashvili K, Rules to Obtain Evidence and Lawfully Support Them, guidelines for the lawyers, Council of Europe, 2021, 16

¹⁸ Erin C. Blondel, Victims' Rights in an Adversary System, *Duke Law Journal*, Vol. 58, No. 2, 2008, 241, available at: <https://rb.gy/evvec2> [26.10.2023].

¹⁹ Tumanishvili G, *Criminal Proceeding, Review of the General Part, edition “Lawyers’ World,” Tbilisi 2014* 226

²⁰ Mskhiladze L, Comment to the Article 25 of the Criminal Procedure Code of Georgia, magazine *Justice and Law*, N2(66) 2020, 9

²¹ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-41

²² Independence And Impartiality of The Judicial System, Department for The Execution of Judgments of The European Court of Human Rights, Thematic factsheet, 2020, 2.

²³ Mskhiladze L, Comment to the Article 25 of the Criminal Procedure Code of Georgia, magazine *Justice and Law*, N2(66) 2020, 8

²⁴ Three Is: Independence, Impartiality and Integrity, Courts and Tribunals Judiciary, available at: <https://rb.gy/udwvo> [26.10.2023].

for this principle is important in the criminal proceedings of both inquisitorial and adversarial systems.²⁵ “The main requirement, which is strictly obligatory for the governments of the democratic and rule of law states, is to ensure fair administration of justice”.²⁶

“Only with impartiality of court proceedings is it possible to protect fundamental human rights and freedoms [...] and the due execution of justice”.²⁷

“In the adversarial proceeding, the court is deprived of the possibility to survey additional circumstances based on its initiative and relies only on the evidence submitted by the parties”.²⁸ With the increasing authoritarian functions, the responsibility of the court also increases “to protect citizens from unlawful actions of the state and stay institutionally independent”.²⁹

The independence of a judge is not a privilege but a responsibility – to resolve the court dispute in good faith and impartially, without any outside pressure or interference.³⁰ The principle of independence of the judiciary enshrined in the Constitution cannot *a priori* ensure the independence of the court; it is important that all three branches of the government – executive, legislative, and judicial - recognize and respect this principle. “Judges shall be aware that they are not accountable before the government, and do not depend on it”.³¹

In this light, in the criminal proceeding, which is based on the equality of arms and adversarial principle, a judge may be “passive” but she/she leads the hearing and is responsible for passing lawful and well-grounded judgment.³² “Constitutional obligation of the State is to ensure purposeful, effective and fair prosecution, investigation and administration justice”.³³

1.2. The Authority of a Judge to Ask Questions to the Parties for Clarification: Domestic and International Practice

The judges’ role at the stage of evidence examination and witness examination is manifested in their authority to ask questions and dismiss questions of parties to the proceedings.³⁴ Under

²⁵ Erin C. Blondel, *Victims’ Rights in an Adversary System*, *Duke Law Journal*, Vol. 58, No. 2, 2008, 241, available at: <https://rb.gy/evec2> [26.10.2023]

²⁶ Constitutional Court of Georgia, Judgment №1/4/557,571,576 of November 13, 2014, “Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikoleishvili and Aleksandre Silagadze v. the Parliament of Georgia,” II-91

²⁷ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-41

²⁸ Constitutional Court of Georgia, Judgment №1/1/650, 699 of January 27, 2017 “Citizens of Georgia – Nadia Khurtsia and Dimitri Lomidze v. the Parliament of Georgia,” II-41

²⁹ Three Is: Independence, Impartiality and Integrity, *Courts and Tribunals Judiciary*, available at: <https://rb.gy/udwvo> [26.10.2023].

³⁰ “Bangalore Principles of Judicial Conduct” and its comments, GIZ, Tbilisi 2015, 66

³¹ *Ibid*, 68

³² *Mskhiladze L*, Comment to the Article 25 of the Criminal Procedure Code of Georgia, magazine *Justice and Law*, N2(66) 2020, 8

³³ Constitutional Court of Georgia, Judgment №1/8/594 of September 30, 2016, *Citizen of Georgia Khatuna Shubitidze v. the Parliament of Georgia*, II-29

³⁴ *Kvirikashvili M*. Role of a judge in the examination process of a witness, Irina Akubardia 60 – anniversary edition, *Ivanidze M. (edition)* Tbilisi, 2020, 162

Article 25 (2) sentence 3 of the Criminal Procedure Code of Georgia, “in exceptional cases, a judge may, after obtaining consent of the parties, ask clarifying questions if so required for ensuring a fair trial.” Hence, before the normative content of the said provision was declared unconstitutional, the participation of a judge in the witness examination process was minimal, thereby echoing the adversariality of judicial proceedings.³⁵ In fact, “there is no analog of the rule effective in Georgia neither in common nor in continental European laws”.³⁶

Based on the adversarial principle, some authors were questioning such a restrictions of the judge’s authority, given that “the principle of a fair trial prevails in the course of administration of justice”.³⁷ Moreover, some authors considered the abovementioned norm as a legislative mistake, which discredited the role of a judge and contradicted the interests of judiciary as it was incompatible with the right to fair trial guaranteed under Article 6 of the European Convention on Human Rights.³⁸ Under such a legislative regulation, a judge was deprived of the possibility to impartially, comprehensively, effectively, and promptly examine the case as he/she could not receive relevant information about case details, which could help pass a well-grounded decision on the case.³⁹ “This restriction is particularly harmful if one of the parties, because of low qualification or other reason cannot support its position adequately”.⁴⁰ Additionally, the “final result of the criminal case often depends on the testimony of a witness”.⁴¹

The Georgian Criminal Procedure Code is based on the so-called Anglo-American Law (USA, England) model. However, unlike Georgia, in the USA (on the federal level and state level) a judge does not have the right to ask questions to a witness.⁴² In the UK, a judge is not just an arbitrary, considering the strict meaning of this word – who does not participate in the process of examination of the evidence of the parties. His/her goal is to “determine the truth and execute justice in accordance with the law.” Respectively, a judge participates in the process of evidence examination, among them in the examination of witnesses when it is necessary to clarify or/and determine some details.⁴³ To estimate the truth and avoid obscurity, in the adversarial model, a judge may ask questions to a witness but shall not interfere in the work of the defense lawyer.⁴⁴

³⁵ Ibid, 166

³⁶ Mskhiladze L, Comment to the Article 25 of the Criminal Procedure Code of Georgia, magazine Justice and Law, N2(66) 2020, 11

³⁷ Chakvetadze G. Role of a judge in the Georgian Criminal Procedure Code which is built based on the adversarial principle, review of the modern law N1(2), Davit Batonishvili Law Institute, Law faculty of the Eastern Europe University, 2014, 34

³⁸ Mskhiladze L, Comment to the Article 25 of the Criminal Procedure Code of Georgia, magazine Justice and Law, N2(66) 2020, 11

³⁹ Gurieli A. “Scopes of the authorities of a judge as a mean to ensure fair trial in the criminal proceeding,” magazine: Law and World, N5, 2016, 51

⁴⁰ Ibid

⁴¹ Diasamidze F, Rule of examining a witness in the Georgian law, magazine “Law and World,” No 13, 2019, 160

⁴² Kvirikashvili M. Role of Judge in the examination process of a witness, Irina Akubardia 60 – anniversary edition, Ivanidze M. (editor) Tbilisi 2020 164

⁴³ Teoh P., Judge’s Role in Adversarial and Inquisitorial Systems, 2015, available at: <https://rb.gy/635f5> [26.10.2023].

⁴⁴ Finkelstein R., The Adversarial System And The Search For Truth, Monash University Law Review, Vol. 37, No1, 138, available at: <https://rb.gy/o6k10> [26.10.2023].

In this light, in the adversarial model, it is reasonable and the judge is also entitled to ask questions to a witness if it is necessary to promote clarity and promptness of the court proceeding as “clearness contributes to the justice’ – the purpose of each criminal proceeding is to determine the truth and executive justice.⁴⁵ Judges must be neutral and independent when they examine evidence submitted by the parties. Additionally, judges shall demonstrate ‘judicial reticence’ – after the criminal proceeding is over the parties shall have a feeling that the court heard their arguments substantially and examined their evidence.⁴⁶

1.3. Legal Analysis of the Judgment N3/2/1478 of December 28, 2021, of the Constitutional Court of Georgia

The third sentence in Article 25 (2) of the Criminal Procedure Code of Georgia – “in exceptional case, a judge may, after obtaining the consent of the parties, ask clarifying questions if so required for ensuring a fair trial,” was considered by the Constitutional Court of Georgia based on the constitutional reference in the case No. 1478.⁴⁷ In accordance with the authors of the constitutional lawsuit, a judge assesses and determines the essential circumstances for the criminal case and makes the final decision. Thus, “to clarify an obscurity, to solve the concrete issue and ensure a fair trial, a judge shall be entitled to ask clarifying questions without the consent of the parties”.⁴⁸

The Constitutional Court should have determined the constitutionality of the third sentence in Article 25 (2) of the Criminal Procedure Code of Georgia in relation to the right to fair and timely trial (the second sentence in Article 31 (1) of the Constitution of Georgia). The Constitutional Court granted the constitutional reference and declared the above provision unconstitutional as it imposed some limitations on a judge in the criminal proceeding among them deprived of the possibility to ask a question “which does not contradict the equality of arms and adversarial principle as well as impartiality of a judge”.⁴⁹

⁴⁵ Hamilton H., Hobgood H., When Should a Trial Judge Intervene to Question a Witness? Campbell Law Review, Vol. 3. Issue 1 1981, Art. 3, 2012, 69

⁴⁶ Akinbode A., Summerell T., How much can a judge intervene in cross-examination before a trial becomes unfair? Dentons, 2017, <https://rb.gy/ojber> [26.10.2023]

⁴⁷ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part V and first sentence of the Part VII of the Criminal Procedure Code of Georgia”

⁴⁸ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, I-9

⁴⁹ Ibid II-51

Pursuant to the assessment of the Constitutional Court, the “requirement of the impartiality of court affects those proceedings too, where the mentioned decisions are made. The court shall implement its functions without favoritism, preliminary supporting or preliminary feelings about either party of the case”.⁵⁰ A judge shall refrain from the action, which demonstrates him/her as a party to the proceedings; therefore, the judge is obliged not to demonstrate his/her loyalty or hostile attitude towards either party. External demonstration of the judge’s independence and impartiality is also important and for that “it is necessary that the judge was perceived as impartial for the case parties and the society”.⁵¹

When discussing the equality of arms and adversarial principle in the context of criminal proceedings, the Constitutional Court clarified that the court is responsible for ensuring respect of this principle but “it is also important that the judge, motivated with the respect of these principles, is not discharged of his/her main responsibility – to exclude all reasonable doubts about the guiltiness of the defendant and execute justice”.⁵² At the same time, in the process of evidence examination, active and unwilling by the case parties’ interference by the judge may influence the strategy of the parties – “questions asked about various details may divert the process in the direction, which was not considered by the parties before or did not wish at all”.⁵³ Nevertheless, the purpose of the execution of justice in criminal cases is to estimate the truth. Consequently, the interests of neither party can be respected to artificially hinder examination of the evidence contradicting their position (examination of a witness), which is important to fairly solve the dispute”.⁵⁴ Additionally, “individual judge (jury trial) creates guarantee to fair and due execution of justice in concrete case”.⁵⁵

To establish the truth and ensure fairness, judges must participate in the evidence examination process. In this light, “a passive court and arbitrary restrictions may trigger injustice – conviction of the innocent person or acquittal of the guilty person”.⁵⁶ “Obscure testimony of a witness, may, create fake perception of the guiltiness of a defendant and result in the conviction of an innocent person”.⁵⁷ With the existing regulations, to clarify obscurity, a judge could not find

⁵⁰ Ibid, II-36

⁵¹ Ibid

⁵² Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-38

⁵³ Ibid, II-39

⁵⁴ See the Judgment №2/13/1234,1235 of December 14, 2018 of the Constitutional Court of Georgia “Citizens of Georgia – Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia,” II-98

⁵⁵ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-40

⁵⁶ Ibid, II-50

⁵⁷ Ibid II-50.

out and clarify the issues, whose knowledge should have assisted him/her in estimating the truth, creating internal faith, and passing impartial, fair, and well-grounded decisions over the case.⁵⁸

In order to avoid the breach of the principles of the equality of arms and adversariality or/and constitutional requirements about fair trial by judge's participation in the witness examination process, the Constitutional Court has set forth specific standards. Namely, the judge's engagement in direct or cross-examination of a witness shall not hinder the comprehensive examination of the evidence submitted by the parties and annulment of the evidence of the other side.⁵⁹ A judge shall implement this authority within the "judicial self-limitation frames" – "judge's function is to examine the evidence submitted to the trial, to encourage estimation of truth rather than the creation of new evidence".⁶⁰ In accordance with the court assessment, during the judge's participation in the evidence examination process judge shall not act as a party, which may create a feeling that the court is biased toward either party. Additionally, "a question shall not be asked in a language and terminology, tone, gesture, behavior or form and intensity to create an impression that he/she believes one version of evidence and does not believe or doubts over the credibility of other evidence".⁶¹

2. JUDGE'S PARTICIPATION IN THE EVIDENCE EXAMINATION IN THE CASES WITH ALLEGED POLITICAL MOTIVES – KEY FINDINGS

Human Rights Center monitors court proceedings of criminal, administrative, and civil cases with alleged political motives.⁶² Considering the topic to be surveyed in this analytic document, the two criminal cases monitored by the HRC will be analyzed in this document:

1. Case of Iveri Melashvili and Natalia Ilychova (so-called cartographers' case);
2. Case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stephane Gikoshvili, and Lasha Samkharadze.

The section below will analyze the participation of a judge in the evidence examination process, and his/her "activity" in the evidence examination stage - how it is coherent with the abovementioned standard determined by the Constitutional Court of Georgia.

Based on general observation, it is worth mentioning that in criminal cases with alleged political motives, the third sentence of Article 25 (2) of the Criminal Procedure Code of Georgia

⁵⁸ Ibid, II-48-49

⁵⁹ Ibid, II-42

⁶⁰ Ibid, II-42

⁶¹ Ibid, II-43

⁶² Monitoring of Court Proceedings of Cases with Alleged Political Motives, (Summary Report), Human Rights Center, available at: <https://rb.gy/gikq7> (23.09.2023)

(“in an exceptional case, a judge may, after obtaining the consent of the parties, ask clarifying questions if so required for ensuring a fair trial,”) never created problems for the defense side.⁶³ Before the normative content of this norm was declared unconstitutional, judges only asked clarification questions while, for example, a witness used to give two different answers to the question.⁶⁴ After the Constitutional Court of Georgia, on December 28, 2021, passed the abovementioned judgment,⁶⁵ the frequency of questions asked by judges increased, however, the equality of arms and adversarial principle were violated and neither party had a feeling that the court was biased.⁶⁶

2.1. The Case of Iveri Melashvili and Natalia Ilychova (“Cartographers’ case”)

HRC monitors are observing the criminal cases ongoing against Iveri Melashvili, the former Director of the Bordering Relations Service of the Department for Neighboring Countries within the Ministry of Foreign Affairs, and Natalia Ilychova, former Chief Inspector of the Land Border Defense Department of the Border Police under the Ministry of Interior. They are charged under Article 308(1) of the Criminal Code envisaging the action against Georgia aimed at transferring the entire territory or part of Georgia to a foreign country and/or separating a certain part of the Georgian territory. The defendants were remanded in custody from October 8, 2020, till January 28, 2021. On January 28, 2021, following the motion by the prosecution, the Presiding Judge Lela Kalichenko changed the measure of restraint applied against the defendants with a remand on bail of GEL 20,000 each. Further, the Court granted the motion of the prosecution to dismiss Iveri Melashvili from his job. To collect the amount of bail, the civil movement “Shame” disseminated information on the social network. As a result, within a couple of hours, many citizens joined the campaign to assist in the release of the accused persons, collecting the full amount of the bail - GEL 40,000. The case is being heard by the Tbilisi City Court.⁶⁷

Judge Nino Natchkebia is in charge of this case. Unlike other judges, she is not known for asking many questions to the witnesses. However, she is engaged in the evidence examination process. Additionally, during some hearings, the judge did not ask any questions to the witness and her participation in the evidence examination process was minimal.⁶⁸

After the abovementioned judgment was passed by the Constitutional Court of Georgia, a judge will not violate the equality of arms and the adversarial principle of the criminal proceeding

⁶³ Interview with the defense lawyers in the cases with alleged political motives, Human Rights Center, 22.09.2023

⁶⁴ Ibid

⁶⁵ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetititskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia

⁶⁶ Interview with the defense lawyers in the cases with alleged political motives, Human Rights Center, 22.09.2023

⁶⁷ Trial monitoring findings are presented in the summary report: Monitoring of Court Proceedings of Cases with Alleged Political Motives, (Summary Report), Human Rights Center, available at: <https://rb.gy/gikq7> (23.09.2023)

⁶⁸ HRC monitor’s trial monitoring report from the case of Iveri Melashvili and Natalia Ilychova (so-called cartographers’ case): 18.11.2022

if he/she asks the questions to the parties without their preliminary consent. Nevertheless, the judge in charge of this case in the examination of evidence does not create a perception of her favoritism, preliminary support, or approaches to either party to the case.⁶⁹ Besides, the judge refrains from demonstrating loyalty or a hostile attitude towards either party to the case. The parties have equal conditions to examine their evidence.⁷⁰

In this light, in the process of direct or cross-examination of witnesses, the judge's participation does not hinder the parties from comprehensively examining the submitted evidence or/and annulling the evidence presented by the other party. Hence, her active engagement does not violate the equality of arms and adversarial principle or constitutional requirements about a fair trial.

2.2. The Case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stephane Gikoshvili, and Lasha Samkharadze

On April 26, 2023, hearings on the criminal case were finalized against Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stephane Gikoshvili, and Lasha Samkharadze. At the court session, the prosecutor made a motion to complete a plea agreement with Besik Tamliani, Emzar Siukaev, and Lasha Samkharadze. Under the plea agreement, Besik Tamliani, Emzar Siukaev, and Lasha Samkharadze were found guilty of the crime punishable under Article 353 (1) of the Criminal Code of Georgia and were sentenced to 2 years of imprisonment, which counted as a conditional sentence. Further, the offenders were placed on probation, and they had to get registered with the Bureau of Probation each month.

As for the other defendants in the case –Kakhaber Keshikashvili and Stephane Gikoshvili opted out of accepting the plea agreement. In the closing arguments, the prosecution requested the Court to find these two defendants guilty of the crime under Article 353¹(1) (attack on law enforcement officers) of the Criminal Code. The Judge rejected the motion by the prosecution and subsumed the charges from Article 353¹(1) (assault on the law enforcement officers) to Article 353(1) (violence/threat against the law enforcement officers), as the judge found that the submitted evidence failed to prove the element of assault against the police. The Court sentenced the two defendants to 2 years in prison. However, the imposed sanction counted as a conditional sentence, and the offenders were placed on probation with an obligation to get registered with the Bureau of Probation each month.⁷¹

⁶⁹ HRC monitor's trial monitoring report from the case of Iveri Melashvili and Natalia Ilychova (so-called cartographers' case): 15.12.2022

⁷⁰ HRC monitor's trial monitoring report from the case of Iveri Melashvili and Natalia Ilychova (so-called cartographers' case): 31.10.2022

⁷¹ Monitoring of Court Proceedings of Cases with Alleged Political Motives (Summary Report, 2023) available at <https://rb.gy/gikq7> (26.10.2023)

The trial monitoring revealed that the judge was actively involved in both direct and cross-examination of the witness and asked questions. There was an impression that the judge tried to obtain more information from the witness,⁷² as well as cast doubts over the credibility and accuracy of the witness's testimony.⁷³ It is evident that based on the ruling of the Constitutional Court of Georgia, a judge is authorized to obtain additional information from witnesses, when, for example, the witness makes obscure testimony and it is necessary to clarify details. Additionally "the function of a judge is to examine the evidence submitted to the court, to promote clearness rather than create new evidence".⁷⁴ Also, there were court hearings, when the judge did not ask any questions to the witness.⁷⁵

At one of the trials, the judge doubted the credibility of the witness testimony from the defense side, while the prosecutor did not cast any doubts over his testimony. The judge noted the testimony of the witness contained some inaccuracies.⁷⁶ Additionally, during one of the hearings, the judge asked several concrete and detailed questions to the witness with regard to his testimony; furthermore, he asked the witness to clarify and evaluate such details, which the parties had not paid attention to before.⁷⁷ Unquestionably, a judge's participation in the evidence examination process shall not "create an impression that he/she trusts one version of evidence but does not trust or doubts about the credibility of the evidence submitted by another party".⁷⁸

In the end, the trial monitoring revealed that as a result of the judge's participation in the process of evidence examination substantial and vivid violation of the standard determined by the Constitutional Court was not observed. It may be caused by the fact that the determined standard is "impetuous and requires additional clarifications".⁷⁹ Nevertheless, there was an instance when "the judge changed the content of the question asked by the prosecutor with their own interpretation" and gave the prosecution's witnesses a chance to divert the question".⁸⁰

⁷² HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 10.11.2022

⁷³ HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 26.12.2022

⁷⁴ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-42

⁷⁵ HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 16.12.2022

⁷⁶ HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 12.10.2022

⁷⁷ HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 22.11.2022

⁷⁸ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-43

⁷⁹ Ibid

⁸⁰ HRC monitor's report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 11.07.2022

According to the Constitutional Court, “participation of a judge in the evidence examination process shall not create a feeling of the partiality”.⁸¹ To exclude similar doubts, it is essential that judges utilize this authority within the frames of the “judicial self-limitation” and in accordance with the requirements of the equality of arms, adversariality, and the impartiality of the court - as set forth in the Constitution.

CONCLUSION

A Judge’s participation in the process of the examination of evidence, among them, during the direct and cross-examination of witnesses is part of the right to a fair trial. “Comprehensive consideration of the evidence by a judge is within the interests of not only the parties to the case but within the general interests of justice.”⁸² Limitation of a judge’s authority to ask a question to a witness, among them the question which does not violate the equality of arms and adversarial principle as well as does not undermine the impartiality of the court, does not violate the right to a fair trial.”⁸³

In the criminal cases with alleged political grounds, which were analyzed above, in the evidence examination process and on the stage of witness examination in the court, although judges were active, their such engagement was mostly aimed at clarifying the factual circumstances in the testimonies made by witnesses rather than to create new factual circumstances. It is worth mentioning that the defense lawyers never protested the similar involvement of the judge.⁸⁴ Nevertheless, in accordance with the assessment of the defense lawyers in the abovementioned cases, the standard determined by the Constitutional Court is impetuous and needs additional clarifications as judges, indicating the right to a fair trial and their authority to estimate the truth, may take advantage of the new standard and ask such a question to a witness, which shall undermine the equality of arms.⁸⁵

The normative content of the third sentence of Article 25 (2) of the Criminal Procedure Code of Georgia was declared unconstitutional not so long ago. Therefore, it is impossible to make accurate conclusions about whether it had an impact on practice and whether it was advisable to issue this judgment. For the effective realization of the principle of fair trial and execution of

⁸¹ Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-43

⁸² Constitutional Court of Georgia, Judgment №3/2/1478 of December 28, 2021 on the case „Constitutional Reference of the Tetitritskaro District Court to examine the constitutionality of the second sentence in the Article 3 Part 20, third sentence of the Article 25 Part II, Article 48 Parts I and II, first sentence of the Part IV and first sentence of the Part VII of the Criminal Procedure Code of Georgia, II-50

⁸³ Ibid, II-51

⁸⁴ HRC monitor’s report from the trial monitoring of the case of Besik Tamliani, Emzar Siukaev, Kakhaber Keshikashvili, Stepane Gikoshvili and Lasha Samkharadze: 11.07.2022

⁸⁵ Interview with the defense lawyers in the cases with alleged political motives, HRC, 22.09.2023

justice, a judge shall have the right to ask questions to a witness. However the judge's "active" engagement must be coherent with the "reasonable judicial self-limitation", the constitutional requirements of the principles of equality of arms and adversariality, as well as the fair trial.