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## INDIRECT EVIDENCE – A CONSTITUTIONAL-LEGAL BASIS FOR CONVICTION?

### ABSTRACT

The practice of Georgia’s general courts in applying a “beyond reasonable doubt” standard being necessary for convicting a defendant is inconsistent. Whereas until recently, at least two direct pieces of evidence were required to convict a person, in its recent decisions, the Supreme Court of Georgia has changed this approach to some extent, allowing guilty verdicts to be based on indirect evidence as well.

As a result, the above-mentioned change in the court practice allows convicting a person based on indirect evidence that could raise concerns, including those regarding with compliance with the Constitution. In its precedent-setting judgment N1/1/548 of January 22, 2015 *Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia*, the Constitutional Court of Georgia declared unconstitutional the normative content of the articles of the Criminal Procedure Code of Georgia, allowing for indictment and conviction of a person based on hearsay testimony (being the most common form of indirect evidence).

The article examines the practice of general courts of Georgia with a particular focus on the recent interpretations made by the Supreme Court of Georgia, their potential impact on the parties involved in criminal proceedings, and their compatibility with the right to a fair trial and the presumption of innocence, as safeguarded by the Constitution of Georgia and international legal instruments. These issues are examined through the perspective of the legal doctrines and practices adopted by national courts, as well as those established by the European Court of Human Rights and the courts of the United States.

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## I. INTRODUCTION

In a democratic state based on the principles of rule of law and social justice, where the full realization and adequate protection of universally recognized human rights and freedoms must remain a high priority, the special attention should be paid to the measures taken by the state against individuals.<sup>1</sup> Among those, the national criminal policy should be a subject to the most rigorous study, which is deemed successful only when used as *ultima ratio*.<sup>2</sup> Taking into account all potential consequences of convicting a person for committing criminal offense including the imposition of penalty (particularly when it implies imprisonment), social isolation, criminal record and stigmatization - it is essential that the conviction of an individual should be conducted strictly according to all relevant standards.

The Constitution of Georgia allows for the conviction against an individual only on the basis of incontrovertible evidence.<sup>3</sup> The Criminal Procedure Code of Georgia further elaborates on this constitutional provision, stipulating that a guilty verdict must be based solely on a body of coherent, clear, and convincing evidence that establishes the defendant's guilt beyond reasonable doubt.<sup>4</sup> It should be noted that the national legislation does not specify the exact type, number, or combination of evidence required for achieving this standard. Furthermore, the Criminal Procedure Code does not explicitly distinguish between direct and indirect evidence. Consequently, the evaluation, classification, admissibility, acceptance/rejection of evidence as well as its sufficiency for reaching the guilty verdict is entrusted to the discretion of judicial bodies. This creates the risk that an individual's legal standing will depend on the personal convictions of a judge.

Undoubtedly, combating crime effectively, identifying offenders, and ensuring the administration of justice fall into the scope of significant public interests.<sup>5</sup> However,

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<sup>1</sup> Judgment of the Constitutional Court of Georgia on case N1/3/421,422 "Citizens of Georgia Giorgi Kipiani and Avtandil Ungiadze v. the Parliament of Georgia", 10 November 2009. Paragraph II-1; Judgment of the Constitutional Court of Georgia on case N3/1/531 "Citizens of Israel Tamaz Janashvili, Nana Janashvili, Irma Janashvili, and Citizens of Georgia Giorgi Tsakadze and Vakhtang Loria v. the Parliament of Georgia", 5 November 2013. Paragraph II-1; Judgment of the Constitutional Court of Georgia on case N1/3/534 "Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia", 11 June 2013. Paragraph II-3; and Judgment of the Second Board of the Constitutional Court of Georgia on case N2/1/536 "Citizens of Georgia Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili, and Gocha Gabodze v. Minister of Labour, Health and Social Affairs of Georgia", 4 February 2014. Paragraph II-53.

<sup>2</sup> Judgment of the First Board of the Constitutional Court of Georgia on case N1/4/592 "Citizens of Georgia Beka Tsikarishvili v. the Parliament of Georgia", 24 October 2015. Paragraph II-37.

<sup>3</sup> Article 31, paragraph 7, the Constitution of Georgia. 24 August 1995. Official Gazette of the Parliament of Georgia, 31-33, 24.08.1995.

<sup>4</sup> Article 3, paragraph 13, article 13, paragraph 2, article 82, paragraph 3, article 259, paragraph 3, the Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette of the Parliament of Georgia, 31, 03.11.2009.

<sup>5</sup> Judgment of the Plenum of the Constitutional Court of Georgia on case N3/5/1341,1660 "Constitutional

these legitimate interests are confronted by an individual's private interests such as the right to a fair trial and presumption of innocence.<sup>6</sup> When the public and private values are in conflict, it is essential to harmonize and reasonably balance between them.<sup>7</sup> Beyond introducing a legislative leverage, the development of consistent judicial practices by general courts is crucial to prevent conviction based on insufficient and/or unreliable evidence.

This article analyzes the general court's practice on sufficiency of the evidence required for convicting a person as well as the guarantees provided by national legislation, which protect individuals from unjust and unsubstantiated guilty verdicts. The article sequentially examines the concept of evidence and its evaluation; distinguishing features between direct and indirect evidence; the essence of the evidentiary standard "beyond reasonable doubt" as well as the requirements established by the right to a fair trial and the presumption of innocence. Additionally, the risks associated with the judicial assessment of individual pieces of evidence are studied in order to identify problems and find respective solutions.

For the purpose of conducting comprehensive research and providing a thorough assessment of current legal institutions, the article employs dogmatic-legal, comparative-legal, and analytical research methods.

## II. ESSENCE AND IMPORTANCE OF EVIDENCE IN CRIMINAL PROCEEDINGS

In 2009, with the adoption of the new Criminal Procedure Code, the Parliament of Georgia renounced the inquisitorial model of proceedings, replacing it with an adversarial system. One of the purposes of this major change was to ensure and adversarial court process based on the principle of equality of arms between the parties.<sup>8</sup> The transition to the adversarial model has amplified the significance of evidence in

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Submissions of Tetrtskaro District Court on the constitutionality of the first sentence of Article 200 (6) of the Criminal Procedure Code of Georgia", 24 June 2022. Paragraph II-24; Judgement of the Constitutional Court of Georgia on case N2/2/1276 "Giorgi Keburia v. the Parliament of Georgia", 25 December 2020. Paragraph II-44.

<sup>6</sup> Judgment of the European Court of Human Rights on case N9487/19 "Mamaladze v. Georgia", 3 November 2022. Paragraph 105.

<sup>7</sup> Judgment of the Constitutional Court of Georgia on case N1/1/477 "the Public Defender of Georgia v. the Parliament of Georgia", 22 December 2011. Paragraph II-45; Judgment of the European Court of Human Rights on case N37359/09 "Hämäläinen v. Finland", [GC] 16 July 2014. Paragraph 65; Judgment of the European Court of Human Rights on case N32555/96 "Roche v. The United Kingdom", [GC] 19 October 2005. Paragraph 157.

<sup>8</sup> Explanatory Note to the Draft Law on the Criminal Procedure Code of Georgia, Section a.b. Objectives of the Draft Law, 04-04-2006, Registration N07-2/218/6; Report of the Commissioner for Human Rights of the Council of Europe Mr. Thomas Hammarberg, following his visit to Georgia on April 18-24, 2011, 5.

criminal proceedings, as the core of this principle lies in granting the parties the ability to present their version of the past events, submit supporting arguments and evidence as well as challenge and refute the evidence presented by the opposing party.<sup>9</sup>

A comprehensive legal definition of evidence is provided in Article 3, paragraph 23 of the Criminal Procedure Code of Georgia, according to which: “Evidence is an information [...] submitted to the court in the manner prescribed by law, based on which the parties confirm or deny facts, make their legal evaluation, perform duties, protect their rights and legitimate interests, while the court determines whether there is a fact or action for which criminal proceedings have been initiated, whether this action has been committed by a certain person and whether or not that person is guilty. The court as well study the circumstances, which make an impact on the nature and degree of the defendant’s responsibility, and reflect on the defendant’s character [...]”<sup>10</sup> The Constitutional Court of Georgia explained that “in the process of administering justice in criminal cases, evidence constitutes a source of information that can confirm or deny the fact of committing crime by the accused person.”<sup>11</sup> “Evidence is the information obtained from the sources as defined by the Criminal Procedure Code and in the manner prescribed by the Code, with regard to the factual circumstances of an act, its illegality, culpability, the commission of the act, mitigating factors and aggravating circumstances, and, where applicable, the nature and extent of the harm caused.”<sup>12</sup>

In practice, disputes have emerged regarding the question as to which facts or information obtained by the parties is appropriate for the status of evidence. For example, the Supreme Court of Georgia disagreed with the reasoning of the Kutaisi Court of Appeals, which, by referring Article 3, paragraph 23 of the Criminal Procedure Code considered as evidence only those materials on the criminal case, which were officially submitted to the court. The Supreme Court explained that various factual data or other materials on the case get a legal status of evidence before their formal submission to court. The Supreme Court based its conclusion on the following two arguments: 1. Provisions of different norms<sup>13</sup> of the Criminal Procedure Code indicate the option of availability of

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<sup>9</sup> Judgement of the Constitutional Court of Georgia on case N2/13/1234,1235 “Citizens of Georgia Roin Mikeladze and Giorgi Burjanadze v. the Parliament of Georgia”, 14 December 2018. Paragraph II-75; Judgement of the Plenum of the Constitutional Court of Georgia on case N3/1/574 “Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia”, 23 May 2014. Paragraph II-75; K.F. Gutsenko, L.V. Golovko, B.A. Filimonov, *Criminal Proceedings in Western States* (Meridiani Publishing 2007) 13.

<sup>10</sup> Article 3, paragraph 23 of the Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

<sup>11</sup> Judgment of the Constitutional Court of Georgia on case N1/1/548 “Zurab Mikadze v. the Parliament of Georgia”, 22 January 2015. Paragraph II-5.

<sup>12</sup> Zaza Meishvili and Omar Jorbenadze, *Commentary on the Criminal Procedure Code of Georgia* (as of December 31, 2006) (Sezani Publishing 2007) 276 (in Georgian).

<sup>13</sup> Article 3, paragraph 25, article 33, paragraph 6n, article 38, paragraph 7, article 39, article 83, paragraph 8, article 169, paragraph 1, and article 169, paragraph 3g of the Criminal Procedure Code of Georgia, 9

evidence during the investigation phase of the case (prior to its submission to the court);  
 2. In certain cases, the proceedings and final decisions on the case may be completed before the court hearing.

Examples to the above-mentioned include the ruling to close investigation and/or not to initiate and discontinue criminal prosecution, on applying diversion or recognizing a person as a victim or successor of victim's rights. The Court of Cassation states that the ruling made during the investigation phase should be substantiated and it should clearly specify the evidence on which the ruling is based. Consequently, the Supreme Court has come up with a broader interpretation of evidence, encompassing information and materials obtained by a party prior to their submission to the court.<sup>14</sup> This approach is acceptable since a narrow interpretation of the status of evidence would, in many instances, be unjustifiably detrimental to the issuance of rulings by the Supreme Court, before hearing the case.

Evidence in criminal proceedings is essential and plays a decisive role in reaching a verdict.<sup>15</sup> It forms an "objective foundation" upon which the court bases its final decision regarding a person's guilt or innocence.<sup>16</sup>

### III. DISTINCTION BETWEEN DIRECT AND INDIRECT EVIDENCE

The applicable Criminal Procedure Code provides an exhaustive list of admissible evidence, establishing that any evidence not explicitly defined within the Code cannot be recognized in criminal proceedings, in accordance with the principle of *numerus clausus*.<sup>17</sup> Evidence may exist in the form of testimony, material evidence and/or document,<sup>18</sup> but their content and material form vary (e.g., photographs, computer files, audio/video recordings, traces, objects, items).<sup>19</sup>

Although there is no unified stance regarding the classification of different pieces of evidence,<sup>20</sup> they can still be grouped by the acquisition methods, sources, origin,

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October 2009. Official Gazette, 31, 03.11.2009.

<sup>14</sup> Judgment of the Criminal Chamber of the Supreme Court of Georgia on case N221-20, 28 May 2020. Paragraphs 8-9.

<sup>15</sup> See supra note 11, paragraph II-23.

<sup>16</sup> Giorgi Tumanishvili, Criminal Procedure: General Overview (World of Lawyers Publishing 2014) 200 (in Georgian).

<sup>17</sup> *ibid*, 206.

<sup>18</sup> A judicial notice (*res judicata*) should be taken into account as well, accepted by the court as the evidence without further examination. Article 73, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

<sup>19</sup> Judgment of the Constitutional Court of Georgia on case N2/2/579 "Maya Robakidze v. the Parliament of Georgia" 31 July 2015. Paragraph II-10.

<sup>20</sup> Group of authors, Criminal Procedure of Georgia, General Part (3rd edition, Meridiani Publishing 2015) 258-261 (in Georgian).

relevance, and connection of the evidence to the subject of proof. These categories include incriminating and exculpatory, personal and material, primary and derivative, as well as direct and indirect evidence.<sup>21</sup> The applicable Criminal Procedure Code does not classify evidence or explicitly distinguish between direct and indirect evidence. Consequently, when discussing this issue, theoretical perspectives and practical interpretations are particularly important.

According to procedural literature, the distinction between direct and indirect evidence is determined by their relationship to the subject of proof. Specifically, evidence whose origin directly and explicitly indicates the circumstances relevant to the subject of proof, confirming or denying essential facts or any of their elements - such as the accused's participation in a criminal act - is considered as direct evidence. Examples of direct evidence include the testimony of the victim, the testimony of an eyewitness to the crime, or surveillance footage clearly showing the accused discharged a firearm at the crime victim. In contrast, indirect evidence does not directly and explicitly relate to the subject of proof or its elements; it does not clarify significant factual circumstances.

However, when combined with other evidence and examined in the context of the case, indirect evidence can lead to important conclusions regarding essential case-related circumstances.<sup>22</sup> An example of indirect evidence is a forensic medical report, which can establish the existence, severity, and location of injuries but cannot determine who inflicted them, when, or under what circumstances the injuries occurred. Such a report cannot prove that a specific individual caused the injuries to the victim.<sup>23</sup> Similarly, the Supreme Court of Georgia classified as indirect evidence the discovery of stolen cattle at the home of the accused's father-in-law. The court clarified that neither this evidence nor any other evidence in the case directly established the essential elements of theft (Article 177 of the Criminal Code of Georgia), specifically the circumstances under which the cattle were misappropriated or by whom.<sup>24</sup>

Direct and indirect evidence is interpreted similarly in the United States legal system. According to U.S. legal doctrine and case law, direct evidence is defined as the evidence based on personal knowledge or observation, which, if confirmed, establishes a fact

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<sup>21</sup> Jemal Gakhokidze, Mikheil Mamniashvili and Irakli Gabisonia, *Criminal Procedure of Georgia (General Part)* (World of Lawyers Publishing 2013) 84 (in Georgian).

<sup>22</sup> Lavrenti Maghlakelidze and Giorgi Tumanishvili, "Significance of Indirect Evidence in Georgian and International Criminal Proceedings" (2017) 1 (53) 17 *Justice and Law* 32 (in Georgian); Group of Authors, Revaz Gogshelidze (ed.), *Criminal Procedure, Separate Institutions of the General Part* (2nd edition Law Publishing 2009) 399 (in Georgian); Group of authors, *supra* note 21, 259-261.

<sup>23</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1043ap-22, 10 November 2022. Paragraph 9; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N105ap-22, 27 June 2022. Paragraph 5.11; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N493ap-21, 8 November 2021. Paragraph 10; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N287ap-20, 27 September 2021. Paragraph 10.

<sup>24</sup> Uniform Court Practice on Criminal Cases of the Supreme Court of Georgia (second half of 2014 - 2016) Department for the Study and Generalization of Court Practice (2018) 108 (in Georgian).

without the need for presumption or inference.<sup>25</sup> Direct evidence confirms the existence or absence of facts essential to the case.<sup>26</sup> For example, in a murder case, the testimony of a witness who saw the defendant stab the victim with a knife would constitute direct evidence. Circumstantial evidence, sometimes referred to as indirect evidence, is evidence that establishes a connection to the primary fact through intermediary facts. It is termed circumstantial/indirect because it relies on inferences drawn from connections between facts.<sup>27</sup> An example of indirect evidence is the testimony of a police officer who apprehended an individual carrying a bag containing money marked with identifiable stains.<sup>28</sup> Notably, the International Criminal Court (ICC) similarly defines and underscores the importance of indirect evidence, recognizing that in complex cases (such as genocide), prosecution is almost impossible based solely on direct evidence.<sup>29</sup>

The above-mentioned demonstrates a critical importance of accurate differentiation, and proper classification of direct and indirect evidence. The connection between evidence and the subject of proof directly influences the determination of essential elements of a crime, thereby affecting the judgment of guilt or innocence. This is closely linked to the presumption of innocence, implying that no person be deemed guilty until every element of the crime is proven by a sufficient and convincing body of evidence.<sup>30</sup> Ultimately, this reflects on the right to a fair trial, which mandates that an individual be convicted solely based on reliable and adequate evidence. The core of the right to a fair trial is to ensure that an entire criminal process against an individual accused of committing a crime is conducted in fair manner and is equipped with all appropriate guarantees.<sup>31</sup> This fundamental right inherently requires that no person be convicted without clear and sufficient evidence.<sup>32</sup>

<sup>25</sup> Henry Campbell Black, M.A., *Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (West Publishing 1968) 546.

<sup>26</sup> *Yancey v. State*, 65 So. 3d 452, 2009; *Ramos v. State*, 478 SW 2d 102, 1972; *Frank Brown v. State*, 72 S.W.2d 269, 1934; *Lee Beason v. The State*, 67 S.W. 96, 1902.

<sup>27</sup> *People v. Smith*, 177 Cal.App.4th 1478, 2009; *People v. Rivera*, 109 Cal.App.4th 1241, 135 Cal.Rptr.2d 682, 2003.

<sup>28</sup> Jefferson L. Ingram, *Criminal Evidence* (10th edition, Routledge 2009) 25.

<sup>29</sup> Judgment of the International Criminal Court ICC-02/05-01/09-73 “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010. Paragraph 33; Situation of the International Criminal Court in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 14 March 2012. Paragraph 57.

<sup>30</sup> Article 5, paragraph 3 of the Criminal Procedure Code of Georgia provides for the same guarantee: “any doubt arising during the assessment of evidence that cannot be confirmed in accordance with the law shall be resolved in favor of the defendant (convict).”

<sup>31</sup> Judgment of the European Court of Human Rights N926/05 “*Taxquet v. Belgium*”, [GC] 16 November 2010. Paragraph 84; Judgment of the European Court of Human Rights N9154/10 “*Schatschaschwili v. Germany*”, [GC] 15 December 2015. Paragraph 101; Judgment of the European Court of Human Rights N 50541/08, 50571/08, 50573/08, 40351/09 “*Ibrahim and Others v. The United Kingdom*”, [GC] 13 September 2016. Paragraph 250; Judgment of the European Court of Human Rights N29714/18 “*Pirtskhalava and Tsaadze v. Georgia*”, 23 March 2023. Paragraphs 50-54.

<sup>32</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1090ap-22, 25 January 2023.

#### IV. RULE FOR EVALUATION OF EVIDENCE

The evaluation of evidence permeates all stages of criminal proceedings.<sup>33</sup> According to the principle of direct and oral examination of evidence, only evidence that has been directly and orally examined by the parties during trial is admissible.<sup>34</sup> This same guarantee is enshrined in Article 6 of the ECHR, which stipulates that, as a rule, any evidence against the accused must be presented and examined in his/her presence or in the presence of the defense counsel (with some exceptions).<sup>35</sup>

In addition to the general principle of direct and oral examination, all evidence presented by the parties is assessed according to the same mandatory standard; namely, the following three criteria are assessed collectively: relevance of evidence towards to criminal case, its reliability (credibility), and admissibility (legality).<sup>36</sup> The principle of free evaluation of evidence applies in criminal proceedings, according to which no piece of evidence has a predetermined weight, and the significance assigned to it by one subject involved in the process is not binding for the other one. Key criteria guiding the court's evaluation of individual pieces of evidence include addressing the following questions: whether the evidence is related to the subject of proof in the case; whether the evidence accurately reflects the facts essential to the case; the credibility of the source from which the evidence was obtained; overall relevance and reliability of the evidence.<sup>37</sup>

It is important to note that evidentiary law does not establish a rigid hierarchy of evidence or predetermined criteria for defining such a hierarchy. The weight of evidence increases depending on how essential or significant the fact it addresses is to the subject of proof and how accurately and convincingly it affirms or denies it.<sup>38</sup> A clear example of this can be found in the judgment of the ECtHR on the case *Merabishvili v. Georgia*, where the Court deemed the applicant's account of his alleged removal from prison credible. This conclusion was based on the applicant's ability to recall the sequence of events, the timing, the individuals involved, and distinguishing details associated with his late-night removal from prison [...].<sup>39</sup>

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<sup>33</sup> Judgment of the Constitutional Court of Georgia on case N1/1/650,699 “Citizens of Georgia Nadia Khurtsidze and Dimitri Lomize v. the Parliament of Georgia”, 27 January 2017. Paragraph II-41.

<sup>34</sup> Article 14, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

<sup>35</sup> Council of Europe, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (criminal limb) (2022) 94.

<sup>36</sup> Article 82, paragraph 1, Criminal Procedure Code of Georgia, 9 October 2009. Official Gazette, 31, 03.11.2009.

<sup>37</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N626ap.-17, 29 March 2018. Paragraph 3.

<sup>38</sup> Group of authors, Commentary on the Criminal Procedure Code of Georgia, 1 October 2015 (American Bar Association 2015) 288, 295 (in Georgian).

<sup>39</sup> Judgment of the European Court of Human Rights N72508/13 “Merabishvili v. Georgia”, 14 June 2016. Paragraph 104.



Consistent and convincing recounting of events by a witness is also actively used as a criterion for assessing the reliability of testimony in the practice of the Supreme Court of Georgia.<sup>40</sup> Thus, the evidentiary strength of evidence varies depending on the factual circumstances of each individual criminal case. As for the authority evaluating evidence, the responsibility of its full assessment rests solely with the court.<sup>41</sup> In addition, a distinction must be drawn between the judge's criteria for evaluating evidence during the pre-trial and substantive stages of case hearings. During the pre-trial stage, the judge's evaluation is limited to determining the admissibility of evidence, assessed superficially and from a formal perspective.<sup>42</sup> In contrast, during the substantive hearing, the evidence undergoes comprehensive examination.<sup>43</sup> As a general rule, the judge presiding over the substantive hearing is not authorized to rule on the admissibility of evidence, as this falls under the jurisdiction of the pre-trial judge. However, this does not mean that the substantive judge is bound by the pre-trial judge's decision; instead, he/she assesses all evidence during the deliberation process, and only after this comprehensive review issues a procedural decision; determining, while doing so, which evidence to accept and which to reject.<sup>44</sup> In all cases, the evaluation of the credibility of evidence is the responsibility of the court reviewing the criminal case, based on a full and comprehensive examination of the circumstances.<sup>45</sup> The law entrusts the judge with a decisive role in the evaluation of evidence.

The European Convention on Human Rights (hereinafter – the ECHR) does not establish a specific rule for admissibility and evaluation of evidence. According to the practice of the European Court for Human Rights (hereinafter – the ECtHR), such matters primarily fall under the scope of regulation of national legislation.<sup>46</sup> The ECtHR's role in evaluating evidence is subsidiary to that of national courts, and within the scope of its jurisdiction, it does not assume the fact-finding functions of a trial court.<sup>47</sup> Thus, the ECtHR is not responsible for judging on the admissibility of concrete type of evidence, even if it was obtained unlawfully under national law, nor does it adjudicate on the guilt

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<sup>40</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N896ap-22, 16 December 2022. Paragraph 5.5; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N521ap-22, 19 October 2022. Paragraph 4.7.

<sup>41</sup> Group of authors, *supra*, note 38, 288.

<sup>42</sup> Gakhokidze, Mamniashvili and Gabisonia, *supra* note 21, 263.

<sup>43</sup> Ketevan Chomakhashvili et al., *Evidence in Criminal Proceedings* (Open Society Georgia Foundation 2016) 131 (in Georgian).

<sup>44</sup> Ruling of the Tbilisi Court of Appeals on case N1g/1614-16, 20 October 2016.

<sup>45</sup> Ruling of the Supreme Court of Georgia on case N468ap-22, 1 November 2022. Paragraph 20.

<sup>46</sup> Judgment of the European Court of Human Rights N19867/12 “Moreira Ferreira v. Portugal” (no. 2), [GC] 11 July 2017. Paragraph 83.

<sup>47</sup> Judgment of the European Court of Human Rights N27602/95 “Ülkü Ekinci v. Turkey”, 16 July 2022. Paragraph 142; Judgment of the European Court of Human Rights N28883/95 “McKerr v. The United Kingdom”, 4 April 2000.

or innocence of the applicant.<sup>48</sup> The central issue the ECtHR evaluates, in relation to the complaints filed under Article 6 of the Convention, is whether the proceedings were fair in general, and whether the rights of the defense were respected. When assessing the fairness of proceedings, the ECtHR considers several factors, including whether the applicant had the opportunity to challenge the authenticity of evidence and object to its use. The quality of the evidence, the circumstances of its collection, and whether these circumstances raise doubts about the authenticity and reliability of the evidence, are also examined.

According to the general standard established in case law, when evidence is sufficiently compelling and there is no significant risk of it being considered unreliable, presenting additional evidence is less necessary. The high public interest towards investigating and punishing specific crimes is also taken into account, when assessing the fairness of proceedings. Namely, the public interest must be balanced with the private interest, necessitating that evidence against the accused is obtained lawfully.<sup>49</sup>

An example of this is the so-called Rostomashvili Group cases, in which the applicants' primary complaint concerned their conviction based on "planted" evidence (in some cases, drugs or firearms), alleging a violation of Article 6 of the Convention.<sup>50</sup> In these cases, the ECtHR applied the principles established by its case law and assessed not the admissibility of the contested evidence in isolation but the overall fairness of the proceedings. Accordingly, when an applicant brings a claim before the ECtHR alleging a violation of the right to a fair trial, the Court examines the overall fairness of the proceedings based on the aforementioned criteria, rather than focusing solely on the admissibility of specific piece of evidence.

A second issue arises when the ECtHR evaluates the evidence to determine the validity of a complaint. Specifically, when submitting a complaint to the ECtHR, the applicant must attach the documents (evidence) relevant to proving a violation of the Convention,

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<sup>48</sup> Judgment of the European Court of Human Rights N7215/10 "Prade v. Germany", 3 March 2016. Paragraph 33.

<sup>49</sup> Judgment of the European Court of Human Rights N4378/02 "Bykov v. Russia" [GC], 10 March 2009. Paragraph 90; Judgment of the European Court of Human Rights N44787/98 "P.G. and J.H. v. the United Kingdom", 25 September 2001. Paragraph 76; Judgment of the European Court of Human Rights N5935/02 "Heglas v. the Czech Republic", 1 March 2007. Paragraphs 89-92.

<sup>50</sup> Judgment of the European Court of Human Rights N21074/09 "Bakradze v. Georgia", 10 December 2020; Judgment of the European Court of Human Rights N6739/11 "Bokhonko v. Georgia", 22 January 2021; Judgment of the European Court of Human Rights N57255/10 "Kalandia v. Georgia", 22 April 2021; Judgment of the European Court of Human Rights N36416/06 "Kobiashvili v. Georgia", 14 June 2019; Judgment of the European Court of Human Rights N30364/09 "Megrelishvili v. Georgia", 7 May 2020; Judgment of the European Court of Human Rights N43854/12 "Shubitidze v. Georgia", 17 June 2021; Judgment of the European Court of Human Rights N41674/10 "Tlashadze and Kakashvili v. Georgia", 25 March 2021; Judgment of the European Court of Human Rights N42371/08 "Tortladze v. Georgia", 18 June 2021.

such as protocols, witness statements, medical records, etc.<sup>51</sup> In other words, the applicant must demonstrate to the ECtHR that his/her rights, guaranteed by the Convention, have indeed been violated. The types of evidence required vary depending on the nature of the complaint. In other words, the principle of *affirmanti incumbit probatio* (the burden of proof lies with the claimant) is not absolute. In exceptional cases, for example, when an individual is under the control of the police or similar state authorities and the issue entirely or partially falls within the exclusive competence of the state, the burden of proof lies with the state. The state must provide a satisfactory and convincing explanation, supported by adequate evidence, to counter the version of events presented by the victim.<sup>52</sup>

As a general rule, the ECtHR requires that claims submitted before it be substantiated with sufficient evidence. When assessing this evidence, the Court applies the “beyond reasonable doubt” standard. However, it emphasizes that such proof may derive from sufficiently strong, clear, and consistent conclusions or similar compelling presumptions.<sup>53</sup> The ECtHR explicitly notes that this standard is not equivalent to that used in national legal systems, and the Court’s aim has never been to replicate the national standard applied by domestic legal systems.<sup>54</sup>

The ECtHR’s case law contains numerous instances where the Court has not found a violation of a specific article of the Convention due to insufficient evidence. For example, in the recent judgment in *Machalikashvili and Others v. Georgia*, the ECtHR judged that the evidence presented in the case was insufficient to establish a violation of the substantive aspect of Article 2 (right to life) of the Convention. For the same reason (the lack of sufficient evidence), the Court declared the complaint under the substantive aspect of Article 3 inadmissible for examination on the merits.<sup>55</sup>

The standards established by national legislation and the ECtHR practice confirm that the probative value/weight of evidence depends on how essential and critical the fact it addresses is to the case, and how convincingly it affirms or denies that fact. When applying this reasoning to direct and indirect evidence, their definitions indicate that direct evidence, by its nature, relates directly to the subject of proof and its constituent

<sup>51</sup> European Court for Human Rights, Notes for filling in the application form (2022) 12 <[https://echr.coe.int/Documents/Application\\_Notes\\_KAT.pdf](https://echr.coe.int/Documents/Application_Notes_KAT.pdf)> (in Georgian) [last accessed on 15 April 2023].

<sup>52</sup> Judgment of the European Court of Human Rights N23380/09 “Bouyid v. Belgium” [GC], 28 September 2015. Paragraphs 83-84.

<sup>53</sup> Council on Europe, “Guide on Article 3 of the European Convention on Human Rights, Prohibition of torture” (2022) 12.

<sup>54</sup> Judgment of the European Court of Human Rights N39630/09 “El-Masri v. The Former Yugoslav Republic of Macedonia” [GC], 13 December 2012. Paragraph 151.

<sup>55</sup> Judgment of the European Court of Human Rights N32245/19 “Machalikashvili and Others v. Georgia”, 19 January 2023. Paragraphs. 106, 113; Judgment of the European Court of Human Rights N15762/10 “Cadiroğlu v. Turkey”, 3 September 2013. Paragraph 27.

elements. Consequently, as a general rule, direct evidence carries greater probative value. For example, in a murder case, the testimony of an eyewitness who saw the accused fire a weapon at the victim (direct evidence) carries greater weight than the discovery of a firearm at the accused's residence during a search (indirect evidence). However, neither direct nor indirect evidence holds predetermined weight. Cases vary, and contrary outcomes are not excluded by this analysis.<sup>56</sup> Nonetheless, it is undisputed that the more compelling and credible the evidence, the less need there is to corroborate it with additional evidence.

## **V. ESSENCE AND ROLE OF THE “BEYOND REASONABLE DOUBT” STANDARD**

The “beyond reasonable doubt” standard represents the highest evidentiary threshold, playing a vital role in criminal proceedings. Its significance can be analyzed from various interconnected perspectives. As a procedural safeguard, its primary aim is to uphold the principles of the rule of law, including protecting individuals from state arbitrariness and preserving human dignity during legal processes.<sup>57</sup>

According to the Constitutional Court of Georgia, the “beyond reasonable doubt” standard ensures the protection of the universally recognized presumption of innocence (*in dubio pro reo*), significantly reduces the risk of unjust and unfounded convictions, helps prevent errors in the administration of justice, and fosters public trust in the judiciary by ruling out criminal liability based on doubt or speculation. The “beyond reasonable doubt” test serves as a safeguard for members of a free and democratic society who value personal liberty and actively advocate for the protection of human rights. For such individuals, it is essential to believe, and have legal assurance, that the state will not convict a person unless the highest degree of certainty regarding his/her guilt is achieved through a fair trial. Additionally, this evidentiary standard serves as a guiding criterion for courts in resolving evidentiary conflicts, properly weighing evidence, and ruling in favor of the accused whenever reasonable doubt arises.<sup>58</sup> Notably, since the court verdicts concern past events, reconstructing the situation or proving the defendant's guilt with absolute, mathematical certainty is not required.

The same approach is reflected in the practice of the Supreme Court of Georgia when assessing the reliability and relevance of witness testimony. The Court has clarified that demanding a witness to recall and recount every detail with complete accuracy,

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<sup>56</sup> See opposite example, *supra* note 38, 295.

<sup>57</sup> Group of Authors, *Commentary on the Constitution of Georgia, Chapter II, Citizenship of Georgia. Basic Human Rights and Freedoms* (Petit Publishing 2013) 485 (in Georgian).

<sup>58</sup> See *supra* note 11, paragraphs II-41-45.

regardless of the passage of time, is unreasonable and impractical.<sup>59</sup> Given that reaching a guilty verdict necessitates the elimination of reasonable doubt, rather than all possible doubt, the critical question becomes: what qualifies as reasonable doubt?

A reasonable doubt is the one grounded in common sense, logic, reasoning, experience, or scientific research, which would arise in the mind of an ordinarily prudent person upon careful consideration of all evidence. Such doubt may stem from the presence, insufficiency, or content of the evidence. A doubt is not considered reasonable if it is based solely on speculation, probability, conjecture and/or intuition.<sup>60</sup> Evidence that meets the “beyond reasonable doubt” standard must be so convincing that a rational person can rely on it and act upon it. Thus, the court is obliged to dispel any reasonable doubt concerning essential matters of the case and, most importantly, regarding the defendant’s guilt. Moreover, Article 31, paragraph 7 of the Constitution of Georgia explicitly and unequivocally establishes that only incontrovertible evidence can serve as the basis for convicting a person. “The constitutional standard of “incontrovertibility” not only prescribes inadmissibility of doubtful evidence (meaning exclusion of suspicion on falsification or loss of essential characteristic) but also requires that significant facts or circumstances be confirmed solely through reliable and duly verified sources.”<sup>61</sup> The burden of proving the defendant’s guilt beyond reasonable doubt lies with the prosecution, as mandated by both the Georgian Constitution and procedural legislation. This principle is further reinforced by the ECHR, and consistently upheld by the ECtHR’s case law, according to which, no individual may be found guilty if any reasonable doubt remains regarding his/her guilt.<sup>62</sup>

In the United States, criminal convictions require the highest standard of proof - “beyond a reasonable doubt”, which applies to each element of the alleged offense. This evidentiary test is directly linked to the Fifth Amendment of the U.S. Constitution, which guarantees, among other rights, the right to a fair trial, reinforces the privilege against self-incrimination, and compels the prosecution to present evidence that proves the defendant’s guilt beyond a reasonable doubt.<sup>63</sup> It is important to emphasize that the focus here is made not on any doubt but specifically on “reasonable doubt”. The “beyond reasonable doubt” standard plays a crucial role in reinforcing public confidence

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<sup>59</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N626ap.-17, 29 March 2018. Paragraph 9.

<sup>60</sup> Guidelines on the Structure, Reasoning, and Stylistic Clarity of Criminal Rulings (The Supreme Court of Georgia publishing 2015) 51 (in Georgian).

<sup>61</sup> See supra note 11, paragraph II-7.

<sup>62</sup> Judgment of the European Court of Human Rights N10590/83 “Barbera, Messegue and Jabardo v. Spain”, 6 December 1988. Paragraph 77; Judgment of the European Court of Human Rights N58442/00 “Lavents v. Latvia”, 28 November 2002. Paragraph 125; Judgment of the European Court of Human Rights N35450/04 “Melich and Beck v. the Czech Republic”, 24 July 2008. Paragraph 49.

<sup>63</sup> The Constitution of the United States of America, Fifth Amendment.

in the criminal justice system and safeguarding the presumption of innocence for the accused.<sup>64</sup> Additionally, while not all jurisdictions require judges to provide juries with a detailed explanation of the “beyond reasonable doubt” standard, where necessary, judges must clearly instruct juries on the concept of this evidentiary threshold. This explanation must ensure that jurors do not convict the defendant if the prosecution fails to present sufficient evidence.<sup>65</sup> The understanding of the “beyond reasonable doubt” standard in Georgian national legislation aligns closely with that of U.S. law, which is explained by the fact that Georgian criminal proceedings are based on the Anglo-American legal system.

## **1. SUFFICIENCY OF EVIDENCE REQUIRED FOR REACHING A GUILTY VERDICT**

As noted above, criminal procedural law does not prescribe the exact number or type of evidence necessary for convicting a defendant. This lack of specification is justified by the principles of free evaluation of evidence, the adversarial model, and the avoidance of rigid formalistic proof requirements. In any case, the constitutional and legislative goal is clear - the conviction of a defendant must rest solely on clear, convincing, consistent, and “beyond reasonable doubt” evidence.

Evidence is deemed consistent when its individual components are mutually supportive, free from material contradictions, and do not generate reasonable doubt.<sup>66</sup> As for sufficiency, there is no quantitative threshold established – meaning that there is no predefined number of pieces of evidence required to convict a person. Sufficiency implies accumulation of enough evidence to establish all circumstances of the crime that will allow the court make a well-founded decision during the trial and deliberation process.

## **2. JUDICIAL PRACTICE IN THE GEORGIAN GENERAL COURTS**

The judicial practice in the General Courts of Georgia reveals that national courts generally require the prosecution to present at least two pieces of direct evidence to convict a defendant. One illustrative example (along with many others) is the Judgment of the Tbilisi City Court Criminal Chamber (Case No. 1/493-13), in which the court, referencing Article 82 of the Criminal Procedure Code of Georgia, provided the following clarification: “A combination of corroborating evidence that eliminates

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<sup>64</sup> *In re Winship*, 397 U.S. 358, 1970; *Clark v. Arizona*, 548 U.S. 735, 2006; *Ring v. Arizona*, 536 U.S. 584, 2002.

<sup>65</sup> *Sandstorm v. Montana*, 442 U.S. 510, 523, 1979; *Arizona v. Fulminante*, 499 U.S. 279, 291, 1991.

<sup>66</sup> See *supra* note 62, 52.

reasonable doubt requires at least two pieces of direct evidence that are fully consistent with one another and collectively establish all elements of the crime.”<sup>67</sup> A similar interpretation was made by the Tbilisi City Court in Case No. 1/5400-14, where it stated: “The beyond reasonable doubt standard necessitates at least two pieces of direct evidence (each addressing separate elements of the crime), which would convince a neutral and reasonable person of the defendant’s commission of the alleged act.”<sup>68</sup> The same position was upheld by the Zugdidi District Court in its Judgment of February 8, 2022. This court required, in line with the high standard of proof, the presence of at least two pieces of direct evidence to convict a person. After being appealed at both the appellate and cassation levels, the judgment was upheld, indicating that higher courts agreed with the reasoning of the trial court. Specifically, the Criminal Chamber of the Supreme Court of Georgia held that a single piece of direct evidence presented by the prosecution was insufficient to secure a conviction, thereby affirming the acquittal of the defendant.<sup>69</sup> This case was not an isolated one, as the Supreme Court has consistently required at least two pieces of direct evidence to secure a guilty verdict. In cases where a single piece of direct evidence was presented, the Supreme Court did not consider it sufficient for conviction.<sup>70</sup>

Although the Supreme Court does not explicitly classify evidence as direct or indirect, the reasoning in certain case(s) implies such a distinction. For example, in Case No. 784ap-21, involving domestic violence, the Court of Cassation noted that the case lacked at least two pieces of direct evidence to confirm that the victim did indeed experience physical pain.<sup>71</sup> Hence, the court did not consider as direct evidence either of the following: information provided to the investigation by the ambulance doctor; a restraining order issued against the defendant; and the record of the restraining order; and so affirmed the acquittal.<sup>72</sup> At first glance, the Supreme Court requires at least two pieces of direct evidence for each element of the alleged offense to secure a conviction, that suggests that not only is a combination of pieces of indirect evidence insufficient, but even a single piece of direct evidence fails to meet the standard.

<sup>67</sup> Ruling of the Criminal Chamber of Tbilisi City Court on case N1/493-13, 1 August 2013.

<sup>68</sup> Ruling of the Criminal Chamber of Tbilisi City Court on case N1/5400-14, 2 March 2015.

<sup>69</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N599ap-22, 29 September 2022; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1199ap-22, 18 January 2023.

<sup>70</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N251ap-16, 26 July 2016; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N475ap-18, 17 January 2019.

<sup>71</sup> The experience of physical pain that did not result in an outcome provided for by Articles 117, 118 and 120 of the Code constitutes ‘an unlawful consequence’, which is one of the elements of the objective composition of the offense of domestic violence stipulated by Article 126<sup>1</sup> of the Criminal Code of Georgia. Mzia Lekveishvili, Gocha Mamulashvili and Nona Todua, *Private Part of Criminal Law (Book I)* (7th edition, Meridiani Publishing 2019) 170 (in Georgian).

<sup>72</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N784ap-21, 3 December 2021; Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N47ap-23, 23 March 2023.

However, more recent rulings show the Supreme Court moving away from the rigid two-direct-evidence standard, particularly in the cases of domestic violence. In Case No. 784ap-21, the court explicitly stated that the applicable evidentiary standard for conviction does not vary based on the category of crime. Yet, in Case No. 1323ap-22, the court aligned its interpretation of the “beyond reasonable doubt” standard with that of the ECtHR<sup>73</sup>, and due to the absence of the victim’s testimony (direct evidence) and referring the indirect evidence available, overturned the acquittal issued by the appellate court, replacing it with guilty verdict.<sup>74</sup>

The cases involving domestic violence are not the only instances where the Supreme Court did not mandate the presence of at least two pieces of direct evidence to reach a guilty verdict. In ruling No. 541ap-22, the Court of Cassation stated: “[...] The applicable legislation does not specify the type or number of evidences required for issuing a guilty verdict. Moreover, it does not mandate that a conviction must be based solely on direct incriminating evidence [...]”.<sup>75</sup> In this above-mentioned case, the subject of proof - the defendant’s commission of robbery by threatening to use violence dangerous to life and health, and demanding the transfer of money (with the intent of unlawful appropriation of another person’s movable property) - was confirmed by a single piece of direct evidence: the victim’s testimony. Other evidence, such as witness statements and surveillance footage from the perimeter of the crime scene corroborated only peripheral facts, including the defendant’s presence at the scene and a physical argument between the victim and the defendant. The court stated that the prosecution’s inability to obtain additional evidence was hindered by the defendant’s subsequent actions. Ultimately, the court issued a guilty verdict based on the combination of one direct and several indirect pieces of evidence. A similar interpretation was provided in Ruling No. 951ap-21, where the Supreme Court dismissed the defense’s argument that a final verdict must rely solely on direct evidence, therefore regarding a combination of direct and indirect evidence as sufficient to establish guilt.<sup>76</sup>

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<sup>73</sup> The European Court of Human Rights applies the “beyond reasonable doubt” standard in the assessment of evidence and argues that this standard must arise from sufficiently strong, clear and consistent inference or presumption of similar incontrovertible fact. Judgment of the European Court of Human Rights N27602/95 “Ülkü Ekinci v. Turkey”, 16 July 2002. Paragraph 142; Judgment of the European Court of Human Rights N19634/07 “Dvalishvili v. Georgia”, 18 March 2013. Paragraph 18.

<sup>74</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N1323ap-22, 28 February 2023.

<sup>75</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N541ap-22, 9 August 2022. Paragraph 20.

<sup>76</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N951ap-21, 18 May 2022. Paragraphs 27-28.



## VI. IDENTIFYING PROBLEMS AND FINDING SOLUTIONS

Imposing criminal liability in accordance with appropriate standards is intrinsically linked to the main principle of the state based on the rule of law, with its essential components - presumption of innocence of an individual and his right to a fair trial. In its turn, the right to a fair trial encompasses multiple procedural guarantees aimed at ensuring lawful and just judgement made on the case.<sup>77</sup> The presumption of innocence applies throughout the entirety of legal proceedings. It serves as a guiding principle in criminal justice, requiring that all individuals be treated as innocent until proven guilty by a court of law through a proper legal process.<sup>78</sup> The Constitution of Georgia and the Criminal Procedure Code establish that the appropriate evidentiary standard for convicting a defendant is a proof beyond reasonable doubt, grounded in incontrovertible evidence. While the nature and purpose of these guarantees have been addressed in previous chapters, the focus now shifts to practical challenges associated with their implementation.

The practice of general courts of Georgia, which consistently required at least two pieces of direct evidence to convict a person, raises several concerns. Firstly, it must be reiterated that the sufficiency of evidence is not measured quantitatively. This is justified, as it is impractical to demand minimum two direct pieces of evidence in all criminal cases; making impossible to account for the unique circumstances and nuances of each individual case. Moreover, such a standard could undermine the principles of adversarial proceedings and equality of arms; since knowing that presenting two direct pieces of evidence by the prosecution could *a priori* lead to a conviction, the legal process risks becoming purely formal, thereby eroding the defense's ability to effectively exercise its rights. Consequently, limiting the evidentiary threshold for convictions to a specific number of evidences contradicts the principles of applicable criminal procedure.

The role of the Georgian Court in consolidating this practice is particularly important, as it serves the highest and final instance Court of Cassation administering justice nationwide; while the legal assessment (interpretation of the legal norm) provided by the Grand Chamber of the Supreme Court are binding for all lower-instance courts.<sup>79</sup> This highlights the importance of the Supreme Court developing a uniform practice regarding the evidentiary standard required for convictions, to ensure that it is properly

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<sup>77</sup> Dissenting Opinion of Eva Gotsiridze, Justice of the Constitutional Court of Georgia on the plenum record N3/11/1620 of November 4, 2022 on case “Lasha Janashia and Paata Danelia v. the Parliament of Georgia”. Paragraph 5.

<sup>78</sup> Judgement of the Constitutional Court of Georgia on case N3/2/416 “Public Defender of Georgia v. the Parliament of Georgia”, 11 July 2011. Paragraph II-62.

<sup>79</sup> Articles 14 and 17, Organic Law of Georgia on General Courts, 4 December 2009. Official Gazette, 41, 8.12.2009.

understood and adequately enforced.<sup>80</sup> Commonly, “the general courts, within their competence, reach the final judgements concerning the normative content of the law, its practical application, and enforcement. Accordingly, the judicial interpretation given by the general courts is very important for determining the real meaning of the law.”<sup>81</sup> And yet, the practice of the Supreme Court of Georgia is marked with obvious inconsistencies regarding the issues of higher significance, being directly associated with legal standing of a person, determining his/her procedural status and the question of guilt or innocence. The analysis of a number of court judgments given above clearly shows that in one case the Supreme Court issued and/or upheld the acquittal verdict due to absence of at least two pieces of direct evidence; while in another instance, it withdrew from this standard, stating that the law does not mandate convictions based solely on direct evidence. Notably, these contradictory approaches are reflected in the ruling(s) issued by the court in the same year.

These inconsistencies revealed in the practice of the Supreme Court is problematic for several reasons. Firstly, the Supreme Court interprets the “beyond reasonable doubt” standard similarly to the ECtHR. However, the ECtHR explicitly states that, on the one hand, this standard is applied when evaluating evidence presented before the Court, and on the other hand, it has the independent, convention-based meaning, which should not be equated with the standard existing in the domestic legal systems of Convention signatory countries, including Georgia. In other words, a direct transposition of the ECtHR’s “beyond reasonable doubt” standard into the national law is unjustified, as evidenced by the ECtHR’s own rulings.

Furthermore, the Supreme Court’s position remains ambiguous regarding what exactly is deemed admissible. By stating: “The applicable legislation [...] does not mandate that conviction to be based solely on direct evidence,” the Court leaves open the question of whether a single piece of direct evidence combined with indirect evidence suffice, or whether a conviction can rest entirely on indirect evidence alone. While the legislature does not explicitly mandate that a conviction must rest on direct evidence, indirect evidence or both combined, this should not either way be interpreted as validating convictions based solely on indirect evidence in all cases. Drawing a parallel to Article 76 of the Criminal Procedure Code of Georgia, prior to the Constitutional Court ruling of 2015, it can be concluded that this provision did not provide for any guidance and/or prohibition of using indirect evidence for issuing a guilty verdict. The procedural law merely outlined (and continuous to do so at present) the prerequisites for admissibility and consideration of such evidence during the trial, which means that according to that

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<sup>80</sup> Judgement of the Constitutional Court of Georgia on case N2/7/779 “Davit Malania v. the Parliament of Georgia”, 19 October 2018. Paragraph II-44.

<sup>81</sup> Judgement of the Constitutional Court of Georgia on case N1/2/552 “Liberty Bank v. the Parliament of Georgia”, 4 March 2015. Paragraph II-16.

version of the law, if indirect evidence met the criteria set by Article 76, paragraphs 2 and 3 of the Criminal Procedure Code and was deemed admissible during the substantive hearing phase, it could serve as the grounds for a guilty verdict.

These cases can be found in the practice of the general courts. For instance, the Supreme Court of Georgia overrode a lower court's conviction and replaced it with an acquittal precisely because the original conviction was based solely on hearsay testimony from a witness, with no other direct evidence corroborating the defendant's involvement in the alleged crime (stabbing).<sup>82</sup>

It is important to recognize that in certain cases, indirect testimony can confirm the facts relevant to the case and by this, have a meaning of a direct evidence. The Constitutional Court of Georgia does not reject this argument, noting that the indirect testimony, as a type of evidence, may directly indicate the defendant's commission of the crime or serve as "supporting" evidence confirming peripheral or intermediate facts. For example, during a trial, a witness may testify before the judge that the victim came to him/her on the day of the incident and described how his/her spouse had slapped him/her repeatedly in the face. In this scenario, the witness provides hearsay testimony based on the victim's account; however, since it directly pertains to the subject of proof (the composition of domestic violence secured under Article 126<sup>1</sup> of the Criminal Code of Georgia) it serves as a direct evidence by its nature. Despite this, the Constitutional Court ruled that hearsay testimony, even when corroborated by other evidence, cannot constitutionally serve as the basis for a conviction. The court's rationale centered on the inherent nature of indirect (hearsay) testimony, its limited reliability, and its inconsistency with the constitutional principle of incontrovertibility.

A certain form of indirect evidence is a testimony of a police officer, based on the information provided by an informant.<sup>83</sup> The Constitutional Court clarified that the use of indirect testimony to issue a guilty verdict "may be permissible only in exceptional cases, under clearly defined legal provisions and with adequate constitutional safeguards, and not by the general rule outlined in the applicable Criminal Procedure Code."<sup>84</sup> Whereas the Criminal Procedure Code has not been amended regarding this matter, the use of hearsay testimony of a witness to secure a conviction remains inadmissible, regardless of whether this testimony is considered direct or indirect evidence.

Another critical factor to consider is that judges evaluate evidence based on their inner conviction and the legal requirements established by legislation. This means that the assessment of evidence, as well as its (in)admissibility, partially depends on the

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<sup>82</sup> Ruling of the Criminal Chamber of the Supreme Court of Georgia on case N14ap-15, 30 June 2015.

<sup>83</sup> Judgment of the Constitutional Court of Georgia on case N2/2/1276 "Giorgi Keburia v. the Parliament of Georgia", 25 December 2020. Paragraph II-44.

<sup>84</sup> See supra note 11, paragraph II-52.

subjective judgment of the judge. Although judges are expected to act in good faith, impartially, and based on their internal belief, this alone cannot provide sufficient safeguards against errors or potential abuse of authority.<sup>85</sup> For instance, Article 82 of the Criminal Procedure Code outlines three criteria for evaluating evidence, but it is the judge who determines whether the evidence meets these criteria. Judges also classify evidence as direct or indirect and assess its sufficiency. To minimize the risk of a defendant's legal standing being influenced by the personal views of individual judges, the establishment of general courts' uniform judicial practice regarding the totality of evidence is essential.

While we agree with the Supreme Court of Georgia that defining the sufficiency of evidence by a quantitative measure is unjustified, the significance of direct evidence in criminal proceedings must also not be overlooked. According to guiding principles, direct evidence should form the primary foundation for the trial court's decision, and the focus should remain on such evidence.<sup>86</sup> Based on the principle of free evaluation of evidence, direct evidence does not carry predetermined weight and it must be assessed with the same (if not greater) scrutiny as other evidence in the case. However, basing a conviction solely on indirect evidence may, in most cases, leave lingering doubts about the defendant's innocence in the eyes of the public, since the latter does not directly relate to the subject of proof but corroborates peripheral events instead.

In any case, it is imperative for general courts to develop a uniform judicial practice that would clearly define the concept of the totality of evidence required by the "beyond reasonable doubt" standard. This should prevent its divergent interpretations by the court as on the other side of the scale lie the fundamental human rights.

## VII. CONCLUSION

The issues addressed in this article are highly intricate and demand careful consideration by the general courts of Georgia. To safeguard the universally recognized right to a fair trial along with its procedural guarantees - most notably, the presumption of innocence, enshrined in the Constitution of Georgia and international legal instruments - it is essential to imperative to establish a coherent and consistent judicial approach. Such an approach would aim to provide a firm guarantee of the constitutional-legal principle that convictions must be based solely on incontrovertible evidence. Once again, this does not suggest the need for a rigid formula to secure a guilty verdict in every criminal case but rather, underscores the importance of determining whether a conviction based exclusively on indirect evidence is legally and procedurally acceptable, and if so, defining the safeguards to balance the risks inherent in such cases.

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<sup>85</sup> See supra note 11, paragraph II-11.

<sup>86</sup> See supra note 62, 52.