

PRINCIPLES OF ANCIENT DEMOCRACY AND JUDICIAL PRACTICES IN ANCIENT GEORGIA

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Abstract. Ancient Greece, and later Rome, used to be a source of information for ancient Georgia regarding the principles of judicial practices. This information was reflected in the Georgian Law. The article aims to identify those elements of Georgian judicial practices that exhibit democratic trends to varying degrees and have parallels in the ancient world. The elements in question are to be looked for in the early customary law, which survives in Georgian highlands even nowadays. This form of judicial practice allows for higher degree of direct popular participation and hence, democracy. The paper is focused on mediation, which was part of judicial culture in early times, as well as on such questions of the medieval legal system as appellation, democratically elected jury, legal acts tailored to regional needs, requirements for judges and forms of punishment.

From time immemorial, Georgia has maintained contact with the ancient world and shared experience in various fields, including the field of legal procedure. Unfortunately, notwithstanding the abundance of fascinating information about the ancient Caucasus, and Georgia itself, offered by ancient sources, we have little data

on ancient legal procedure itself.¹ Unsurprisingly, Greek and Roman authors tend to write on issues which are unusual, interesting, or new to them. Not so in the case of legal procedure: according to ancient Greek authors, legal procedure in Greece had been developing since the 9th-8th centuries B.C. In the works of Homer, we read about a law court at the lowest level of its development, but this court seems to be an already-evolved version of something even earlier.² Homer's epics present *basileus*, who employs the scepter (*Il.* 1.237, 18.497) as the symbol of a judge and performs judicial duties; the *basileus* also acts as a judge, when Minos, scepter in hand, puts the ghosts of the dead on trial (*Od.* 11.568-71). Along with the single-member court, Homer writes about the multi-member court, which consists of several elders. In both cases, the trial is open to the public (*Il.* 18.497-508). The presence of a multi-judge court marks a new stage in the development of legal procedure: the duty of decision-making has been transferred from the sole *basileus* to a group of reputable citizens, as depicted on the shield of Achilles. The sentences passed by the multi-judge court, as well as the ones passed by the *basileus* himself, were to be executed. Hesiod often mentions the *basileus*, as judge, in his *Works and Days* (38-9, 220-1, 248-51, 263-4, 320-4); in *Theogony*, Hesiod names eloquence and persuasiveness (81-7) as necessary characteristics of a king. A man endowed with these talents is able to eliminate conflicts. Hesiod believes that a judge must have high social status. The fact that he took part in the legal trial against his own brother proves that his insights concerning legal procedure were based on practical knowledge.³

Georgia most likely obtained information about the earliest principles of legal procedure first from ancient Greece and then from ancient Rome. This can be traced back in Georgian customary law,

¹ See CA 2010; Suny ²1994, 16ff.

² See Wolff 1961, 6-33; Gagarin 1986, 26-33.

³ See Gagarin 1974, 103ff.

especially in the mountainous regions of the country. To begin, we must highlight the parallels that transcend the scope of typological similarities, for example, the institutions of *makhvshi* in Svaneti (a mountainous region in Western Georgia) and *gaga* in Khevi (a mountainous region in Eastern Georgia).

The commission of the elected *makhvshi* expired on death and combined the responsibilities of a judge with other functions. However, when a *makhvshi* failed to fulfill his obligations, his status could be terminated. Anyone of age could run for the *makhvshi* position, but female candidates were always fewer than the male. Furthermore, several different candidates could represent the same family. A *makhvshi* had to be brave, experienced, honest, smart, and committed. As a rule, the voting procedure was carried out at a public place called *lalkhor*, *sviph*, or *sakhev*. In the beginning of the voting, someone from the community bugled to bring everyone together. Once they heard the bugle call, people would put on their best clothes and go to the appointed place, where candidates would put themselves up for a nomination. Depending on his eligibility, a potential candidate acted as the *makhvshi's* assistant. Thus, *makhvshis* were elected long before the voting procedure itself and people gathered simply to acknowledge his power. At the ceremony, orators would remind the candidate about the duties of the *makhvshi* before blessing him. For his part, the *makhvshi* asked the God to grant him the ability to perform his duties with honor. The *makhvshi's* functions included solving any issues of civil, criminal, or religious law, but he deferred to the opinion of the congress and made no decisions without its consent. The *makhvshi* was responsible for resolving disputes and preserving the peace among members of the community. *Makhvshis* were paid no salary, but were highly respected by society, and could not be arrested.⁴

⁴ See Tarkhnishvili 2012, 213.

In Khevi, the *gaga* performed the same functions as Svan *ma-khovshi*. *Gagas* were elected governors and leaders of Khevi, responsible for almost everything in the community. They were called the masters and legislators of the people. Besides other responsibilities, they were authorized to reconcile families who were deadly enemies. *Gagas* were considered chief justices, and their authority was determined by laws and based on custom. A *gaga* supervised the judges of his community. Usually, if the crime committed was not grave, the enemies were reconciled on the authority of the elders of the village. If a feud was characterized by endless murders and blood revenges, then the proceedings would be initiated at the community level and supervised by the *gaga*, as soon as the hostile parties had gone through the ceremony called *azar* – the offering of sacrifices by deadly enemies. During the trial, the *gaga* would take the main seat, a long rock slab, and persuade the heads of the families at enmity to reconcile. Upon reaching an agreement, they would swear by their moustaches. Afterwards, at daybreak of the forthcoming festival, the messenger of the *gaga* would blow the bugle from the top of a tower and arouse the villagers from their sleep. In the morning, two lance-bearers would open the gates of the *gaga's* house and the *gaga*, dressed in his purple mantle, would step out proudly. Followed by two rows of armed, bareheaded men, he would move wordlessly to the wall around the place (about 1 ha) where deadly enemies usually reconciled. This place was surrounded by a stone wall with two gates, eastern and western. The gates were always locked, and the *gaga* kept the key. When the *gaga* had delivered his speech at the eastern gates, the gates would open and a 10-12-year-old girl with loose hair would pass a low table to him. The table held bread, salt, and water. The *gaga* would utter a prayer and deliver another speech. The heads of the warring families would repeat each of his words. Then the entire procession followed the *gaga* and stood in two rows around the counseling place. The *gaga* would take his seat again and consider

the case. On his order, the heads of the conflicting families would step forward and announce that both sides had made equal sacrifices and were willing to be reconciled. The *gaga* and eight councilors, chosen by the *gaga* himself, would discuss the case. After discussion, the *gaga* would lead everyone to the place of reconciliation and recite a tacit prayer in a hole dug specially for the case. Then the heads of both families would kneel before the *gaga*, who would break a sword into two halves, throw the pieces into the hole, and say: "Let the earth bear the sin of the blood of the brothers." Those who attended the ceremony repeated the words of the *gaga* and then the people (starting with the men) offered up their sacrifices, such as earrings, rings, and other goods. The *gaga's* messenger would also break his lance into two parts and throw them into the hole before the *gaga* approached the hole again to throw a handful of earth into it. When the hole was filled with earth, three large and three small stones were buried on top. By the end of the ceremony, the *gaga* would go to the western gates, where two girls with braided hair⁵ would meet him with abundant food and beer.⁶

So, *makhvshi* and *gaga* were endowed with the powers of a Hellenic *basileus*, but unlike the early versions of this institution in Greek culture, where the judge was necessarily of high social status (the *basileus*, or a collegial body composed of members of high social status), in Georgian customary law, the same institution was more democratic in nature. Any member of the community could become the *makhvshi* or the *gaga*. Although rare, there were even cases of women ascending to the *makhvshi* position. As for the scepter, the symbol of the judge king, it was also used in the mountainous regions of Eastern Georgia. The *gaga* of Khevi decided cases with a scepter in his hand, the scepter being the symbol of a judge.

⁵ Loose hair symbolized grief, and braided hair symbolized happiness.

⁶ See Tarkhnishvili 2012, 213; Nizharadze 1964, 78.

As for late antiquity in Colchis and Iberia, documentary evidence proves that Georgians had already enhanced their skills, making rhetoric an essential part of legal procedure. If we focus our intention on the sepulchers and cultural remnants discovered during the examination of the foundation of Svetitskhoveli Cathedral (2001), we will see that burial vault no. 14 stands out for the sheer multitude, diversity, and uniqueness of the utensils found in it. Among twenty-five items made of gold, silver, bronze, iron, glass, and different minerals, there are silver and gold writing accessories – three pens in a silver case, its silver cover garnished with an inscribed gold plate. The gold inkpot holder attached to the cover depicts three men and the inscription: ΜΕΝΑΝ [δῶρος] ΟΜΗΡΟΥ ΔΗΜΟΚΡΑΤΗ ΝΗΚ [Menander, Homer and Demosthenes], and a plate with golden frame depicts the following: ΒΑΣΙΛΕΥΣΤΑΜΟΥ ΤΟΥ ΚΑΙ ΕΥΓΕΝΟΥΣ [Of the King Ustamos and Eugenous].⁷ Similarly, there are inscriptions of the nine muses on the back of the case.⁸ Along with the styluses and inkpots found in Mtskheta, these archaeological finds provide evidence of the development of writing traditions and the standards of urban culture in the Kingdom of Kartli (Iberia). It is also important to note that no analogs of the above-mentioned adornments have ever been found. Thus, we can presume that these accessories were specially commissioned. The Georgian of that time knew of ancient thinkers, like Demosthenes, and it was the custom to portray such thinkers on personal belongings.

The fact that there was a school of rhetoric near Phasis (present-day Poti) in the 3rd-4th centuries⁹ is one of crucial importance. The Greek philosopher Themistius was also educated at the school of

⁷ Kaukhchishvili (2009, 367-8) dated the inscriptions to 2nd-3rd centuries A.D.

⁸ See *Online Catalogue of Greek Inscriptions in Georgia*.

<http://mrc.org.ge/Inscriptions>

⁹ Kaukhchishvili and Gamkrelidze 1961, 45.

rhetoric in Colchis.¹⁰ According to Themistius, his father Eugenius, who was also a philosopher, studied in Colchis, too. In an address to a man from one of the provinces, Themistius talks about the school of rhetoric in Colchis. The man had asked the thinker to help him move from the provinces to the Capital, where he planned to acquire his education. In response, Themistius pointed to Odysseus, who was educated on Ithaca, and to Nestor, who was taught in Pylos, and he wrote that people are educated by masters, not by places. The philosopher revealed that Colchis was where he himself trained in the art of rhetoric: "I picked the fruit of rhetoric in a place much undistinguished than ours, at the end of Pontus, near Phasis, instead of serene Hellenic places." In the same oration, the philosopher notes that the wisdom and virtue of the man who trained him in eloquence instead of trick riding, lance throwing, or archery (as neighboring barbarians did) had turned that uncivilized and sullen place into a Hellenic temple of muses (*Orat.* 27.332d-333a, 333b). I. Javakhishvili comments on the data provided by this author:¹¹ The words of Themistius reveal that Colchis proved to be a fertile ground for Hellenic teaching... the country turned into the 'adobe of Muses.' ... Of course, a country which bore such fruit could never be so fertile due to the work of foreigners alone, diligent as they might be; the Colchis locals had to have had their own cultural achievements.¹² Themistius resorts to refined rhetoric devices (antithesis, analogy, etc.). S. Kaukhchishvili believes that it might even be unnecessary to search for the single man mentioned by Themistius. He is sure that the single man mentioned by the philosopher was his father, while F. Wilhelm thinks that, in this case, we have to deal with both a rhetoric device, and the common belief of the time that anything good in a "barbarian

¹⁰ See *RE* 5A, 1642-80, s. v. Themistios (W. Stegemann).

¹¹ Javakhishvili ³1928, 253.

¹² All translations are mine.

country” had to be the work of someone Greek.¹³ At the school of rhetoric in Colchis, students were trained in gymnastics and eloquence. They studied philosophy, law, myths, rudimentary history, poetry, metaphysics, physics, math, ethics, and politics. The school hosted public competitions on legal and political issues. According to some Greek sources, such competitions were usually won by Colchian participants. But what was the working language at the school of rhetoric in Colchis? We have no information about the working language or the curriculum of the School, and we know nothing about the teachers. However, we can assume that, in the beginning, students were taught in the Colchian language, but when the school of rhetoric became well-known in Hellas, to simplify the whole process for foreign students, instruction was given in Greek as well, for certain disciplines. As for locals, they were also taught in Colchian.

In the *Histories* by Agathias Scholasticus (536-82) we read about brilliant speeches of Laz orators such as Aeetes and Phartaz. It is obvious that they were firmly grounded in knowledge apparently acquired at the school of rhetoric in Colchis. The speeches delivered by these orators at Laz meetings are among other examples of top-level rhetoric. In 554, the Laz King Gubaz was assassinated by the Byzantines. In 555, the elders called together a large assembly of people who expressed many different opinions about the best course of action. The noblemen divided into two groups, one of which was led by Aeetes, an old enemy of the Byzantines and an ally of the Persians. Aeetes was opposed by Phartaz, who led the second group of noblemen. Phartaz was much respected by the Colchians. His logical and persuasive speech convinced the Colchians to side with the Byzantines. Both Aeetes and Phartaz must have appealed to the people in their native Colchian language. Phartaz was victorious, and the Byzantine emperor decided on

¹³ See Kaukhchishvili and Gamkrelidze 1961, 50; Wilhelm 1929.

capital punishment for the murderers of the king. The speeches delivered by Aeetes and Phartaz are proof of the strong rhetorical training provided by the school of rhetoric in Colchis.¹⁴ Agathias Scholasticus writes of Aeetes:

He spoke so as if he was speaking at the people's congress. He spoke so beautifully, better than barbarians usually do; his natural flexibility helped his thoughts... So spoke Aeetes and all the people went into raptures... cried out with joy... The Laz became so excited not only because they were barbarians, but because... Aeetes's words greatly astonished them... Colchians, there was nothing strange in what happened to you, the words which were said so skillfully and effectively agitated your minds. Eloquence is something invincible, defeating almost everything, especially those who have never experienced its strength.¹⁵

Thus, even the great Greek historian acknowledged the rhetorical prowess of orators instructed at the school of rhetoric in Colchis. Lazika boasted of many gifted orators. Procopius of Caesarea quotes the speech of Laz ambassadors to Khusro, King of Persia. Procopius writes that the king, delighted by the eloquence of the Laz envoys, willingly promised assistance (*Bell.* 2.15.15).¹⁶ Furthermore, in his *Epistulae* (963-4), Libanius praises Bacurius, proclaiming, "From all of your virtues, I would distinguish your love for logos and those who remain faithful to them... Of course, you were a meadow because we are amidst such flowers." Since Libanius calls Bacurius a meadow, S. Kaukhchishvili states that Libanius and his friends were indebted to Bacurius for their knowledge of and skill in rhetoric: "They picked the flowers on the meadow."¹⁷

¹⁴ Kaukhchishvili 1940, 34.

¹⁵ See Kaukhchishvili 1936, 64-81.

¹⁶ Kaukhchishvili 1965, 144.

¹⁷ Kaukhchishvili and Gamkrelidze 1961, 63-4.

Since that time, Georgian legal procedure has arguably comprised a variety of traditions, including those of ancient customs. Many elements of ancient customary law are partially preserved in the mountainous regions of Georgia. First, we would like to make a point about the courts of mediation. In the early stages of social evolution, the courts of mediation were an integral part of legal culture; Greeks and Romans alike resolved disputes by means of the court of mediation. These courts were established simultaneously with other legal institutions, just as the latter had been gaining strength in its struggle against older customs of feuding and vengeance. The courts of mediation were intended to prevent the need for revenge in all cases, and to reconcile the parties involved by means of certain penalties, such as forfeiture of estate, foreseen by the customary law. Thus, reconciliation of parties was the core function of the courts of mediation.¹⁸ The courts of mediation existed in Sparta, Georgina, Ephesus, and Lampsacus, but detailed information about such courts is available only in case of Athens. We know of *diaitetes* (arbitrators), who, like experts invited by the *praetor*, were generally guided by the principles of equity. As for the experts who took on the role of mediators, they were not restricted by rigid legal rules and could run a case on the basis of *aequitas*. As a result, all cases carried in Rome freely, without any strictly determined formula, were called *arbitria*. In both instances, the mediators were elected by mutual agreement of the parties. It was the obligation of the elected mediators to design decisions that were equitable and satisfactory to both parties. In the ancient world, arbitration also influenced interstate relations greatly, as can be supported by the record which describes how Argos tried to settle a conflict between two of its colonies, Knossos and Tilos, in 450 B.C. Earlier examples of international arbitration seem almost fictional

¹⁸ Roebuck 2001, 345-60; cf. Roebuck and de Loynes de Fumichon 2004.

(e.g., Sparta's mediation with regard to Salamis, between Athens and Megara).

There was a developed institution of mediation in Georgia too. In Khevsureti (a mountainous part of East Georgia), the mediation court and the local law were both called *rjuli*, and a mediator was called *rjulis katsi* (a man of *rjuli*), or *bhche*. The hearing of a case on merits was called *garjulva*, and a sentence passed was *narjulevi*. As for the parties involved in a case, they were the *merjules* (those who demand justice). In Khevsureti, cases of wounding, murder, and theft were most frequently tried by the mediation court. Usually, the men of *rjuli* confined themselves to determining the amount of *drama*,¹⁹ or penalty to be paid by the perpetrator of a crime, provided that he presented himself and confessed to the crime. The amount of penalty depended on the severity of injuries. Sometimes cases were heard in order to identify the perpetrators. If a suspect denied committing a crime, he was made to sin and step on a grave to prove his innocence. Otherwise, he would be convicted and penalized. According to Khevsurian law, if the murderer was identified, the *rjuli* legal proceedings were not conducted at all: the amount of *drama* for murdering was commonly known and indisputable.²⁰ *Rjuli* was not a regular court; it gathered only when the parties were willing to reconcile. To avoid mob retaliation or acts of revenge, *shuakatsi* acted as a mediator between the parties, whose readiness to meet at the *rjuli* court was a prerequisite to reconciliation. In agreeing to go to the *rjuli* court, the aggrieved party renounced the right to vengeance, and the defendant agreed to pay the *drama* determined by the *rjuli*. The Khevsurian men of *rjuli* were chosen by the parties for each case. As a rule, they were respected, pious men well versed in the *rjuli*.²¹ The number of *bches* depended on the gravity of the offence. Cases of trivial crime

¹⁹ A kind of silver coin.

²⁰ Makalatia ²1985, 78-82; cf. Makalatia ²1984.

²¹ Kekelia 1988b, 147-9.

might be tried by two men of *rjuli*, but murder cases were required to be tried by twelve judges. The *narjulevi* had to be passed unanimously; a majority agreement was insufficient. In *rjuli*, cases were heard in neutral territory, such as a grove, shore, or hill. The opposing parties would stand so as not to see or hear each other. Khevsurian judges assumed the highest responsibility. Misjudgment was considered equivalent to eternal damnation, and to secure the *bches*²² from it, the witnesses were sworn on the icon and interrogated on oath. At the first stage, the *bches* studied a case from beginning to end and interrogated the *shuakatsis*. Then they interrogated the parties separately – the complainant first and the defendant afterwards. The head of the complainant's family, if he was more eloquent than the complainant himself, was sometimes authorized to take the place of the complainant. The men of *rjuli* would report to the parties what was said by either side as witnesses were interrogated multiple times, in order to compare all testimony given. In the case of wounding, physicians were also interrogated, since they could speak to the severity of the injury. Sentences were determined at the second stage of the *rjuli* trial, and no one but the men of *rjuli* were permitted to attend the procedure. If a defendant was proved guilty, the judges penalized him with *drama*. If both parties were to blame, the men of *rjuli* made a decision about the *gabra* (subtraction) and determined the amount of *drama* to be paid by each of the parties. The guiltier party paid the difference. If the men of *rjuli* failed to make a unanimous decision, the *rjuli* court was broke up, and new men of *rjuli* were chosen. One of the judges would announce the decision separately to each of the involved parties. There were no compulsory measures aimed at judgment execution, which completely depended upon the will of the parties. If any of the parties did not accept a decision, they could ask for their case to be reconsidered. Sometimes,

²² Bardavelidze 1952, 623-30.

cases were tried three or four times. According to legend, *rjuli* arbitration proceedings could be carried out a maximum of nine times for the same case. When both parties accepted the decision of the *bches*, the men of *rjuli* took part in its execution. Together with the convicted offender, they brought the *drama* to the injured person, where the offender would apologize before a feast of reconciliation. If the party at fault accepted the decision, the men of *rjuli* received salary: the number of cows to be paid by the perpetrator equaled the number of sheep to be given to the men of *rjuli*. At times, the men of *rjuli* would waive their salary.²³

A court of mediation in Svaneti, has been one of the most important elements of Georgian legal culture. A specific accusatorial procedure, the most ancient form of the legal proceedings, has been an integral part of Svan law, in which the composition of the court depended upon the decision of the parties who provided proofs. The mediators did not participate in collecting evidence; they evaluated evidence and made a decision on the case. In Svaneti, the trial had a competitive character, and all parties stood absolutely equal. In earlier period Svan folkmoors elected no judges. The mediators were *morval* and they were chosen for each case immediately by the parties. The mediators heard both civil and criminal cases for the benefits of parties if they could not be decided otherwise. As for the easiest cases, they might be tried by a folkmoot, but when one of the members of a certain community acted contrary to the interests of his community, his case would be decided by a community gathering, which passed a corresponding sentence upon the violator.²⁴ To sum up, the courts of mediations in Svaneti mostly arbitrated the cases of private individuals. In order to appeal to *morval*, both parties had to express their will to be reconciled by the mediation court; otherwise no hearing would

²³ Elisashvili 1988.

²⁴ See Nizharadze 1964, 102-5; Kekelia 1988a, 86-94.

take place. It was not easy to persuade parties to be reconciled, especially in murder cases: Svan families took it as an insult if they did not have their revenge, although they reconciled more readily when the number of victims from each family was equal. Thus, the Svans had different methods of reconciling blood enemies by means of mediation, such as intermediaries like *metskularis* and *makhvshis*, or community gatherings. To avoid misunderstanding, adversaries expressed their consent to reconcile in writing. Written consent was required as a prerequisite for further execution of the decision made by the mediators. The party that did not fulfill its obligations had to pay the forfeit agreed on by the adversaries. Parties willing to be reconciled nominated judges. The aggrieved party, or the family of the murdered person, was the first to nominate its candidates. The mediators would introduce a list of the arbitrators to the parties to confirm that all candidates were impartial. If any of the potential mediator turned out to be at enmity with any of the parties, he was disqualified. Any man of age could bear the responsibility of a judge, but in Svaneti *morval* were usually heavyweight members of the society, those whose authority guaranteed further impartiality. The *morval* were obeyed like clergymen. Since *morval* were obligated by custom to be faithful, their impartiality was above suspicion. Notwithstanding the sizeable reputation of the mediators, Svans preferred not to be nominated as *morval* who made vows of impartiality. Svans believed that breaking such a vow would bring the wrath of God down upon their families and descendants, and, since there was no guarantee that a mediator would only make fair decisions, it was difficult to find willing *morval*. When a person heard that he was to be nominated as a mediator, he would typically try to avoid such a responsibility.²⁵ It is commonly known that Svan customary law did not determine the exact number of mediators for certain types of cases. The existing

²⁵ See Nizharadze 1964.

sources reveal that the parties had to nominate at least two mediators (a mediator from each party), but no more than twenty-four. The number of *morval* varied in accordance with the severity of the case. For example, twenty-four mediators were gathered to consider murder cases. The notion of oath was one of the most important ones in Georgian customary law. Among other types of judicial evidence, it has been regarded as a primary notion. In Svaneti, the *morval*, as well as the opposing parties, had to swear an oath before the hearing. The oath sworn by the *morval* was called *tolobis pitsi* (the equality oath) and the oath sworn by the parties involved was called *ertgulebis pitsi* (the loyalty oath). Both oaths were taken at a church before an icon.²⁶ The *morval* vowed that they would not divulge the secret of their decision until it was announced. They also vowed to prevent their final judgment from being swayed or dictated by any one person. The trial itself began when all the *morval* were chosen. The *morval* examined the case and interrogated the parties at their own homes. When visited by the mediators, each party entertained them with all kinds of delicacies. The aggrieved person was the first to be interrogated. Then the mediators would go to the party at fault and report the status of the injured one. Sometimes the *morval* visited parties more than once. The party which contradicted any of the mentioned facts would swear an oath, and the *morval* would make a decision (*namoravi*). To keep their decision a secret, the *morval* gathered at a solitary place, at the outskirts of the village in the summer, or at a deserted house in the winter. Sometimes, it took 10-15 days to come to a decision. If the secret decision was known by others before its time, both parties had the right to back out of the agreement with impunity. If the bench found it difficult to come to a single decision, some of the *morval* were asked to consult and make a final and binding decision, since a group of fewer men had a greater chance of coming to

²⁶ Nizharadze 1964, 104-5.

a conclusion than did a large group. Sometimes the decisions of the mediation court were executed in writing, having foreseen all the obligations and penalties assessed for each party. The arbitral procedure reached its climax when the *morval* took the final oath and each mediator was named individually. *Bacha liljeni*, or stone-burying, was the ritual which took place when the decision of the *morval* was announced. One of the mediators would dig a hole and bury a stone in it. This ritual symbolized that the case was settled and the decision made by the *morval*, binding. *Namoravi* was typically announced at night, when the oath-taking ritual had already been performed at a church. The *morval* went to the party at fault and asked the aggrieved person to attend as well. It was the obligation of the perpetrator to entertain and atone for his wrongdoing, during the feast.

Even this brief review of mediation makes obvious the democratic nature of such courts. It defended the interests of society as a whole while protecting the interests of each party in any given case. The courts of mediation were tasked with crafting a compromise which was acceptable and fair to both parties. In both the ancient world and the mountainous parts of Georgia, legal procedures were based more on the concept of justice than on legal norms; independent courts warranted open trials.

As for the middle ages in Georgia, the Byzantine culture greatly influenced many aspects of the country, including field of law. Georgians had the opportunity to study Byzantine legal procedure deeply. The texts of ancient canonical law, the *Minor Nomocanon* and the *Great Nomocanon*, were adopted by Georgia.²⁷ The influence of Byzantine ecclesiastical law is tangible in the *Decree of the Church Council of Ruisi and Urbnisi* held by King David the Builder (1103). As for secular law, *King Vakhtang VI's Book of Law*²⁸ must be

²⁷ Giunashvili, Gabidzashvili, and Dolakidze 1972; Gabidzashvili et al. 1975.

²⁸ Dolidze 1963.

mentioned first. This collection of laws consists of six different parts: 1. *The Law of Moses*. 2. *Greek Law*. 3. *Armenian Law*. 4. *Catholicos Law*. 5. *The Law of King Giorgi*. 6. *The Law of Aghbugha*. The book also includes the *Book of Law of Vakhtang VI*. In this compilation, the provisions of Greek law come after the norms of Georgian customary law and are represented in the form of 418 preserved articles. Though the rules adopted by King Vakhtang himself prevailed over other provisions, foreign laws were also quite popular. So, during the rule of Vakhtang VI, late ancient Roman and Byzantine provisions comprised a significant portion of positive law.

Due to the social, political and legal norms, even in the context of absolute monarchy, we can see certain tendencies of democratic rule in the legal structure of feudal Georgia. In that period, there were two judicial establishments in the country: the court of the Catholicos (*sasjulo samreblo*) and the royal court (*samartali sameu-peo*). The King was the Chief Justice, and he tried cases in person or by means of those "who would hear and decide fairly."²⁹ The *darbazi* also shared the functions of the court. The King convened the *darbazi* where legal procedures was to be carried out by professionals. As for the *saajo kari*, it was the Supreme Court run by the Mtsignobartukhutsesi-Chkondideli. It was somewhat of a court of appeal. The cases were examined by several judges: *mtsignobartukhutsesi* and two of his assistants (*satsolis mtsignobari* and *zardakhnis mtsignobari*). The charter issued by King Giorgi III in 1170 mentions the court of *samparavtmdzebneli*, but thieves were denounced by officials called *chenilis*, who tried the criminals and executed the sentences. According to the *Article 100 of Bagrat Kouropalates' Law*, the so-called rank courts persisted, as in feudal courts,³⁰ where feudal lords administered justice by means of their servants. In Georgia, there were some standard requirements which a judge

²⁹ Javakhishvili 1928b, 81-142.

³⁰ Javakhishvili 1984, 170-1.

had to meet. According to the *Article III* of the *Book of Law of Vakh-tang VI*, a judge ought to be “much punctilious, keen-witted, earnest, quiet, amiable, attentive to complaints, interested in the opinion of the complainant and others, willing to find witnesses, uncorrupted and pious.”³¹ *Article 215* determines the age of a judge and emphasizes that no poor man could become a judge. This restriction has much in common with the present-day requirements of modern legal procedure.

While talking about the legal procedure we must mention Athenian and Roman appeal proceedings, *epheasis* and *provocatio ad populum*, which restrained the process of passing sentences against public officials. A citizen had the right to appeal against the court judgment. Appealing against court decision, bringing a case again,³² was common practice in Georgian legal procedure. The king, as the chief justice, presided over hearings of the disputed decisions, but could send a case to the queen (who was authorized to act as a judge for a limited range of cases and had no right to hear, say, criminal proceedings), the princes, or the Catholicos (clerical disputes). The procedure of appealing against court decisions in Georgian law resembles the appellation principle that worked at the regular courts in Rome, where disputable decisions were usually sent up.

It is worth mentioning that in Athens, to stimulate the civic fervor, a monetary reward was offered for certain public cases (*apographe*),³³ but this also could have some adverse effects. People were encouraged to become professional questmen (sycophants).³⁴ However, the Court of Athens developed an efficient mechanism against sycophants: if a defendant failed to receive at least 1/5 of

³¹ Surguladze 2000, 107.

³² Javakhishvili 1984, 349-53.

³³ Nadareishvili 2012, 107.

³⁴ See MacDowell 1986, 62-3.

votes during the trial, he would be fined 1,000 drachmas and be partially disfranchised (*atimia*).

The questman institution in Georgian judicial proceedings was different. The *mtkhrbeli*³⁵ (narrator), the person who reported the words of witnesses to the aggrieved party, acted as a prosecutor. Prosecution cases were built up on the basis of information provided by a *mtkhrbeli*, who was paid a special salary. It was *mtkhrbeli's* obligation to witness at a court hearing.³⁶ Besides, legal perjury was also punishable. Unlike sycophants, *mtkhrbelis* took part in private-law disputes.

In Athens, court proceedings were instituted on the basis of private initiative: you had to write the text of accusation, take it to the magistrate, hand the court summons to the opposing party who would appear before the court on the day named by the magistrate and attend the preliminary examination of the case (*anakrisis*), where each party submitted the documents necessary in establishing his case. In Rome, initiation of court proceedings as well as the legal procedure as a whole was more sophisticated. The system adapted to contemporary requirements regarding enabled citizens, as complainants and defendants were to be more protected at the court.

In contrast to the Athenian court, which really was absolutely open, unbiased, and democratic, Roman legal procedure was controlled by the ruling class and often turned out to be tendentious.³⁷ Roman justice passed different levels of procedural development. The *legis actio* procedure, the most ancient form of dispute resolution, was very close to Athenian justice.³⁸ The accusatory process was the most widespread form of judicial process in feudal Geor-

³⁵ Javakhishvili 1984.

³⁶ The law excludes *mtkhrbeli's* personal attitude to the accused, which may turn out to be a prerequisite to the charges brought against the latter.

³⁷ See Hansen 1991, 296-321.

³⁸ Gardapkhadze 2012, 58.

gia. The complainant and the defendant had equal rights. Their case was initiated by parties. They gathered evidence and submitted them to the judge whose functions were to examine the case and make a decision. Oral procedure and public hearings were typical of Georgian court of that time. Beside the accusatory process, another form of legal procedure, the investigative process, was also developed in the country. In the investigative process, the state investigates a case and collects evidence, while the *samparavtmdzebneli* mentioned in the Charter issued by King Giorgi III in 1170 was part of their scheme. The head of the court of *samparavtmdzebneli* (chief *mparavtmdzebneli*) was authorized to find and condemn thieves, while the *chenilis* (officials of lower rank) detained criminals and executed sentences.

The Georgian feudal accusatory process resembles the rules of Athenian legal procedure and Roman *legis actio* procedure, where legal subjects are the principal initiators of cases. In all three societies the aggrieved party appealed to a public official (a magistrate, the king, the queen, or the prince) but, unlike Athens and Rome, Georgian legal proceedings have much in common with the praetor's court. Praetors chose candidates from the list of judges in person. In Athens the judges were elected in a very democratic manner; in Rome, people partially participated in the formation of the People's court. In feudal Georgia, the king decided which court was to decide the case. In Athens, disputing parties appeared before dikasts, judges, and took the floor themselves. The parties could also have a *synegoros*,³⁹ who spoke in their favor but was not regarded as a formal lawyer. It was unlawful to involve a lawyer in any trial.

The speakers recited speeches written by logographers tried to improvise, as if they were amateurs in litigation, so as not to be accused of. At the People's court in Rome, the magistrate read out

³⁹ See MacDowell 1986, 62-3.

the charge before the accused was given the chance to defend himself or be defended by a lawyer advocate. In contrast to the Greek system,⁴⁰ lawyers appeared at early stages of the development of Roman legal procedure. Georgian sources provide us with information about *meokhis*, protectors who also participated in litigation. I. Javakhishvili identified *meokhis* as lawyers.⁴¹ In the period of the Roman Republic, lawyers defended their clients, free of charge. Lawyer fees were determined later, in the Roman Empire. The fact that masters spoke as attorneys in the court, enables us to draw a parallel between these masters, and the *synegoros*. When both parties had appeared, the court tried to collect evidence. This procedure was followed by the taking of oaths to gather indubitable proof. The testimony of one of the witnesses was usually ignored (*testis unus, testis nullus*). Underage and feeble-minded persons, slaves, women, and infamous (*infamis*)⁴² characters had no right to testify in a trial.

The fact that one of the testimonies was not taken into consideration may be regarded as the court's attempt to avoid warped decisions. In Rome, as in Athens, cases of public prosecution were tried with the utmost care, for example, the number of witnesses who took part in such trials exceeded the number of witnesses in cases of other types. Legal perjury was sometimes punishable by death. In the 9th-14th centuries testimonies of witnesses (brought by both parties to the court) were of great significance in the legal proce-

⁴⁰ See Gagarin 1986, 61-2.

⁴¹ See Javakhishvili 1984, 355.

⁴² Notorious person who was deprived of his rights because of his infamous acts: polygamy; father's consent to a widowed daughter to get married until the period of mourning was over; matchmaking; avoiding to fulfill one's obligations; theft; robbery, etc. Such citizens were disfranchised and could not take political office. They were also deprived of voting rights, could not defend themselves before the court and were excluded from military lists. See *RE* 9.2. 1915. col. 1537-40, s.v. Infamia (Pfaff) (G. Humbert and Ch. Lecrivain).

ture. Later, the role of witnesses faded in importance. In *Vakhtang VI's Book of Law*, testimony stands fifth in the evidence list, after the oath and ordeals. *Vakhtang VI's Book of Law* was mostly based upon Georgian customary law, according to which witnesses never appeared before the court in criminal proceedings (cases which anticipated blood vengeance), except the cases of theft, borrowing, etc. However, this compilation assigns an essential role to witnesses, and in *Article 13*, it determines the ideal characteristics of witnesses to be honesty, intelligence, and piety. The same article determines the number of witnesses. One of the testimonies was ignored by Georgian legal procedure, as well.

In ancient Athens and Rome, juries, judges, and witnesses swore to speak the truth and examine the case impartially. In the Georgian legal framework, in customary law as well as state law, an oath was regarded as evidence. In Svan customary law, we can see three different forms of oath: loyalty oath, equality oath, and acquittal oath. In the mountainous parts of East Georgia, we can observe swearing on flags, swearing in public, a relative's swearing, and swearing during fencing. According to the *Law of Vakhtang VI*, the latter ritual was performed mostly in property disputes when the court completely lacked evidence. The diversity of the forms of oath as evidence points to the significance of this institution in Georgian customary law. The feeble-minded, underage, and female were also barred from taking oaths in a trial. The number of those who had to swear an oath in a certain case depended on how grievous the crime was. As much as the law of feudal Georgia implied all moral and legal norms characteristic of that social structure, some of the provisions determined a settlement between the statuses of those who had to make an oath in a case. According to the *Law of Vakhtang VI*, an oath made by two grand princes equaled the oath made by twenty princes or the oath of sixty gentlemen. Thus, the significance of the oaths made by such witnesses remained large.

It must be said that a monetary penalty was the most widespread form of punishment in Greece and Rome, but ancient legal procedure also foresaw separation from the society and capital punishment. In both societies, the cases where judges might resort to maximum sentencing, were tried by special courts. Imprisonment as a form of punishment was rarely used, but preliminary detention was also common practice in Rome. All these forms of punishment were common in Georgia, too. In ancient Georgia, convicts had to face various strange punishments: the death penalty, permanent injury, separation from society, imprisonment, execution of forfeiture (forfeiture of estate), temporary or life forfeit of civil rights, fines, damnation, and other penances. Convicts were rarely imprisoned in Georgia, too. *Articles 177 and 64 of the Code of Vakhtang VI* deal with this form of punishment: "If a man tortures his wife and outrages her, the King as well as the Catholicos shall bind and reprimand him." *The Law of Bagrat Kourapalates* interprets the notion of deprivation of liberty (arrest) more extensively (*Articles 101-4*).

So, in the context of absolute monarchy and social, political, and legal norms characteristic of it, we can trace back the effects of democratic rule to the legal structure of feudal Georgia. Georgian kings initiated legislation, but they could not make legislative changes on their own. Amendments were considered by professionals, public officials, and representatives of the people (*khevisberis, khevistavis*).⁴³ Then the new laws were enacted by the *darbazi* (consultative body). The king was the Chief Justice, but he did not

⁴³ King Giorgi V the Brilliant first united the country in the beginning of the 14th century; at that time he gets acquainted with the processes in the mountainous parts of East Georgia (lawlessness, frequent crimes, unorganized governance) and draws up the code called *Dzeglis dadeba* for this region. Khevisberis took part in the legislative process as well as royal officials. The Code made of 46 articles aimed at law observance and establishing order. See Kapnadze 1913.

make individual decisions, except in very rare cases. The attack against Erekle II is a spectacular example of the aforementioned. The king investigated a case himself, but sent it to the *darbazi* for further consideration. Besides, within its limited jurisdiction, the Court of Representatives also functioned in Georgia.⁴⁴ Judges of this Court were elected by vote from different layers of society.

As stated above, the traditions of legal procedure which have been obvious to Georgians since antiquity, reveal multiple parallels within the principles of ancient legal procedure – parallels that transcend the scope of typological similarities.

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⁴⁴ The case of attack against King Erekle II and the institute of *kedkhudis* took place in the late feudal period, but we focus our attention on them because they seem to originate from ancient traditions. *Kedkhudis* represented different social layers (merchants, craftsmen, etc.) and were a connecting link between the state and the population. They served at Mamasakhlisis Panel of Judges. The *kedkhudies* representing high social classes took part in the legal proceedings carried out at Mdivanbegi and Melik-Mamasakhlisi Courts. They also heard minor civil cases but were not authorized to consider criminal cases.

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