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APPLICATION OF THE EUROPEAN STANDARDS ON HUMAN RIGHTS IN THE GEORGIAN PRACTICE

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The European Convention on Human Rights has become an integral part of Georgian legislation – a legal act on the basis of which judicial (or administrative) lawsuits can be settled. Both the Georgian Constitution[1] and other national legislation, including Georgian Laws 'on International Treaties'[2] and 'on Normative Acts'[3] have determined the role that international treaties, *inter alia*, the European Convention on Human Rights, have played in Georgian legislation.

A recent study of Georgian court practice has identified an increase in the application of international acts by Georgian courts. This trend is equally applicable to international treaties, including the European Convention on Human Rights in the administration of justice.

The European Convention on Human Rights is, in fact, the most frequently applied international treaty in the Georgian courts.[4] An examination of Georgian court practice has identified approximately 120 cases in which European human rights standards have been applied.[5]

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[1] See 2nd paragraph of Article 6.

[2] See Article 6.

[3] See 1st paragraph of Article 4 and 1st paragraph of Article 19.

[4] This has been indicated in a survey conducted among judges of general courts as well as those of the Constitutional Court of Georgia, which showed that the European Convention on Human Rights and the Universal Declaration of Human Rights are the most frequently applied international treaties in Georgian courts. It is noteworthy that the survey shows that the Universal Declaration, which in itself is a recommendation guideline, is more frequently applied in Georgian courts than, for example, the International Pact of Civil and Political Rights, which in Georgia is legally binding. See the survey 'On the practice of the application of international treaties of human rights and the decisions of the European Court in Georgian courts' conducted by BCG Research at the request of UNDP. See also International Human Rights Treaties and Georgian Court Practice, Part I, 2006 pp.17.

[5] Since merely *referring* to all the Georgian court decisions in which European standards have been applied takes up several pages, only those decisions made in the last 5-6 years have been indicated in this work. For more on the practical application of the European standards by Georgian courts in the initial years after the ratification of the Convention, see K. Korkelia, "Application of the European Convention on Human Rights in Georgia," 2004. These decisions are as follows: #107 Kol Decision, February 9, 2004, The Grand Chamber of the Supreme Court of Georgia ; #111Kol Decision, October 12, 2004, the Grand Chamber of the Supreme Court of Georgia ; Nas-168-465-05 Decision, June 1, 2004, the Civil, Industrial, and Bankruptcy Chamber of the Supreme Court of Georgia ; Nbs-1109-910-k-04 decision, November 5, 2004 ; Nbs-550-473-k-04 decision July 8, 2004, the Chamber of Administrative and Other Cases; Nbs-877-746-k-04 decision, December 3, 2004, the Chamber of Administrative and Other Cases; Nbs-1278-1081-k-04 decision December 17, 2004, the Chamber of Administrative and Other Cases; Nas-322-605-04 decision, July 21, 2004, Civil, Industrial and Bankruptcy Chamber; Nas-993-1248-04 de-

There are a mounting number of court decisions in Georgia which have been applying European standards of human rights. However, this is not fully satisfactory as the practical application of these standards is accompanied by certain problems. There are still quite a number of court decisions made in Georgia which, in terms of the application of European standards, one could evaluate very negatively. Luckily, there have also been decisions which may be evaluated quite positively. To demonstrate this one can refer to two examples from Georgian court practice.

In one of the very first court cases in which the application of European Convention and European Court case law was raised, the general court was completely unaware of how to apply the European Court of Human Rights case law and why the lawyer referred to this case law[6]; the second court not only applied to the European Convention and case law of the European Court but also put an emphasis on the role and significance of applying European Court case law in the administration of justice. The latter, for its interpretation, could be considered a historic decision for its contribution to the development of Georgian court practice as the court referred to European Court of Human Rights case law to 'fill and specify the context of the norms established by the European Convention and by the Georgian Constitution' confirming the necessity of the application of case law of the European Court of Human Rights along with the European Convention.[7]

The analysis of the application of European standards of human rights by çase category (civil, criminal and administrative) has demonstrated that these standards are most frequently referred to in administrative cases. However, in the initial years after the ratification of the Convention the practice showed that the European standards were most intensively applied in civil cases. More recently, European standards have been only rarely applied in civil cases. the present practice also shows that in the general courts of Georgia European standards are comparatively rarely applied in criminal cases.

cision, December 23, 2004, Civil, Industrial and Bankruptcy Chamber; Nas-593-1241-03 decision, April 14, 2004, Civil, Industrial and Bankruptcy Chamber; N99 decision, June 14, 2005, the Grand Chamber of the Supreme Court of Georgia; Nbs-586-507-k-04 decision, April 1, 2005, the Chamber of Administrative and Other Cases; Nbs-1281-1024-k-04 decision, January 20, 2005, the Chamber of Administrative and Other Cases; Nbs-1500-1075-k-04 decision, November 29, 2005, the Chamber of Administrative and Other Cases; Nbs-336-267-k-05 decision, June 9, 2005, the Chamber of Administrative and Other Cases; Nbs-548-134-k-05 decision, October 17, 2005, the Chamber of Administrative and Other Cases; Nbs-115-91-k-05 decision, April 7, 2005, the Chamber of Administrative and Other Cases; Nbs-1143-719-k-05 decision, November 17, 2005, the Chamber of Administrative and Other Cases; Nbs-325-259-k-05 decision, June 16, 2005, the Chamber of Administrative and Other Cases; Nbs-1478-1199-k-05 decision, March 11, 2005, the Chamber of Administrative and Other Cases; Nbs-105-84-k-05 decision, July 15, 2005, the Chamber of Administrative and Other Cases; Nbs-662-249-k-05 decision, November 24, 2005, the Chamber of Administrative and Other Cases; N156ap decision, July 12, 2005, Criminal Justice Chamber; N438ap decision, May 19, 2005, Criminal Justice Chamber; N512ap decision, December 19, 2005, Criminal Justice Chamber; Nas-1236-1437-05 decision, April 28, 2005, Civil, Industrial and Bankruptcy Chamber; Nas-1349-1471-04 decision, May 18, 2005, Civil, Industrial and Bankruptcy Chamber; Nas-627-903-05 decision, July 29, 2005, Civil, Industrial and Bankruptcy Chamber; Nbs-1576-1150-k-05 decision, May 17, 2006, the Chamber of Administrative and Other Cases; N457saz decision, December 26, 2006, Criminal Justice Chamber; Nsaz-03-06 decision, March 7, 2006, Criminal Justice Chamber; N779ap decision, November 8, 2006, Criminal Justice Chamber; N102ap decision, March 30, 2006, Criminal Justice Chamber; N267ap decision, February 23, 2006, Criminal Justice Chamber; Nas-1333-1562-05 decision, July 29, 2006, Civil, Industrial and Bankruptcy Chamber; Nas-1106-1352-05 decision, June 14, 2006, Civil, Industrial and Bankruptcy Chamber; Nbs-475-452-k-06 decision, January 9, 2007, the Chamber of Administrative and Other Cases; Nbs-995-912 decision, January 15, 2007, the Chamber of Administrative and Other Cases; Nbs-455-44-k-05 decision, August 2, 2007, the Chamber of Administrative and Other Cases; N3/2058 decision, October 10, 2007, Panel of Judges of Tbilisi City Court; Verdict Nas-968-1269-07, May 15, 2008, Civil, Industrial and Bankruptcy Chamber; Verdict Nas-810-1129-07, May 16, 2008, Civil, Industrial and Bankruptcy Chamber.

[6] Verdict Nas-3k/599, February 22, 2001: Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

[7] Decision N2/a-25-2002, Tbilisi Regional Court Civil and Industrial Board, July 3, 2002; see also Georgian Supreme Court Decision N3k/1240-02, April 24, 2003.

If the practical application of the European Convention is analyzed with regard to court instances, it will clearly demonstrate that the European Convention is most frequently applied by the Supreme Court of Georgia. Unfortunately, however, with due regard to several exceptional cases, the application of the European Convention in Georgia's other courts can be generally considered unsatisfactory.[8]

The effectiveness of application of these European standards of human rights in conducting justice is determined by its positive effect on a court decision; and whether the application of the European standards actually upheld the protection of human rights to the required level. That is why the real effect of the application of European standards of human rights in conducting justice in Georgia must be examined.

As a turning point the following should be noted: the application of European human rights standards in the administration of justice is important only when the court, after its application, makes a decision which it could not have made otherwise.

If a court decision adopted on the basis of a domestic normative act (for example, a law) would be similar to the decision adopted on the basis of the law, as well as to that of the European standard, the application of the latter would be given a negligible role. In such a case, the application of the European standard of human rights will have almost no practical effect on the court decision.

If analyzed, those court cases in which the Georgian general courts have applied European human rights standards will clearly show that their effect on court decisions is mostly negligible. In most cases, the courts apply European human rights standards along with Georgian domestic normative acts. In particular, a Georgian general court examines the norm which has been established by previous domestic acts and only afterwards does it refer to (or, at best, recite) the relevant article of the European Convention.[9] Afterwards, the Georgian court concludes that the rules of conduct established by Georgian domestic normative acts and the European Convention are similar and court settles the dispute on the grounds of these two acts.[10]

It should therefore not be considered that the application of Georgian law together with the European standards had an important – or indeed any – effect on the court's decision since the Georgian court would have arrived at the same decision by applying only the relevant domestic normative act (for example, a law). The court would therefore have reached the same decision without applying the European standards as it would have if it had applied relevant European law along with those standards. The courts by applying domestic normative acts along with the Euro-

[8] However, there are also some exceptions. See: Decision N2/64, Tchiatura District Court, April 3, 2002.

[9] For instance, see Decision N3k/1044, March 1, 2002, of the Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, #5, 2002, pp.93; Decision N3b-63 Appeals Chamber on Administrative Law and Taxation, May 16, 2000; Verdict N3g-ad-429-k-02 on Administrative and Other Cases, December 18, 2002, N2, 2003, pp.224; and Verdict N3g-ad-405-k-02 on Administrative and Other Cases, February 27, 2003, N4, 2003, p. 847.

[10] For instance, see Decision Nas-593-1241-03 of the Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, April 14, 2004. Georgia is not the sole exception with regard to this practice. For instance, the same practice was established in the courts of Germany and then changed over the course of time. (B. Simma, D.E. Khan, M. Zöckler & R. Geiger: "The Role of German Courts in the Enforcement of International Human Rights," in: *Enforcing International Human Rights in Domestic Courts*, B. Conforti & F. Francioni (Eds.), 1997, 73.

pean standards found that the normative act applied by court is in compliance with the European standards and that in making such a decision court was guided not only by domestic normative acts (for example, a law) but also by the European standards of human rights in impartiality of which the parties of a dispute cast, as a rule, no doubt. By applying the European standards in this manner, courts reinforce credibility[11] of their decisions and legitimize them.[12]

Bearing in mind all the mentioned one can draw the conclusion that courts of Georgia frequently apply the European standards of human rights in such cases when their application has almost no practical contribution in settling a court dispute.

Georgian court practice has also demonstrated that, regarding court decisions, the court has directly held up the European Convention on Human Rights, but it does not mention in its decision European Court case law. However, the analysis of some Georgian court decisions show that to settle a dispute, the national court has taken into consideration not only specific provisions of the European Convention but also European Court case law, although this has not been directly referred to in court decisions. The manner in which the European Convention on Human Rights is being applied is proof of this, as it does not come out of the specific provision of the Convention but reflects the interpretation and argumentation expressed in European Court case law.[13] The formulations applied to the decisions of Georgia's courts also provide the basis with which to attest the mentioned which are similar to those applied in cases of the European Court.[14]

By analyzing the practice of general courts of Georgia, it was also discovered that, although the European Convention on Human Rights was applied, the general courts did not usually apply European Court case law, so it has not interpreted the Convention in the same spirit or meaning as the European Court of Human Rrights.

The case dealt with a complaint filed in Marneuli district court by practitioners of a particular religion against the district mayor and several high-ranking police officers, alleging that the plaintiffs were not given the right to attend a particular religious service.[15] The plaintiffs allege that a rival group (made up of practitioners of a different religion) broke up their service on religious grounds and went on to inflict material damage as well as cause moral offense.

The plaintiffs also alleged that the police officers failed to act to protect their rights thus enabling the rival party to disrupt their meeting and thereby breach their rights. Evidence given by the head of the district police station is noteworthy as it says that "it is beyond the competence of the police to protect the members of different confessions..."

[11] H. Schermers, "The European Community and the European Convention on Human Rights: Their Effect on National Law," in: *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Even of the 21st Century*, B.Markesinis (Ed.), 1994, 171.

[12] For comparison see: ix. Second Report, Committee on International Law in National Courts, International Law Association, 1996, 18.

[13] Criminal Justice Chamber of the Supreme Court of Georgia, verdict (the right of hearing a case in reasonable time), July 17, 2001; see `Sample Decisions on Protection of Human Rights` (2001), Tbilisi, 2002, pp.16-19.

[14] Criminal Justice Chamber of the Supreme Court of Georgia, verdict (imposing criminal responsibility on expressed opinion), December 12, 2000; see 'Sample Decisions on the Protection of Human Rights' (2001), Tbilisi, 2002, pp.20-24.

[15] See Marneuli district court Decision #3/9-2002, May 13, 2002 ; See also Verdict #3/413 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia, March 24, 2000; Decisions of the Supreme Court of Georgia, Part I, N8, 2000, pp.373-376.

The defendants considered the suit groundless as the police officers inflicted neither offence nor assault or moral or material damage upon the plaintiffs. A representative of the Ministry of Internal Affairs remarked that the police officers had not dismissed the meeting and that none of the plaintiffs had accused any police officer of offending them or of assisting the rival party in breaking up the meeting.

The Court considered the plaintiffs' demand to be groundless and did not satisfy it. The Court noted that the police did not prevent the faithful of the religion in question from attending the religious meeting. The Court also noted that the rival party confronted and inflicted material damage on the plaintiffs and that the police officers did not assist them in doing these things. The Court also ruled that the existing video footage does not implicate the involvement of any police officers in breaking up a religious meeting.

The Court did not share the plaintiffs' opinion that the police had breached Articles 8, 9, 10, 11, 13, and 14 of the European Convention on Human Rights. The Court also failed to refer to European Human Rights Court case law (particularly the case *Plattform* "*Ärtzte für das Leben*" v. *Austria*) to identify the context in which these Convention articles were created.[16] Had the Georgian Court done this, it would have helped it to reach a more proper interpretation and application of the spirit of the Convention. There are enough grounds to prove that the Marneuli District Court would have assessed the case differently had it applied the case law of the European Court and accordingly, would have reached a different decision.

1. The Forms of European Standards Applied by General Courts of Georgia

By analyzing Georgian court decisions in which European Human Rights standards are applied, some trends can be identified regarding the forms of their application:

a) Georgian courts, like the courts of other European states, most frequently apply European standards as a means to properly interpret domestic normative acts.[17] The courts of Georgia examine disputed issues on the basis of Georgian domestic normative acts along with existing European standards. However, these standards are applied mainly to reassure the court that it is upholding the proper interpretation of the domestic normative act in question (for example, a law).

One can point to a number of examples to demonstrate how the Georgian court system has applied European human hights standards in order to properly interpret domestic normative acts. The Georgian Supreme Court made a ruling on 4 July, 2002 with regard to a series of newspaper articles

[16] Series A, no. 139.

[17] For instance, see Decision N3k-390-02, Supreme Court of Georgia on Civil, Industrial and Bankruptcy Cases, July 4, 2002, N10, 2002, pp.1758-1767 ; See also Decision N2/a-83-2001 of the regional court, Civil and Industrial Panel Board, December 21, 2001 ; Decision N3g-ad-462-k-02 of the Supreme Court of Georgia on Administrative and Other Cases, November 25, 2002, N1, 2003 year, pp.37; N3k1240/02 Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia, April 24, 2003.

in which the journalist had criticized several high-ranking officials. These officials accused the journalist of libel and called upon the Supreme Court to judge that these articles were indeed libelous.

In the case the Court applied Georgian domestic normative acts (the Constitution, the civil code and the law 'on the Press and Other Media') along with the European Convention on Human Rights and European Court case law through which it interpreted domestic normative acts.[18] In particular, court remarked the following:

"Article 10 of the European Convention on Protecting human rights and fundamental liberties guarantees not only freedom of the press to provide society with information but also the right for society to be adequately informed.

"Freedom of political discussion is the core of a democratic society. Therefore the frame of criticizing politics is wide than it is with private individuals. It is inevitable for politicians and after assuming a position, it is taken for granted, that all of his/her words or actions would fall under permanent and persisted scrutiny of journalists. A politician, on its part, shall display patience, especially when he/she conducts in a way that might spark sharp criticism. State officials shall endure more criticism than it is allowed in debates held in press or by television. Therefore, criticism must be constructive and it should not grow into rancorous criticism that is incompatible with the point of discussion and criticism."[19]

By applying the European Convention, the Supreme Court of Georgia assured the proper interpretation of domestic normative acts by the Georgian court system. The contribution of the Convention in helping a court to arrive at a correct decision was expressed by the decree which reads that the frames for criticizing a politician are wider than those for criticizing a private individual. Bearing his/her status in mind, a politician can expect to fall more frequently and openly under the criticism of society (expressed through journalism) and therefore, as a public figure, he/she should prepare him/herself accordingly.

The Supreme Court of Georgia also heard another interesting case regarding defamation and slander in which it applied European Human Rights Court case law to reach a verdict.[20]

A former deputy Minister of Industry filed suit in the Supreme Court of Georgia against a former Member of Parliament for a statement relating to the plaintiff's professional activity made by the latter during a TV program. The plaintiff requested a negation of the inquiry infringing his "honor, dignity and business reputation" as well as compensation for "moral damages." The Vake-Saburtalo Regional Court of Tbilisi ruled against the plaintiff. The decision was then appealed in Appeals Court

[18] Decision N3k-390-02 of the Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, July 4, 2002, N10, 2002, pp.1758-1767 ; See also Decision N2/a-83-2001 of the regional court, Civil and Industrial Panel Board, December 21, 2001.

[19] See pp. 1762-1763.

[20] Decision N3k-376-01 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia, July 18, 2001, N10, 2002. Disputed issue: Infringing upon honor, dignity and business reputation. See decisions of the Supreme Court of Georgia : Civil, Industrial and Bankruptcy Cases, N10, 2001 year, pp.1172-1177 ; See "Sample Decisions on Protection of Human Rights" (2001 year), Tbilisi, 2002 year, pp.79-82.

which revised the decision made by the regional Court and partly satisfied the plaintiff. The defendant was charged with slander and the defamation of the plaintiff's honor, dignity and business reputation.

Then the defendant, the former Member of Parliament, appealed this new decision in the Supreme Court of Georgia, noting that the expression of his opinion against the former deputy minister on a TV program was in fact a critical expression regarding a public official – the then deputy minister – and an assessment of his activity, not the dissemination of factual information (data) that might infringe upon his "honor, dignity or business reputation."

The Supreme Court of Georgia finally overturned the Appellate Court decision, and once again favored the former Member of Parliament. Along with Article 18 of the Civil Code of Georgia, the Supreme Court of Georgia also relied on Article 10 (freedom of expression) of the European Convention on Human Rights, which stipulates that freedom of expression encompasses a person's liberty to make suggestions; and to obtain and impart information and ideas. To interpret Article 10 of the Convention, the Supreme Court referred to the European Court's decision in the case *Castells v. Spain*. This case stipulates that, in assessing instances of humiliation against private individuals and government officials, different standards apply. In particular, the permitted frames of criticism are wider for government officials than for private individuals.

The Supreme Court established that the phrases articulated by the former member of parliament towards the former deputy minister pertained to issues of public interest and noted that "politicians and state officials shall withstand criticism more than permitted in debated held in press or TV." The Court also indicated that the "protection of the interest of reputation (honor, dignity) is balanced with that of the public to freely discuss and obtain necessary information on the country's political, economic and social issues."

The Supreme Court of Georgia applied European Court case law by which it established that an elected or appointed official may fall under sharp criticism for the sake of public interest and that the scope of that criticism is wider than what could be brought against a private individual.[21]

The 3 July, 2001 decision[22] of the Tbilisi Regional Court is also interesting in that it regards the dissemination of information during a TV program on the medical condition of a public official's son.

The Court, in its decision, not only referred to Article 20[23] of the Constitution of Georgia and Article 8[24] of the European Convention on Human Rights but also to the case law of the European Court of Human Rights.

[21] The April 3, 2002, Decision N2/64 of Chiatura District Court is also interesting.

[22] See the July 3, 2002, Decision N2/a-25-2002 of the Civil and Industrial Board of the Tbilisi Regional Court; for more on these cases see: Decision N3k/1240-02 of the Supreme Court of Georgia, 24 April, 2003.

[23] 1st paragraph of Article 20 of the Constitution stipulates that the 'private life of every individual is inviolable.'

[24] The 1st paragraph of Article 8 of the Convention stipulates that 'Every individual has the right for his/her private and family life to be respected'.

The Regional Court relied on the decision of the European Court that directly upholds the confidentiality of individual medical information. The Regional Court referred to the European Court decision on the case *Z v. Finland* which holds the state responsible for not divulging individual health-related issues.[25] The Court also noted that the state is obliged not only by *negative* responsibility – that is, not to disclose private and/or family-related information, but also by *positive* responsibility: 'To preclude third parties from the dissemination of personal health-related information without his/her consent in order to avoid infringement upon the rights of respect of private life envisaged by Part I of Article 8 of the Convention.'[26]

The Court, based on that analysis, considered that 'Information disseminated by the defendant in relation to the health condition of the plaintiff's son represents protected private family material since it is not connected with public life and is aimed at a certain group of individuals. In protecting an individual's honor, dignity and/or business reputation, the law guarantees that the public segment of any person's life precludes the dissemination of false information while simultaneously protecting the confidentiality of the individual's private life. The information describing an individual's private life might be true but the person is interested in protecting it from disclosure.' The regional court also inferred that by disseminating information regarding the health condition of the plaintiff's son to a wider public, the program's presenter caused irreparable damage to the plaintiff's family, and to the plaintiff's son in particular, who was previously unaware of his death diagnosis.

It is clear that by applying European Human Rights Standards the court was given an opportunity to interpret the Georgian legislation using European standards as a guideline and to therefore make a proper decision.[27]

A case heard by the Supreme Court of Georgia on 14 April, 2004 is similarly interesting.[28]

In this case the plaintiff requested 70,000 GEL from the weekly newspaper Kviris Palitra and from its journalist as compensation for the moral damage wrought by a headline which read: "Rape attempt with formidable brutality." All court hearings were closed by request of the plaintiff as the victim.

The Court considered that the facts published in the article were compatible with the truth but reflected inconvenient and unpalatable episodes of the plaintiffs' private life. The Court also noted that by making the plaintiff's full name public in the article they had disseminated information which the claimant was reluctant to disclose. In particular, the paper reveal unpleasant facts from the life of the plaintiff and the plaintiff was unable to keep the details of her private life secret.

[25] According to the case, the author of the statement was contaminated with AIDS and by disclosing this information, Article 8 of the European Convention was breached.

[26] Regarding the positive accountability the regional court referred to the decisions of the European Court on the cases: *Lopez Ostra* v. *Spain* and *Keegan* v. *Ireland.*

[27] A comparatively new decision by the Supreme Court of Georgia is also interesting in which court on the issue of public interest interpreted the Georgian legislation on the basis of the European standards. See May 16, 2008, Verdict Nas-810-1129-07 of the Civil, Industrial and Bankruptcy Chamber. See also: June 1, 2004 Decision Nas-168-465-5 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

[28] See: April 14, 2004, Decision Nas-593-1241-03 of the Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

The Court also note that the plaintiff's relatives as well as a wider group of her acquaintances learned about rape attempt as a result of the publication of the confidential information about her. The disclosure of confidential information from the plaintiff's private life to the wider public hurt her, and apparently inflicted such damage and psychological trauma that her verbal communication skills were impaired.

To settle the dispute, the Supreme Court of Georgia applied domestic normative acts of Georgia along with Article 8 (the respect of personal and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights and European Court of Human Rights case law and delivered a proper legal assessment fitting the circumstances of the case.

The Court put an emphasis on some issues, among others, noting that "Article 20 of the Constitution of Georgia as well as Article 8 of the European Convention are not only applied in cases protecting an individual from the state, but also when one private individual infringes upon the rights and/or interests of a second private individual." Respectively, the Court noted properly that the state is obligated both by negative and positive responsibility in order to protect a private individual in case of infringement by another individual.

The Court also discussed the contradiction of the private and public interests reflecting assessment criteria of the conflict of interests by the European Court. The Court remarked that "A major problem in deciding a case on the freedom of expression is related to striking a balance between freedom of speech and freedom of respect of the right of private life.

In cases which present a contradiction between the respect for an individual's private life and the public interest, the balance could be in favor of the public interest only in cases in which an excessive threat is posed by the perpetrator to the public safety. In the given case the plaintiff (K.K.) had not committed a crime. On the contrary, she was a victim. The court proceedings were closed at her request which is why the balance between the respect for private life and that of public order was to be decided in favor of the individual rights."

The Court also remarked that the publication, when encountering that interest, was to decide the issue in favor of the plaintiff – uphold the protection of her private life – and was not to mention the victim's name in the article against her will.

Finally, the Supreme Court on the grounds of legislation and the European standards established that "the confidentiality of the private life will not only be breached when the distributor spread out information that is incongruent with truth but also when the person without permission of the bearer of the information spreads information that is congruent with truth but unfolds insulting, inconvenient, unpalatable information against the will of the person protected by that right."

The is undoubtedly one of the more vivid and exemplary decisions and attests to the significance of the application of domestic normative acts along with the European human rights standards in making a proper court decisions.

b) The second example of the application of European standards – their application in cases in which they conflict with domestic normative act – is rare in Georgian court practice. Nevertheless, two cases should be referred to.

On 15 May, 2008 the Supreme Court of Georgia heard a case which, *inter alia*, was related to acknowledging as a co-owner of a person, requested by the plaintiff, as being in an unregistered marriage.[29] The plaintiff, living with her spouse (before the death of the person with whom she lived in an unregistered marriage) from 1993 till 2005 claimed disputed real estate and a large sum of money spent for the renovation of the house owned by her spouse's son.

The demand of the plaintiff to be acknowledged as a co-owner of the disputed house was grounded on the circumstance that there was a factual matrimony between her and her spouse. To substantiate her position, the plaintiff referred to the fact that they had been in a church marriage since 1998; although civil legislation is considered to be the registration as the origin of the marriage, Georgia is an orthodox country which acknowledges both state and the church alike; hence, the church marriage should not be of minor legal importance.

The plaintiff also pointed out that Georgia is a part of the European Convention on Human Rights and the established practice stipulates that "marriage has extended the limits of formal relationship and the issue of family co-existence largely depends on the existence of tighter personal relationship." The plaintiff also referred to the 1994 decision of the European Court on the case *Kroon v. the Netherlands*.[30] On the basis of the case the plaintiff remarked that "The notion of a family relationship is not only restrained with a relationship founded in marriage as it might encompass other *de-facto* ties when the parties live together without marriage."

The plaintiff noted that the defendant did not question the existence of the factual matrimony.

Despite the plaintiff's claim substantiating her position with the Constitutional accord between the state and the Orthodox Church as well as with case law of the European Court of Human Rights, the Supreme Court in its decision did not at all consider the notion of "family relationship" as defined by the European Court and the legal consequences arising from it. It only considered the norm envisaged by the Constitutional accord.

Ultimately, the Supreme Court inferred that the Constitutional accord ruled out the plaintiff's claim on her civil right as a spouse – and on originating co-ownership – on the grounds of the church marriage.

This court decision should be assessed negatively. It is clear that there was a contradiction between Georgian legislation, in particular, with the civil code, and with the European standards of human rights. Despite the plaintiff's arguments that, among others, also referred to case law of the European Court to substantiate how to interpret the notion of family relationship, not only did

[29] See: May 15, 2008, Verdict Nas-968-1269-07 of the Civil, Industrial and Bankruptcy Chamber.

[30] October 27, 1994, Series A no. 297-C.

Court not share that interpretation established in the European court practice, but it even did not consider the plaintiff's argument based on the European standard.

The October 10, 2007 decision of the Administrative Board of the Tbilisi City Court is also of importance. In this case the plaintiff requested that the Ministry of Justice of Georgia develop such an administrative act that would be in compliance with the demand of Article 8 of the European Convention protecting a prisoner's right as guaranteed by the Convention to meet with family members more often and with longer duration that was established by the law 'on Imprisonment' – i.e. once a month and for an hour.[31]

In the plaintiff's opinion, the prisoner serving his/her term under this strict regime who is given the right to meet only once per month contradicts the context of Article 8 of the European Convention. To support her position, the plaintiff also referred to the decision of the European Court *Nowicka v. Poland* and indicated that the case stipulated that limiting the right to seeing family members only once per month while serving a prison term was considered as a violation of Article 8 of the Convention.[32]

The Tbilisi City Court satisfied the plaintiff's claim and indicated:

"The permitted quantity of the meetings assigned to prisoners as defined in the law of Georgia 'on Imprisonment' clearly contradicts the Article 8 of the European Convention; it is evidently few in terms of numbers, impinges upon the right of respect of family life and in given circumstances preponderance shall be granted to the international treaty as to that above the hierarchy level of legal act.

"Article 6 of the Constitution of Georgia stipulates that international treaties or agreements have a higher legal effect over domestic normative acts. Hence, the European Convention is part of the legislation. The said provision is supported by the laws of Georgia on 'Normative Acts'. Article 4 of the mentioned law stipulates that the international treaty of Georgia is a normative act of Georgia.

"The Court considers that since the European Convention on Human Rights is acknowledged as part of legislation of the state, protection of human rights shall be conducted in line with international standards.

"The Court considers that the defendant – the Ministry of Justice – must issue a normative act which will be in compliance with the demands of Article 8 of the European Convention and will take into consideration decisions adopted on a disputed issue by the European Court."

The Tbilisi City Court's decision deserves a positive assessment. Special importance shall be attached to some facets of the court decision:

[31] See: October 10, 2007, Decision N3/2058 of the Administrative Board of the Tbilisi City Court.

[32] December 3, 2002.

1. The Court assessed the case not only on the basis of domestic normative acts ('the law on Imprisonment'), but also on that of the European standards and inferred that the established numbers of meetings as defined by the mentioned law of Georgia clearly contradicts the standards of the European Convention for which it grants preponderance to the European standard;

2. Although the Court did not directly mention the specific case of the European Court there is every indication in place that it shared the plaintiff's argument based on the case – *Nowicka v. Poland.*

The decision once more proves the necessity of applying the case law of the European Court along with the European Convention in making a correct decision. Had there be not been that specific case to which the plaintiff could refer, there would have been a greater likelihood that neither the plaintiff nor the Court would have inferred what it did on the grounds of that case since neither the plaintiff nor the Court would have been able to read such a standard in Article 8 of the Convention that granting the right to meeting with a prisoner once a month was not sufficient;

3. It is also interesting that the City Court tasked the Ministry of Justice to issue the normative act which would be in compliance with the demands of Article 8 of the European Convention taking into consideration the decisions made by the European Court on a disputed issue. By doing so, the Court demanded the defendant bring into compliance its normative act regarding that issue with that of case law of the European Court.

c) It is noteworthy that in court practice of Georgia one case can be traced in relation to the application of the third form of the European standards of human rights which considers application of these standards as the sole legal basis to decide a court case; the Supreme Court of Georgia made a decision on the case on 10 May, 2001 and in its motivation part it referred to the European Convention as to the sole legal basis in settling the court case.[33]

2. The Practice of General Courts of Georgia on Initiating the Application of European Standards

The Application of European standards of human rights may be initiated by the parties of the case as well as by the court itself. The parties of the case have the right to found their positions of the grounds of the European standards and maintain that the rights granted to them by the Convention were breached.

As for the application of European standards by the court's initiative, as was noted earlier, the effective involvement of the Court in the application of such a normative act which is not supported by the party of the case differs in a way whether it is a criminal or civil/administrative

[33] See: Verdict May 10, 2001, N8(1) on criminal cases of the Supreme Court of Georgia ; N5, 2001 year, p.268.

case which is at hand. Despite the rather passive role granted to the court on civil/administrative cases, it nevertheless shall apply the European Convention and case law of the European Court if it deems that their application will uphold to establish the truth of a case.

In the vast majority of court decisions, courts initiate the application of the European standards of human rights in which they are applied.[34] In other words, in these cases courts apply the European standards in spite of the parties' official position that they do not refer to them to substantiate their positions.[35]

The active role of the courts of Georgia in relation to civil/administrative cases should be appreciated. Despite the relatively minor role granted to courts on cases of such a category, the courts of Georgia nevertheless apply the European standards.

In Georgian court practice some cases can be traced to cases in which European standards were applied by the Court under the initiative of the party involved in the case.[36] In those cases, the party in the process, in order to substantiate his/her position, referred to the European standards, while the Court in order to make a decision, applied the appropriate article of the European Convention (in some cases, case law of the European Court).

Unfortinately, there are some cases of Georgian court practice in which the party in the process, in order to substantiate his/her case, referred to the European standards while the Court absolutely disregarded them in its decision.[37]

To demonstrate this we may review one particular case. On 6 February, 2003 a case was heard by Kutaisi City Court regarding the Kutaisi vice-mayor's allegation that his honor, dignity and business reputation had been infringed upon by a newspaper article.[38] The plaintiff requested that the defendants (a journalist and the editor of the paper) be obliged to retract the information published

[34] Due to the large quantity of such decisions, we have only indicated some of them. See the other relevant decisions: Application of the European Convention on Human Rights in Georgia – K.Korkelia, 2004. November 25, 2002, N3g-ad-462-k-02 decision on Administrative and Other Cases, SUSG, N1, 2003, pp.37; December 16, 2002, N3k-1188-02 verdict of Civil, Industrial and Bankruptcy Issues, SUSG, N2, 2003, pp.461; December 18, 2002, N3g-ad-429-k-02 verdict, Administrative and Other Cases, SUSG, N2, 2003, pp.224; April 14, 2004, Nas-593-1241-03, Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

[35] In any case, nothing is said in this decision about the European Convention referred to by the party in the process to substantiate his position. A different conclusion was drawn in a survey conducted among judges of Georgia which read that judges mainly referred to cases of the European Court only when it was requested by the barrister and, as a rule, the judges did not initiate it. See the survey: "On the application of international treaties of human rights and the decisions of the European Court" conducted by BCG Research under the request of UNDP. See international treaties of human rights and Georgia's court practice, Part I, 2006, pp.43.

[36] See February 22, Verdict 2001 N3k/599, Civil, Industrial and Bankruptcy Chamber; July 17, 2001, N22(1) verdict on criminal cases, SUSG, N10, 2001 year, pp/653-655; October 11, 2001, N79 verdict on Criminal Cases, SUSG, N1, 2002 year, pp.42-44; November 13, 2001, N3g/ad-82-k-01 verdict on Administrative and other cases, SUSG, N12, 2001 year, pp.1129, 1131; April 3, 2001, N2/64 decision of Chiatura District Court ; May 13, 2002, N3/9-2002, Marneuli District Court ; June 12, 2002; N3k-606-02 verdict of SUSG on Civil, Industrial and Bankruptcy Cases, N9, 2002 year, pp. 1511-1513 ; June 25, 2002, N3k-337-02, verdict SUSG on Civil, Industrial and Bankruptcy Cases, N9, 2002 year, pp. 1625-1637 ; See also on the case December 18, 2001, N2/a-176 decision of Tbilisi Regional Court, Civil and Industrial Board; July 4, 2002, N3k-390-02 decision SUSG on Civil, Industrial and Bankruptcy Cases, N10, 2002 year, pp. 1758-1767.

[37] September 17, 2001, case #2/229 Borjomi District Court decision; See also the complaint and the plaintiff's defensive speech; February 6, 2003, N2/74 decision of Kutaisi City Court ; October 30, 2006 N674-ap verdict of Criminal Cases Chamber of the Supreme Court of Georgia; December 18, 2007, Nbs-536-512-k-07 verdict of Administrative and Cases of Other Categories Chamber of the Supreme Court of Georgia.

[38] See: February 6, 2003, N2/74 decision of Kutaisi City Court.

in the article in the paper – 'P.S' (with the headline: "One should enjoy the rights of Mayor at least, in order to do business in Kutaisi"). The article stated that the person allegedly enjoying the rights of Mayor was involved in the oil business at the vice-Mayoral level; one of the officials managed to identify the plaintiff. The defendant dismissed the complaint and noted that the article did not disseminate information infringing upon the plaintiff's honor, dignity and business reputation.

In order to substantiate his position, the defendant referred to domestic normative acts of Georgia and Article 10 of the European Convention (freedom of expression) as well as many cases from the European Court of Human Rights[39] providing a rather detailed interpretation the European Court's position on similar cases. Regrettably, not only did the Court not consider the defendant's arguments, among them the European Convention and the cases of the European Court, in its decision it didn't even make any mention of them.

3. The Practice of Supporting General Court of Georgia Decisions with the European Standards

As it has been noted earlier, the court shall hear a case on the basis of arguments supported by the European standards if a party in the process refers to them to support his/her position. The Court shall express its own position in its decision whether application of the European standards is possible or not in relation to the specific dispute. The Court shall found the reasons for applying or not applying these norms in settling a dispute, i.e. whether it supports or discards the arguments of a given party supported by European standards. If the Court discards such arguments it shall found the reasons for which it does not share the party's position. The Court may refer to that the specific article of the Convention that is not applied in relation to the case as its sphere of regulation is different, or if the party misinterprets the context of the specific article of the European Convention; similarly, the Court shall found their positions if a party refers to European Court case law.[40]

By analyzing decisions of the Georgian courts in which the European standards of human rights are applied one can draw the conclusion that the situation in terms of substantiating the Georgian Courts' decisions by the European Convention and case law of the European Court is unsatisfactory. In the vast majority of cases court decisions are founded insufficiently specifically in relation to the European standards.

However, an examination of the practice revealed several cases when the Court sufficiently, specifically judged the arguments of a party based on European standards.[41] In those cases the

[39] In particular, the defendant referred to the following decisions of the European Court: *Lingens* v. *Austria*, *Castells* v. *Spain*, *Jersild* v. *Denmark*, *Goodwin* v. *the United Kingdom*, and O*berschlick* v. *Austria*.

[40] See: May 15, 2001, Nas-968-1269-07 verdict of Civil, Industrial and Bankruptcy Chamber.

[41] See: July 17, 2001 N22(1) verdict, SUSG, on Criminal Cases, N10, 2001 year, pp.653-655; April 3, 2002, N2/64 decision of Tchiatura District Court; May 13, 2002, N3/9-2002 decision of Marneuli District Court; June 25, 2002 N3k-337-02 verdict, SUSG, on Civil, Industrial

Court analyzed the case on the arguments of a party based on European standards and founded why it applied or did not apply the relevant norm of the European Convention to settle the dispute. It is unquestionable that such decisions are more conclusive for the parties of the process, including for the party against whom decision was made, than the decision where there is only a 'thin' reference to the European standards.

One of the cases in which the Court deliberated with sufficient specification on the application of European standards in specific circumstances along with the law of Georgia on 'Freedom of Speech and Expression' is related to a lawsuit between the member of the Monitoring Group of the Ministry of Justice of Georgia and the former Minister of Justice. The plaintiff's claim that the TV and press statements made by the defendant infringed upon his honor, dignity and business reputation was considered by the Court on the grounds of the law and the European standards and did not satisfy the complaint since the plaintiff as the person matching to the public official was to burden the commitment of endurance of criticism.[42]

A case heard by the Supreme Court of Georgia on 22 June, 2001 was related to the complaint of a Member of Parliament (MP) against journalists of the newspaper 'Lanchkhuti Pliusi' on infringing upon his honor, dignity and business reputation.[43]

The grounds for the complaint referred to by the Georgian MP from the Lanchkhuti district was that the article "Hey Roman, Roman", published in the abovementioned newspaper helped circulate rumors, thus insulting him, while his honor and dignity were deliberately disparaged in the eyes of voters and co-citizens. In the article, the MP is mentioned as a man who has 'lost his head'. In the article the following phrases are used to describe and/or refer to him: 'Who are you and how did you happen to be in such a confusion as a Member of Parliament?'; 'How can I believe that you were sleeping during all three hearings?'; 'He chops our legs in Lanchkhuti while he beheads us in Tbilisi'; 'He is maturing so slowly that, alas, Lanchkhuti district is short of time to await the end of this hopeless process'; 'Did Lankckhuti district elect you to parliament in order for you to process wool?'; 'You even failed to read laws at the level of an amateur'; 'You don't even know how to read a paper'; 'Roman, normally people respond adequately to such whims but, alas, this only won't help your misery'; 'Here every knave aspires to become a nobleman while every lazybones seeks to be a commander.'

The MP demanded a retraction of this information and compensation for moral harm from the authors of the article. In his opinion, the defendants intended to compel him to withdraw his can-

and Bankruptcy Cases, N9, 2002 year, pp. 1625-1637; July 3, 2002, N2/a-25-2002, decision of Civil and Industrial Cases' Board; July 4, 2002N3k-390-02 decision, SUSG on Civil, Inductrial and Bankruptcy Cases, N10, 2002 year pp. 1758-1767; April 14, 2004, Nas-593-1241-03 decision of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

This decision of the Supreme Court of Georgia is remarkable. However, it did not consider the European Convention but it considered the cases of the European Court referred to by the party and founded that those cases were not to apply in relation to that specific case. January 23, 2004, N3g-ad-275-k-02 verdict, SUSG, on Administrative and Other Cases, N3 2003 year, pp. 476-479 ; See also April 24, 2003, N3k/1240-02 decision of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia.

[42] See May 16, 2008, Nas-810—1129-07 verdict of Civil, Industrial and Bankruptcy Chamber.

[43] See June 22, 2001 verdict of Civil, Industrial and Bankruptcy Chamber of the Supreme Court of Georgia. See 'Exemplary Decisions of the Protection of Human Rights' (2001 year), Tbilisi, 2002 year, pp. 76-79.

didacy from the parliamentary elections. In the defendants' opinion, no insulting phrases could be traced in the article in relation to the MP, rather the article evaluated critically the activity of the MP of Lanchkhuti district in the Parliament of Georgia which, in the defendants' conviction, was caused by the inactivity of their MP which he demonstrated in relation to the hearing of the bill that was of vital importance for the district.

The complaint was first considered by Lanchkhuti District Court. It deemed that the defendants deliberately spread unrealistic information infringing upon the plaintiff's honor, dignity and business reputation.

The Chokhatauri District Court applied Article 18 of the Civil Code of Georgia and the law of Georgia on 'Press and Other Means of Media' and partly satisfied the plaintiff's request. According to the Chokhatauri District Court's decision, the journalists were obligated to retract the information in the paper, to publicly apologize and to pay 15,000 GEL in damages.

However, Kutaisi Regional Court satisfied the journalists' appeal. It overturned the Chokhatauri District Court's decision. The plaintiff did not consider the Kutaisi Regional Court's decision well-grounded and filed another appeal, by cassation, in the Supreme Court of Georgia.

The Supreme Court of Georgia did not satisfy the cassation complaint of the MP. It is noteworthy in the decision of the Supreme Court of Georgia that it to the fore held up the first paragraph of Article 24 of the Constitution of Georgia which stipulates that every person has the right to obtain and disseminate information, to express and spread his/her opinion verbally, by written or other means. The Court also held up the first paragraph of article 19 of the law on `Press and Other Media Means` which stipulates that the citizens of Georgia have the right to effectively obtain information on the activity of state officials, state agencies and public-political entities. Simultaneously, court put emphasis on the necessity of protection of a person's honor, dignity and business reputation on the one hand, while on the other, it indicated to freedom of speech.

Most importantly, the Supreme Court applied case law of the European Court of Human Rights regarding that decision. The Supreme Court of Georgia held up the decision of the European Court on the case *Castells v. Spain* which stipulated that "freedom of expression implies expression of such statements and convictions which are insulting, outrageous and disturbing." By referring to that case, the Supreme Court approved that an opinion expressed by a person, including by a journalist, could be not only positive but also negative. Negative assessment might be insulting, outrageous and even disturbing.

But for the Supreme Court approval of the idea that expressed opinion could be either positive or negative was not enough. Court was to answer the question where to draw the line, on the one hand, between the permitted frames of criticism and on the other, on the infringement of honor, dignity and business reputation.

To that purpose the Supreme Court again referred to case law of the European Court. It applied the European Court's decision on a case – *Lingens v. Austria* – in which the European Court noted that the permitted frames of criticism of a politician are wider than of a private individual. The

Supreme Court also referred to that part of the mentioned case that a politician unlike a private individual is beforehand aware of and necessarily submits his/her actions and gestures under the control of mass media and public alike. On the grounds of the case, the Supreme Court concluded that `politicians and state officials shall withstand in debates held in press and TV more than permitted criticism if that criticism does not roughly infringe upon their private life and immunity.`

On the grounds of the case the Supreme Court founded that politician or state official being beforehand aware of his/her activity submits his/her behavior under the public control; hence, his/her activity might fall under sharp criticism of public and given his/her position he/she should withstand this. Subordination of his/her activity to public control in which journalists have a greater role, comes out from the fact that a politician's or state official's activity represents the public interest.

It is remarkable that the application of case law of the European Court by the Supreme Court had principal importance in making that decision. It would not have been able to infer by only applying the domestic normative acts of Georgia (the Civil Code and the law on 'Press and Other Mass Media Means') that the permitted frames of criticism of a politician are wider than that of a private individual.