Konstantin Korkelia

JUDICIAL ACTIVISM AND THE INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE GEORGIAN JUDICIAL PRACTICE[1]

Konstantin Korkelia
Professor of International Law of Human Rights,
Tbilisi State University.

1. INTRODUCTION

The article examines how European human rights standards may contribute to improving human rights protection in Georgia, and what role judicial activism may play in securing the protection of human rights. These issues will be analysed on the basis of the practice of Georgian general jurisdiction courts.

The first part of the article examines the influence the European Convention on Human Rights may have on human rights protection based on European standards in Georgia. The second part of the article deals with the existing Georgian practice of judicial activism and self-restraint in the field of human rights.

[1] The article is based on the report delivered by the author at the International Conference "the Judicial Activism and Self-restraint: the Theory and Practice of Constitutional Rights", organised by the Constitutional Court of Georgia. Batumi, July 13-14, 2010.

2. INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON GEORGIAN JUDICIAL PRACTICE

The starting point for examining the influence of the European Convention on Human Rights is that Georgia's international treaties are an integral part of Georgian legislation, which give natural and legal persons the right to directly invoke these international instruments before national courts. Under Georgian legislation, international treaties stand higher than national legislation (except the Constitution and the Constitutional Agreement).

If it is undisputed that the European Convention can be applied in domestic courts, various representatives of the judicial profession have differing views as to the role of the European Court of Human Rights' case-law. Some Georgian judges take the view that judges should apply the case-law, as it secures the convention's correct interpretation and application. Other judges consider that, as Georgia is not a case-law country, there is no need to apply the court's case-law.The national courts of States Parties to the Convention apply the case-law of the European Court of Human Rights not because it is legally binding on them (the European Court's judgments are binding only upon respondent states), but because the European Court provides an authoritative interpretation of the provisions of the European Convention.

Without a proper analysis of the case-law of the European Court, it would be extremely difficult to establish the precise contents of the rights prescribed by the Convention in a correct manner and, accordingly, to rightly apply the provisions of the Convention.[2]

For the purpose of illustrating the above, the example of Article 6, paragraph 1, may be discussed herein. The mentioned provision stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Unless one looks into the relevant cases adjudicated by the European Court, it is difficult to comprehend what these terms mean – a fair and public hearing, an independent and impartial tribunal, and a reasonable time frame within which such a hearing shall take place and how exactly these principles should be applied in practice.

Therefore, when it comes to applying European human rights standards when administering justice, what is implied is the application of not only the standards articulated in the text of the Convention *per se*, but also the standards that have been established through the European Court's case-law. Some legal professionals in Georgia, *inter alia*, judges, unfortunately, do no fully realise the role of the European Court's case-law when administering justice.

[2] Recommendation of the Committee of Ministers of the Council of Europe dated 18 December 2002 Rec(2002)13. The text of the Recommendation is available at the website of the Council of Europe [www.coe.int].

3. ADVANTAGES OF APPLYING EUROPEAN STANDARDS IN THE ADMINISTRATION OF JUSTICE

The application of European human rights standards helps to secure the adoption of proper court decisions. The European standards present certain guidelines for protecting human rights and fostering the maximum protection of those rights.

The application of European human rights standards when administering justice has several significant advantages, and if used, Georgian courts will have the opportunity to ensure human rights protection in compliance with European standards. When administering justice, European standards may be applied as follows:

- to properly interpret general or vague domestic legal norms;
- to prevent any conflict with domestic normative acts;
- to foresee the decisions of the European court;
- to fill the gaps in domestic normative acts;

and two more advantages, which are of particular significance for the present analysis are as follows:

- to develop national human rights standards;
- to render legal credibility to court decisions.

4. EXISTING PRACTICE OF APPLYING EUROPEAN HUMAN RIGHTS STANDARDS IN GEORGIA

A study of Georgian court practice has identified an increase in the application of international acts by Georgian courts. An increasing number of court decisions in Georgia are applying European human rights standards. 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 that may be assessed positively.

If the practical application of the European Convention is analysed 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 to be unsatisfactory.[3]

The effectiveness of the application of these standards when administering 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.

If analysed, those court decisions in which Georgian general jurisdiction courts have applied European human rights standards will clearly show that their effect on court decisions is mostly negligible.

In most cases, courts apply European human rights standards along with Georgian domestic normative acts. In particular, a Georgian general jurisdiction court examines the norm that 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.[4] Afterwards, the Georgian court concludes that the rules of conduct established by Georgian domestic normative acts and the European Convention are similar and the court settles the dispute on the grounds of these two acts.[5]

The general practice of applying European standards by Georgian courts makes it clear that only in a limited number of cases when European standards were applied were human rights protected at a higher level than if they had been secured only on the basis of applying Georgian laws or codes.

Bearing in mind all of the above, one can draw the conclusion that Georgian courts frequently apply European human rights standards in such cases when their application has almost no practical contribution in settling a court dispute. The purpose of applying European standards is not simply to apply them. By applying European standards, Georgian courts protect human rights by higher standards compared to those established by Georgian laws or codes.

In order to improve the situation, it is necessary to take two primary types of measures – the development of a training system for judges and the improvement of the information policy.

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

[4] 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, 16 May, 2000; Decision N3g-ad-429-k-02 on Administrative and Other Cases, December 18, 2002, N2, 2003, pp. 224; and Decision N3g-ad-405-k-02 on Administrative and Other Cases, February 27, 2003, N4, 2003, p. 847.

[5] 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.

5. GEORGIAN JUDICIAL PRACTICE ON JUDICIAL ACTIVISM AND SELF-RESTRAINT

One advantage of applying European human rights standards is that it allows for the development of national human rights standards in line with European standards. The development of Georgian legislation on the basis of the European Convention should be regarded as a form of judicial activism.

One factor warranting the interpretation of national legislation in accordance with European human rights standards is that the Convention is regarded as a "living" instrument. Regarding the Convention as such means that its provisions must be interpreted in accordance with changes in society's way of thinking.[6] If the provisions of Georgian legal acts are not construed in line with European standards, then their meaning may "fall behind" the meaning of the rights protected by European standards. The latter are in the process of continuous development, and run parallel to the increasing level of human rights protection standards in general. If national courts do not use European standards to construe national legislative provisions, it may be that these provisions will eventually be interpreted in a narrower manner and, thus, in violation of the rights as defined by European standards.[7] The interpretation of Georgia's domestic normative acts in accordance with European human rights standards will facilitate the harmonisation of human rights protection standards as envisaged by the European Convention and the European court's case-law, on the one hand, and Georgian legislation, on the other hand. Naturally, such a harmonisation should serve to increase the level of human rights protection standards. The interpretation of Georgian legislation through European human rights standards is especially important with regard to the Georgian Constitution.The interpretation of the Constitution's provisions in line with the European Convention on Human Rights is alleviated by the fact that the provisions of the Constitution and those of the European Convention are similar. Such a similarity is warranted by the fact that the provisions of the European Convention were taken into account during the process of drafting the Constitution.

Such a similarity is particularly evident when it comes to Article 22, paragraph 3 and Article 24, paragraph 4 of the Georgian Constitution, the provisions of which resemble the relevant provisions of the European Convention. Considering that the European Court has significantly developed and specified the meaning of the Convention's substantive provisions, the European Convention and the European Court's case-law may serve as a guideline in the course of interpreting the human rights provisions of the Georgian Constitution.

[6] S. Jensen, The European Convention on Human Rights in Scandinavian Law: A Case Law Study, 1992, 236.

[7] W. Binchy, The Bill, the Advantages and Disadvantages of the Approach Taken, and Possible Alternatives, paper presented to the Conference of the Law Society of Ireland on the European Convention on Human Rights Bill (2001), October 19, 2002.

In the administration of justice, European human rights standards may be used to fill the gaps existing in Georgia's domestic normative acts. This may happen when a domestic legal act (such as a law) does not regulate the relevant legal relations (or, in other words, there is a legal gap), while the legal relations at issue are regulated by the European Convention.

It is interesting to examine some examples from the practice of Georgian general jurisdiction courts.

1. The Supreme Court of Georgia applied the standard of the European Convention on Human Rights in one of its decisions on a case relating to the lack of an appeal procedure in a higher court against a deportation decision. The Supreme Court based its decision on the European Convention on May 10, 2001, as the sole legal basis in settling the court case.[8] As a result, the the criminal legislation was amended to make it possible to appeal against the deportation decision in a higher court.

2. A case decided on October 10, 2007 by the Tbilisi City Court's Administrative Board is also of importance. The case dealt with the prisoner's right to meet with family members more often and with a longer duration than established by the law on imprisonment – i.e. once per month for an hour.[9]

The case *Nowicka v. Poland* of the European Court, stating that limiting the prison visitation rights of family members to only once per month was a violation of Article 8 of the Convention.[10]

The Tbilisi City Court satisfied the plaintiff's claim and indicated that the permitted quantity of meetings assigned to prisoners as defined in the Georgian law on imprisonment clearly contradicts Article 8 of the European Convention. It is few in terms of numbers, impinges upon the right of respect of family life, and priority shall be granted to the international treaty with a higher legal status compared to the law.

It is significant that the Tbilisi City Court gave the task to the Ministry of Justice to issue a normative act that will be in compliance with the requirements of Article 8 of the European Convention and will take into consideration the decisions adopted on a disputed issue by the European Court."

This Tbilisi City Court's decision deserves a positive assessment.

3. In 2008, the Supreme Court of Georgia heard a case which, *inter alia*, was related to acknowledging as a co-owner an individual who had been in an unregistered marriage, as requested by the plaintiff.[11] The plaintiff, living with her spouse (before the death of the

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

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

[10] 3 December, 2002.

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

person with whom she lived in an unregistered marriage) from 1993 until 2005, claimed disputed real estate and a large sum of money spent on the renovation of the house owned by her spouse's son.

The plaintiff's demand 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 registration as the origin of marriage, Georgia is an orthodox country that acknowledges both the state and the church alike. Hence, a 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 relationships". The plaintiff also referred to the 1994 decision of the European Court on the case *Kroon v. the Netherlands.*[12] 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."

Ultimately, the Supreme Court did not satisfy the claim. Unfortunately, this court decision should be given a negative assessment. It is clear that there was a contradiction between Georgian legislation, in particular, the civil code, and European human rights standards.

This is a clear example of how the court missed an excellent opportunity to protect human rights by a higher standard and to secure the harmonisation of Georgian law with European human rights standards.

6. CONCLUSION

Several conclusions may be drawn:

a. European human rights standards play an ever increasing role in the administration of justice in Georgia and they are gradually becoming a part of the system of administering justice and judicial thinking;

[12] October 27, 1994, Series A No. 297-C.

b. European standards serve as a guideline in the course of interpreting human rights provisions and contribute to increasing the quality of human rights protection. Georgian courts should effectively apply such a function of European standards;

c. European standards may become a motivating factor for judicial activism that will ultimately contribute to the development of Georgian legislation and practice;

d. In order to fully establish the practice of applying European standards by Georgian courts, it is pivotal, on the one hand, to secure a better system of informing judges of European standards and on the advantages of their application and, on the other hand, that judges become more courageous in applying European standards in practice.