

State's Positive Obligation in Securing Protection of Human Rights

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The European Convention on Human Rights, to which Georgia became a party in 1999, plays a significant role in Georgian legislation and practice.

The principles established on the basis of the Convention should be applied at the national level. National courts bear an important role in the application of the European Convention on Human Rights. They should apply not only the Convention but also the case law of the European Court i.e. the judgments interpreting the provisions of the Convention and contributing to their proper application.

To demonstrate the necessity of applying the European Convention and the European Court's case law one Georgian court decision is discussed and compared with the decision of the European Court.

The District Court of Georgia examined the claim lodged by the followers of a religious group against the Governor of the Region and several high officials of the local police. The applicants claimed that they were deprived of the right to attend a meeting of the religious group.¹ Namely, they maintained that their opponents on religious grounds broke up the meeting and caused them pecuniary damage and moral insult.

The applicants also claimed that the police officers did not protect their rights as a result of which their opponents were able to break up the meeting and infringe their rights.

The respondents considered the claim ill-founded because the local police officers did not themselves either verbally or physically insult the applicants nor cause them moral or pecuniary damage. The representative of the Ministry of Interior of Georgia pointed out that the persons represented by her did not disperse the meeting. She also noted that none of the applicants named any police officer, who insulted them or assisted their opponents in the break up of the religious meeting. The testimony of the Head of the Department of Interior of the region is remarkable stating that "protection of members of religious groupings falls not within the competence of the police but of guard police".

The District court deemed the applicants' claim ill-founded and dismissed it. The court found that the police had not impeded the supporters of the religious group to attend the religious meeting. The court further reiterated that the insult and pecuniary damage was

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¹ See Decision of Marneuli District Court, No. 3/9-2002, 13 May 2002.

caused to the applicants by their opponents and in which the police officers provided no assistance. The court also noted that the video materials presented did not prove that the police officers had intervened in the break up of the religious meeting.

The court did not share the applicants' view that the police violated Articles 8, 9 10, 11, 13 and 14 of the European Convention on Human Rights. The court did not apply the case-law of the European Court of Human Rights to determine the substance of these Articles.

The decision of the District court is clear. It considered that as long as the employees of the state body (Ministry of Interior) had neither broken up the religious meeting nor assisted in its break up, they should not bear responsibility for the violation of the right concerned.

Bearing in mind the decision of the District court it is important to discuss the case-law of the European Court.

In 1988 the European Court of Human Rights considered the application lodged against Austria (*Plattform "Ärzte für das Leben" v. Austria*), concerning freedom of assembly (Article 11 of the Convention).² In the European Court the application was lodged by the association of doctors campaigning against abortion. The claim concerned two demonstrations by the association, which was disrupted by counter demonstrators. During the first demonstration abortion supporters disrupted the demonstration and used loud-speakers and threw eggs. The police intervened only when tempers had risen to the point where physical violence nearly broke out. The group against abortion disrupted also the second demonstration of the association.

In the application lodged with the European Court the association claimed that the Austrian Government failed to secure the demonstrators right to freedom of assembly under Article 11 of the European Convention.³ On the other hand the Government claimed that Article 11 does not create any positive obligation to protect demonstrators. According to the Government's submission, it is sufficient to protect demonstrators from direct interference by the State. In this regard the European Court of Human Rights held:

"Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8 Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be".⁴

² Plattform "Ärzte für das Leben" v. Austria, Series A. No.139, 1988.

³ Under Article 11(1) of the European Convention: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". Para. 2 of Article 11 provides for possible restrictions on the exercise of these rights.

⁴ Plattform "Ärzte für das Leben" v. Austria, Series A., No.139, 1988, §32; see also, *mutatis mutandis*, X and Y v. the Netherlands judgment of 26 March 1985, § 23.

This decision of the European Court sheds light on the State's obligation to protect human rights. Under the decision, Article 11 of the European Convention imposes on Member States not only a negative obligation – not to prohibit demonstration, but also a positive obligation – to ensure peaceful conduct of the demonstration, including protection of demonstrators against their opponents.⁵ In other words, the state is obliged to refrain from violating rights and freedoms enshrined in the Convention and Protocols thereto as well as “ensure” their protection by a third party, natural or legal person.⁶ If the rights under the European Convention are violated by natural or legal persons, the State must provide an effective remedy for the violated rights.

Thus, as far as the rights under European Convention of Human Rights are concerned the State cannot invoke the fact that the rights of legal or natural person are violated not directly by it but by a third party (persons or group of persons).⁷

It should be underlined that the contents of the provisions of the Convention (and its Protocols) are specified in the case law and concrete decisions of the European Court. Interpretation of the Convention's provisions bearing in mind the case law of the European Court clarifies the framework and contents of the obligations under the Convention, which often can not be understood by just reading the text of the Convention.⁸ Human rights standards of the Convention are determined not only by the text. They are set in the text as well as in the case law adopted on the basis thereof.

From the comparison of European and Georgian courts it follows that for the proper interpretation of the European Convention on Human Rights the domestic court should apply not only the Convention but also the European Court's case law. While the European Convention on Human Rights was applied in this case but not the case-law of the European Court, it did not interpret the Convention in the way that the European Court did. Presumably, had the Georgian District Court applied this precedent it would have found differently.

⁵ *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 105-106.

⁶ *Harris/O'Boyle/ Warbrick*, Law of the European Convention on Human Rights, 1995, 19; *Jensen*, The European Convention on Human Rights in Scandinavian Law: A Case Law Study, 1992, 179.

⁷ *Starmer*, European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights, 1999, 194-195.

⁸ *Polakiewicz*, The Execution of Judgements of the European Court of Human Rights, in: Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000), *Blackburn/Polakiewicz* (Eds.), 2001, 72-73.