LEGAL TRENDS

How Do Judges Develop Law

GIORGI GOGIASHVILI*

"*Moses did not provide us with every kind of law,*
but instead left some things to the judges' opinion..."
Mkhitar Gosh Code of Law, 12th Century

1. Theory on the Separation of the Branches of Power

The Principle of separation of powers is based on the division of material functions of the state into three parts: legislative, executive, and, judicial. A lawmaker, an administrator and a judge acquire their duties from the state, thus each of them is the executor of state will in their respective fields of activities.

The lawmaker develops abstract legal rules, which regulate many cases and individual situations. A court determines unidentified or disputable rights and interests based on legal rules on a case-by-case basis. The administration fulfils the tasks identified by legal rules within their terms of reference. According to the established opinion, all activities of the state that do not fall within duties of the legislature or judiciary should be considered as executive functions. Thus, according to their content and format, individual state acts are divided into statutes, administrative acts and court decisions.

According to the assessment of *Georg Jellinek*, the laws and court decisions are always the acts of state supremacy. The law sets forth legal rules, while court puts each of individual cases through an abstract rule and resolves it in this manner, i.e. determines the outcomes of the case concerned and legal consequences thereof, which should be acknowledged and implemented.[1]

Independent from each other branches of the state power make a cogwheel. Each of them regulates the movement of the others. The manifestation of normal organisation of duties is the system of "checks and balances", which prevents individual branches from overstepping their terms of reference set out by law.

Many theoreticians consider that the legislature enjoys natural advantage as compared with the other branches of power. Together with its growth, the legislature acquires greater advantage with respect to other functions. The goal of executive power is to insure compliance with statutes. As for the judiciary, which aims at the implementation of law, this is

---

* Candidate for Legal Sciences. In memorial of the young judge and scientist *Gocha Utiashvili*.

[1] *Jellinek,* Allgemeine Staatslehre (Russian translation), 1903, 309-316.

apparent by itself. *Montesquieu's* assessment expressed the prevailing opinion – judges are no more than the mouth that pronounces the words of the law, thus they must not depart from it and must follow it accurately. Judicial practice must never change, as it is the outcome of accurate application of the text of a statute. In that period the *Blakstone* doctrine was very popular even in England, according to which the obligation of a court was not the development of a new law, but rather compliance with and interpretation of the old one.[2] The whole of the activities of the judiciary should be based on statutes. The concept of the state governed by the rule-of-law admits the supremacy of law. Thus, administration and justice are carried out based on legal rules.

Only the legislative power enjoys unlimited terms of reference. According to the famous phrase of *de Lolm*, it is capable of everything except for transformation of a woman into a man. The idea of the sovereignty of the parliament reinforces the influence of positive law. Supremacy of the parliament can have a twofold explanation: positive and negative. According to the positive explanation, judges must unconditionally comply with every act of the parliament. In accordance with the negative explanation, no one is entitled to issue rules contradicting a parliamentary act. To what extent are the legislative activities of the parliament compatible with the supremacy of the parliament? According to the assessment of the great authority in this field, *Polok,* this issue seems to be problematic only at first sight, but in fact, the situation is quite different. English judges do not enjoy and do not claim the right to reject statutes; on the contrary, parliamentary acts may overrule precedents (case law) and other legal rules introduced by judges. Thus, the lawmaking power of judges is a subordinate power, which is executed under the consent and control of the parliament.[3]

The determinant of discretion is only the demand of common interests and not a specific legal rule. An activity is law-related or bound by law when it is performed for the fulfilment of predetermined legal obligations. Logically, discretion comes first, which precedes and determines the activities of other bodies. The legislature enjoys the freest discretion, as this field requires such due to its nature. However, it is also bound by international rules.

It is the function of the administration and courts to carry out the legally mandated obligations. Against the background of advancement of the legislature, the limits of free administration are narrowed; however it is not possible to totally subordinate it to the legislature. The most qualitative law-related activity is conducted in the field of justice, the specific form of which – court judgements should always be the result of application of legal rules with respect to individual cases. Thus, no judicial act resolving a judicial dispute can have the nature of a totally self-willed decision, irrespective of the scope of the margin of appreciation of a judge.

It may seem very paradoxical, but along with the legislative power, quite a high level of discretion can be detected in terms of references of the other branches of state power. In

[2] *Blekstone*, Commentaries, 1808, 407.

[3] *Pollok*, Essays in Jurisprudence and Ethics, 502.

the executive power, state policy, identification of priorities and initiatives and selection of personnel have never been specified by legal rules. The Government would have become a political chimera as its activities would have been totally bound by law. Government activities, particularly in the field of foreign policy, are often as free as legislative activities. Thus, the activities of the administration are never a mere execution, or mechanical application of general rules.

As regards the activities of the judiciary, on its face it may seem that there is no element of discretion in judges' duties, whose essential task is the application of law in the settlement of individual cases. Such an opinion omits one detail, that being that the provisions set forth by a legislative act are only abstract rules, which as such do not create concrete reality, but rather require motivated activities, independent from these rules, in order for the objective situation, which they aim to attain, to comply with these requirements.

The state develops abstract legal rules, designed for multiple application and regulation of individual situations. If we carry the administration of justice to mere mechanical application of a statute, and the judge enjoys no discretion, the outcome of every legal dispute would be easily and indisputably predictable, thus and there would be no room for contradictions of court judgements. But the administration of justice implies the element of creativity, which is never subject to any rules. Only in the process of administration of justice may a legal rule be fully developed and comprehended in its full meaning. Thus, a judge is an independent factor in the development of law; apart from this, the activities of modern courts are determined by their margin of appreciation within the framework provided by a statute, which, according to its content, is similar to the activities of administration bodies. Unlike the activities of the executive, activities of the judiciary do not imply any element of initiative. Thus a judge is able to perform his duties only when external factors, independent from him, are present.

2. A Judge and a Statute: a Duel or a Dialogue?!

In the theory of modern law, the attitude towards statutes has changed; for a long period now it has lost the nimbus by which it was surrounded in earlier times. The idea of the primacy of law has ever more intensified this trend. Limiting the state became to a certain extent became the purpose of law. Despite the enhanced process of codification, it is apparent that the concepts of a code and of a statute no longer embody the whole of jurisprudence. Law is not comprised solely of statutes adopted by the sate, but rather includes additional sources such as: court practice, habits, doctrine, principles of natural law, and prevailing principles of human rights, which may considerably differ from statutory law. Sociological and realistic jurisprudence has demonstrated more clear-cut disrespect for a statute, and thus law is no longer equated only with statutes. Consequently, the idea of judicial lawmaking has moved forward, granting judges a greater role, than that of a mere interpreter of a statute. The judge is no longer "an official", an agent of state authority, who mechanically summarises specific cases under the appli-

cation of a statute, in order to make a decision. He acquires ever-increasing independence with respect to the text of the statute, his role becomes more active and esteemed, and his responsibility thus also increases. All this is promoted by the so-called "rubber rules", abstract-assessment criteria, which make a statute indeterminate and thereby increase the possible discretion of a judge. A court judgement is not capable of overruling a legal act, but may considerably change its content through its interpretation. In this context, it can be said, that a statute becomes dependent on precedent. A single case interpretation of a paragraph of a normative act continues to exist, but in a changed form, i.e. it acquires the implication, given to it by a court judgement. Thus, the statute becomes the object of judicial practice, while the court acquires wide possibilities to "correct" the lawmaker.

The law has thus freed itself from the dictate of the abstract rules of the statute. Modern jurisprudence acknowledges the lawmaking function of the judiciary. It is the time to move from the outdated question, whether judges make law, to a more complicated and contradictory one concerning the limits of judicial lawmaking.[4]

Despite the provision of Article 4 of the Civil Code, in the French judicial system the judge is not entitled to refuse the consideration of a case due to the absence of a respective statute, its ambiguity or insufficiency. The tradition of considering judicial practice as a real source of law has yet to develop. A counterargument to the above is that this is contradictory to the principle of separation of powers. However, though leading specialists dispute the notion of judicial practice as a source of law, they still admit the latter as a factor which provides for the authority of law.[5] But others do characterise it as a source of law. It is fair to assert that court judgements are not rules which are legally binding solely for the parties to the proceedings and for no one else, but, even in such situations, due to the hierarchy of judicial institutions, they may have essential influence upon the judgements of the courts of lower instances. In every field of law, the role of judges includes the application of a statute, its interpretation, removal of gaps, as well as revival and rejuvenation of the statute. Although the mission of a judge implies the subordination to statutes and their application, and though he plays the role of an indispensable link between the issuance of a legal rule and its efficient implementation, he may dispute it. Thus, sometimes relations between the legislative and judicial authorities become hurricane-like. It is admitted that antagonism between the lawmaker and judicial practice belongs to the phenomena, which are indispensable peculiarities of the process of formation of law.[6] Similar to the opposition between these parties, cooperative relations may also be established between them.[7]

---

[4] *Fridman*, Limits of Judicial Lawmaking, 1966, 212.

[5] *Carbonier*, Droit Civil, 1971, 376.

[6] *Malaurie*, La Jurisprudence Sourse de Droit, 1965, 423.

[7] *Bergel*, La Loi Juge, 1977, 321.

The influence of a lawmaker over a judge, the mission for which within the framework of written law, is based on the application of statutes, is apparent. But in these cases, it is necessary to clarify the exact influence of the judge over the lawmaker, as well as the reaction of the latter.[8]

As far as judges fill in gaps, interpret them, find new means of their application when facing real situations, they often influence the lawmaker, who becomes obliged to legalise judicial practice. For its part, judicial practice often requires the adoption of statutes. As a result all the participants in a "legal play" more or less promote the development of the legal system.

Judicial discretion is often manifested as a form of law making. According to the assessment of the Chairman of the Supreme Court of Israel – *Aaron Barak* – judicial discretion is the authorisation granted to courts to make a choice between several statutory alternatives.

In my own judicial practice there were frequent cases, when I had to make a choice between several variants for possible action. Thorough thinking and deliberations of several alternatives often presented themselves, each of which was absolutely legal. What should a judge do in such a case, when he faces a legal situation which has more than one solution? The choice of the judge is biased by judicial philosophy, which is the product of his experience and ideology.[9] Professor *Davis* considered that a public official has discretion when the relevant situation enables him to make a choice between several courses of actions or omissions.[10] *Ronald Dvorkin* asserts that each of legal problem has only one solution.[11] Professor *Smith* believes that the existence of judicial discretion itself means that a legal problem cannot have only one correct solution.[12]

What is the subject of judicial discretion? First of all, these are the facts. From among a variety of facts, judicial discretion chooses those which in its opinion are necessary for the solution of the conflict. The second field is the selection of the applicable provision. Of several methods envisaged by the provision, judicial discretion will chose the method which in its opinion is the most suitable one. The third field is the identification of the provision itself – application of the most suitable provision from among various normative alternatives. Judge *Sussman* has proposed that law is an abstract concept, and only a court judgement can transform the lawmaker's rule into a mandatory act with application for the whole of society. Thus a judge gives real and specific form to the law. Therefore, it can be said, that a statute is finally crystallised in the form given to it by a judge.[13] Judicial discretion is never absolute; despite the wide variety of alternatives, it is never unlimited. Its power always derives from various provisions of the law. Accord-

---

[8] L'Interpretation per le Jude des Regles Ecrites, 1978, 133.

[9] *Barak*, Judicial Discretion, Yale University Press, 1999, 435.

[10] *Davis*, Discretionary Justice, 1969, 167.

[11] *Dvorkin*, Judicial Discretion, 1963, 241.

[12] *Smith*, Judicial Review of Administrative Action, 1980, 239.

[13] *Sussman*, The Courts and the Legislative Branch, 1971, 247.

ing to judge *Douglas's* approach, "Absolute discretion, similar to corruption, means the beginning of the end of freedom. The law reaches its apogee when it frees an individual from the unlimited discretion of any ruler, any civil or military official, or any bureaucracy. An individual always suffers when discretion is absolute. Absolute discretion is an unmerciful master. It destroys freedom to a greater extent than any human being. Judicial power is never executed for the purpose of accomplishment of a judge's will, but rather for the purpose of accomplishing the will of the lawmaker, i.e. it is executed under the law".[14]

3. Limits of Judicial Discretion

According to a famous observation, the lawmaking activity of a judge is one of the issues that most of all divides legal systems and legal thinking. Judicial practice is first of all a particular, as well as fundamental source of Anglo-Saxon legal systems. Some modern legal systems, despite their estrangement from common law, acknowledge the right of a judge to be engaged in lawmaking activities. E.g. Section 1 of Swiss Civil Code states, that "In cases, when there is no respective statutory provision, the judge may deliver a judgement in compliance with customary law, while in cases, when there is no custom, then according to the rules, which he would have provided if he had the right to act in the capacity of a lawmaker. The judgement must be based on reasoning which is in the tradition of interpretation and judicial practice".

Despite the variety of the sources of law, there is no legal order which acknowledges only one source of law, and explicitly renounces all the others. However there are legal systems in which one of the sources prevails over the others. If case law prevails in common law systems, Roman-German law systems acknowledge the primacy of statutory over other sources of law. But quite often the provisions of a statute are so general and abstract and even insufficient, that despite permanent concern for the improvement of the legislation and the process of codification, the statute did not prove to be the only sufficient source for the regulation of social relations. Thus, Roman-German law was obliged to fill this deficiency through various means, such as the introduction of the principle of analogy by statute and analogy of law, through which the Roman-German law acknowledged the insufficiency of statutes in their capacity as the primary source of law, and the necessity of complimenting it through additional means. If there is no statute regulating disputed relations, the court applies a statute that regulates similar relations (analogy by statute), but if there is not such statute, the court bases is decisions on general principles of law (analogy by law).

The importance of judicial practice has been partially admitted. In such strict countries of continental system as France, an entire branch of law, administrative law, developed mainly on the basis of judicial practice. Quite often statutes are used to legalise the consequences of developments in judicial practice and the other fields of law. The methods of

[14] *Douglas*, The Theory of Judicial Decision, 1983, 109.

interpretation of a statute also play an important role, where judges have been granted the freedom to interpret the static rules of statutes. Legal hermeneutics (named for Hermes, Zeus's son who wanted to bring the ideas of the gods to people), the doctrine of the interpretation of rules of law, plays an important role in the transformation of law from a static into a dynamic process. The realisation of legal rules is related to their explanation and interpretation. This is the second indication of statutes being the ready recipe for the solution of legal problems. It is presumed, that all the methods of interpretation of legal rules were "born on the knees" of judicial practice.

Depending on the interpreter of the statute, and the legal validity of this interpretation, the following types of interpretations may be identified: authentic interpretation, which is given by the issuer of the rule and is a common value, similar to the legal rule itself; legal interpretation, which is issued by a duly authorised authority; judicial interpretation, where judicial authorities make informal interpretations related to a specific case and which are binding for the case concerned and parties thereto, but which are not binding for the others, and; doctrinal or scientific interpretation, which is not binding on anyone, and is purely advisory in nature.

Within the scope of statutory interpretation, mention should also be made of literally interpretation, which occurs when the text and idea of the provision are identical, i.e. the provision is to be understood as it is written; extended interpretation of a statute, where the content should be understood in a wider sense, and; limited interpretation, in which the text of the statute is broad, but its meaning should be understood in a narrower context.

Listed below are the methods of interpretation: logical interpretation, in which the idea of the statute is identified according to the rules of logic; grammatical interpretation, which involves the comprehension of a statute based on rules of grammar; historical interpretation, in which the idea of the statute is identified through the study of specific historical and social circumstances and analysis of documents. Of a systemic nature is identification of the primary meaning of the statute according to the location of the provision to be interpreted within the respective legal system. In the case of teleological or targeted interpretation, it is important to interpret the statute on the basis of the purpose of the provision by identifying its primary goal.

Custom, statute, judicial practice, precedent, interpretation of law – each of them contributes to the realisation of law in its own way. This is a case of mutual influence and mutual complementariness of the sources of law. Ultimately, law is created only by the process of its realisation, and thus the role of its "realisers" is of particular importance in this process. As a legal rule, a statute in the widest meaning of this term is the "interpreted statute" or "judge's statute", the "statute of the parties to legal proceedings".

Legal qualification includes the legal assessment of a number of factual circumstances of the case by matching certain legal provisions to a specific case (essential factors). Naturally, the assessment elements prevail in the realisation of law, and the judge will enjoy a higher level of discretion.

4. Judicial Precedent, as a Factor of Certainty and Stability of Law

Traditional English doctrine treats precedent as a means of securing the stability and sustainability of the legal order. Application of a precedent does not depend on the subjective discretion of a judge. Quite often it is of greater necessity for the law to be known exactly rather than perfectly, an ideal which in any case probably cannot be attained. When a judge delivers an opinion that contradicts precedent, preciseness and certainty of law are sacrificed to its rational development. It is quite risky to rely on such law. "A precedent which is not rejected may become the provision for many specific cases. Many may trust the validity of such a rule and relate to it their valuable property and other rights. Important agreements and long-term projects may be developed on the basis of this provision. It may become the basis for bilateral commercial relations and settlement. That is why justice is entitled to demand that even an incorrect decision having become precedent remain unchanged".[15]

Judges in continental countries, similar to their English counterparts, always longed for the stability of law. To this end he initially based his decisions on Roman law and codification rules, and later on the codes of the Napoleonic era. These circumstances made the European law certain to a particular extent. But in England there was no reception of Roman law, neither of the codes with their perfection, nor the form of written statements of law. Solid cement was necessary so that English justice did not remain variable and unstable. The solution was found in the doctrine of precedent, created by common law, the main foundation of which was stringency and certainty, as stated by *Goodhart* in his study dealing with the role of precedent in various legal systems.[16] The role of judicial precedent underlies the difference between various legal families. The family of common law was first created in England when judges were examining cases between individual persons, then it spread in the USA, Canada, Australia and other countries. The Roman-Germanic legal family was created on the foundations of Roman law, and the basic source of its law was the statute.

The basic principle, to be followed in the process of administration of justice, is that similar cases are settled in a similar manner. For the attainment of this common goal, the continental legal system and the common law system sought recourse to different methods. This very factor provides for the difference between them. Each of the legal systems chose different ways of evolution.

5. Basic Principles of the Doctrine of Precedent

The Oxford Dictionary gives the following definition of the general concept of precedent – "an example or a case, which is taken or may be taken as an example or as a rule for the next cases, or with the help of which a similar act or situation should be certified or

[15] *Demchenko*, Judicial Precedent, Warsaw, 1914, 401.

[16] *Goodhart*, Precedent in English and Continental Law, London, 1934.

explained".[17] Case law consists of the provisions and principles developed and applied by judges in the process of delivering judgements. In nearly all countries judicial precedent has persuasive force to some extent. *Stare decisis* means to decide in the same manner as it was done earlier. In the case law system, a judge must take account of the provisions and principles, developed in similar cases when considering a case, while in other legal systems, they are only information of which a judge may take account when delivering his own judgement. In England, the doctrine of precedent is characterised by a strongly binding nature. Quite often in England, judges are required to follow earlier decisions, even if there are sufficient reliable grounds, which, if not for the binding doctrine of precedent, would have enabled them to decide a case in some other way. Each of the English courts is obliged to follow the decisions of the court of higher instance, while appellate courts are bound by their earlier judgements. Until 1966 even the House of Lords was unconditionally bound to its earlier decisions, though presently it is authorised to change its judicial practice. The judgements of appellate courts are binding on the courts of lower instance and even for appellate courts. If the House of Lords sets forth a new legal principle once, it should be applied by all the courts until Parliament decides to alter it through the adoption of a respective statute. Nowadays the House of Lords is entitled to change its own decisions delivered earlier, and in this way it somehow competes with the supreme legislative authority in rulemaking activities. Thus, English law is first of all the case law, with the statutory law playing a subsidiary role.

The principle that obliges us to follow the precedent is called *stare decisis*. In practice, though it is not an easy task to follow precedent. In a precedent it is not the entire judgement that is binding, but rather the principle of resolution of the case, which constitutes the essence of the legal position of the judge, and provides the basis upon which he delivers a judgement or a ruling. This part of the judgement is called the *ratio decidendi*. The other parts of the case which are not binding for the court are called *obiter dicta*.

The English doctrine of precedent is almost constantly changing. Despite this fact, it maintains three enduring features: respect for an individual judgement of the superior court; acknowledgement that the decision of such a court is binding precedent for the superior courts, according to the hierarchy, courts; lower courts regard individual judgements as binding precedent. General fields of English law are almost entirely the product of judicial decisions, the rationales for which have been published in court reports for seven hundred years now.

A judge who disregards his obligation to respect precedent will be subjected to unequivocal pressure, and if at some time such disregard becomes commonly acknowledged, the English legal system will then be facing a revolution of the largest scale.[18]

---

[17] Oxford Dictionary, Ch.V, 1977, 292.

[18] *Gross*, Precedent in English Law, 1977, 114.

6. To What Extent Is a Court Bound by Its Earlier Judgements?

Law is mainly developed by courts of high instance (appellate courts). Establishment of facts is important for courts of lower instance, while for the courts of higher instance, questions of law are of primary importance. Judgements of the courts of lower instance, of course, are important for the parties to the proceedings, but they do not become an integral part of the common law. Judgements of special courts formulate principles that are fundamental in their specific fields.

Some time ago, judges and lawyers at the bar used to assert that the courts were not creating law, but rather elaborating principles of common law. Even nowadays, there can be found some judges who do not wish to be regarded as developers of law. Despite this, against the background of speedy social transformations, the necessity of change of a statute is so great, that judges become obliged to develop the principles of common law in order to meet the requirements of the society. Presently, it is presumed, that judges of supreme courts create law, but primarily they develop existing, as opposed to inventing new ones.

Jillmord believes that the main task of a court is not the development of law in general, but rather the search for a fair (in the case of England fair and not lawful, G.G.) resolution of the dispute between the parties to a specific case. Consequently, the development of law depends on the particular situation that arises between the courts of respective instances.

The doctrine of precedent is based on the concept, according to which the judgement of a court of higher instance is upheld and considered as a provision of law until it is overruled by the court of superior instance of the same system or a parliamentary act. If a judgement is severely criticised by leading scientists and academic lawyers, it is better to have a stable legal provision than the confusion produced by controversial judgements. There are many cases, especially in trade dealings, when parties to a dispute prefer to know their exact legal position, as opposed to contributing to the further development of an ideal legal provision by the court. The doctrine of precedent is widely used at every level of judicial hierarchy, except at the highest instance.

A judgement in the capacity of a precedent may be binding or persuasive. This depends on the hierarchy of the court delivering the judgement.

Until 1966, the House of Lords believed that it was bound by its decisions. The prevailing opinion today is that in special cases it is entitled to overrule its earlier decisions. The Supreme Court of Australia is also not bound by its earlier judgements. The appellate courts of England are obliged to follow their earlier decisions.

The entire composition of the Supreme Court of the State Victoria, Australia, is obliged to uphold its own judgements, except for cases in which a special panel of five judges overrules the previous judgement. Though the court is not bound by its own judgements, it generally follows them, as their persuasive authority is of great value in defining the nature of legal provisions.

7. *Ratio desidendi*
(To What Extent Is a Judgement a Precedent and How Does a Court Apply It)

In everyday life, factual situations rarely repeat themselves. Consequently, the factual details of actions, which only in certain cases may be fully identical, differ from one another as a general rule. According to the doctrine of precedent, a court should uphold principles that have been established in previous judgements, and not the detailed factual situations of previous cases. In the case of *Donoghue v. Stevenson* (1932) the plaintiff asserted that he became ill after drinking soft drinks. After drinking the entire bottle of a soft drink he found remains of a snail in it. The plaintiff demanded damages from the manufacturer of the drink. With respect to this case, the House of Lords introduced the so-called principle "care for consumers". According to this principle, a manufacturer must realise that his negligence during the process of manufacturing drinks may cause damage to those, who drink them. The principle of care for customers was applied not only with respect to manufacturers and was not limited to the protection of customers against snails remaining in drinks, but was also applied in the case concerning the negligence of a producer of linen. For linen cleaning he used some new substances (which had been a step forward in production), but due to some negligence, they were not fully removed from the cloth. As a result of this negligence one of the customers suffered from skin diseases. In the case *Crant v. Australian Knitting Mills LTD* (1938), British Privy Council on Australian matters applied the principle developed in *Donoghue v. Stevenson*, and the manufacturer was found liable for damage caused to the buyer.

Lord *Seid* expressed his attitude towards precedents in the following manner: before establishing whether a judgement is to be overruled or not, I consider it necessary to be convinced that not only the *ratio decidendi* is incorrect, but also that there are some other possible grounds for upholding the judgement.

It is possible not to follow the precedent directly, to overrule it, or to dissent from it. Precedent may be rejected by the court of higher instance (the House of Lords and the Court of Appeals). A precedent may be rejected directly, through reference in the specific appellate decision, or indirectly, when a new provision is introduced without explicitly overruling the old provisions, and thus merely drop out of the game. Only a court of the same jurisdiction is capable of overruling a precedent.

8. The Role of Judicial Practice in the System of Georgian Law

For the time being, it could be said, that Georgian law maintained the "rational" position of the Soviet lawyer towards judicial practice. The Soviet lawyer was able to give the following answer to the question: What is the role of judicial practice in your legal system? – This role is very important. To the next question: Is judicial practice a source of law? – The answer was quick and negative. However, the second answer excludes the first.

Pursuant to Article 4 of the Civil Code of Georgia, a court is not entitled to refuse the administration of justice with respect to civil cases, even when there is no applicable legal provision or it is otherwise deficient. A court is not entitled to refuse the application of law on the basis that it considers the provision of law to be unfair or immoral.

Thus according to the Code, the existence of a deficiency in a statute requires its removal by court, thereby providing an excellent opportunity for the development of judge-made law. Similar provisions can be found in the Civil Codes of the countries of continental Europe (Sweden, France). But both in both of these countries, as well as in Georgia, this provision does not have much practical implication. In our opinion, this situation is fully conditioned by the nature of the Roman-Germanic legal system, on the one hand, which is based on the theory of legal positivism, the view that a legal provision must be formulated in writing. On the other hand, the lack of legal traditions of this type is noticeable. Due to both subjective and objective reasons, judge-made law did not duly develop in our country. A certain distrust of judge-made law has also presented itself. On May 18, 2004, the Law on Amendment to Article 441 of the Civil Code of Georgia was adopted which provides the following: "Before the adoption of respective changes to the Law of Georgia on Relations resulting from the Usage of a Dwelling Place, the courts shall be required to suspend the consideration of disputes between the owners and inhabitants of the dwelling places, in addition, all enforcement proceedings shall be suspended, and the respective rights and obligations of owners and inhabitants with respect to dwelling places shall be maintained". A desire to make changes to legislation must not become the imperative for the suspension of the administration of justice. The most primitive way of removal of a deficiency of a statute would be to leave the case under consideration unconsidered due to the lack of a particular legal provision. The outstanding German Scientist *Schnitzer* was correct when he called this situation the bankruptcy of legal order.[19]

Along with the methodological approach, which concerns the legal aspect of the dispute, the problem of purchase of a thing from an owner without following the established formalities was known even to Roman law as bonitary possession under a concept of *Bonae Fidei possession*. The Roman Civil Law required the observance of certain formal acts for the transfer of a title *mancipatio* or *jure cession*. If these formalities were not observed and the thing was transferred only according to some *tradition*, the title was not transferred to an acquirer, the alienator remained *dominus ex jure quaritium*, while the acquirer of the thing used to become its possessor. Only through the expiration of a limitation period, was the latter able to acquire the status of *jus quiritium*. Although the acquirer was capable of possessory protection against not only third persons, but the quiritary owner as well, this possessory protection was not final. For his part, the alienator was able to file a petition – *rei vindication*, the result of which was that the acquirer was obliged to return the property to the alienator. Praetors considered such a situation as unfair, as dishonest people could have benefited from this situation and received some gain, as they could have regained the property after alienation and the receipt of money. With a view to ending such unfairness, praetors began granting those who had received property the *exception*

[19] *Schnitzer*, Vergleichende Rechtslehre, 1945, 237.

rei venditae et traditae (*exception doli* – type), thereby protecting them against the attacks of alienators. Then, in the last century of the Roman Republic, the Praetor Publicius issued the edict entitled *Edictum Publicianum*, which introduced a special type of action for such cases – the action of *publiciana in rem*. This type of action was related to the fiction of the limitation period having lapsed, and thus the possessors of property acquired from an owner without the required formalities were able to obtain a very strong possessory right, that protected them against both third persons and the quiritary owner. Thus along with quiritary property, bonitary property arose, thus, meaning that property acquired without formalities was able to become property of those who acquired it, *in bonis ejus est,* meaning that the property belongs to its owner according to analogous title.

Another example of Georgian judge-made law was the Decision of the Constitutional Court of Georgia, dated December 21, 2004. The constitutional Court considered an action concerning the constitutionality of the prohibition of the right to appeal against a decision of the lawfulness of a search and seizure and concerning the carrying out of investigative actions in emergency cases provided for by the Criminal Procedure Code of Georgia, related to the requirement of obtaining the consent of a judge in advance. In its decision, the Constitutional Court agreed with the complaining party that the relevant provision of Article 290 VII of the Criminal Procedure Code was acknowledged as unconstitutional – "A decision delivered by a judge (recognising the lawfulness of the investigative action carried out, G.G.) is not subject to appeal", as is the case with the whole of Article 293 II with respect to Article 42 I of the Constitution of Georgia; Furthermore, under this decision of the Constitutional Court, the Parliament of Georgia was requested to develop and make respective changes and amendments to the Criminal Procedure Code of Georgia with due consideration given to the reasoning of the decision concerned. This has not yet occurred.

Thus, on the grounds of the Decision of the Constitutional Court, a constitutional right to appeal against a specific coercive measure applied with respect to an individual has been recognized. The courts thus face the dilemma of having to abandon a human right acknowledged by the Constitutional Court by noting the absence of particular procedural provisions, or making resort to judicial lawmaking (practice) by assuming the obligation to fill in this gap until the adoption of a special procedural law!

Judicial opinion is divided on this question. In one opinion, applications filed on the grounds of a particular decision of the Constitutional Court are not to be considered, as the prohibition against appealing such orders, acknowledged as unconstitutional, was not followed by the adoption of the required provisions that would have provided for the authority, place (in which court), timeframe, and procedure of considering such applications, the adoption of which is an explicit prerogative of legislative authority.

There are also judges who would accept the applications filed on the basis of the decision of the Constitutional Court for consideration, and would even consider the deficiencies on legislation to have been filled in through judicial practice. Which of the above decisions should be admitted as the correct one?

The Organic Law of Georgia on the Courts of General Jurisdiction provides for judicial protection of a right (Article 3). "Each person is entitled to apply to a court directly or through a representative for the protection of his rights and freedoms". We believe that Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms upholds the realisation of the right to a fair trial. In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to the opinion of famous commentators of this Conventions, *Gomien, Harris, Zvaak,* due administration of justice has two aspects: institutional (independence and impartiality of the court) and procedural (fairness in examining the case). For signatories to the Convention, Article 6 establishes an obligation to act as opposed to a purely negative obligation, which, even partially, will require of the state concerned that it refrain from interference in the exercise of any of his rights by an individual. With a view to protection of this imperative obligation, parties to the Convention must develop and secure the operation of institutional infrastructure, which is necessary for the due administration of justice. In addition, the state is to uphold and adopt statutes and provisions that secure the impartial and fair consideration of a case by courts. Thus the parties to the European Convention should guarantee the protection of acknowledged rights through fair and public hearings in court.[20]

The Strasbourg Court has broadly interpreted Article 6 of the Convention, based on the notion that the rights secured by this Article have fundamental importance for the functioning of democracy. Under this understanding of the Convention, the right to fair and impartial administration of justice occupies such a central position in a democratic society, that limited interpretation of Article 6 I of the Convention would not be compatible with the goals and tasks of this provision (*Delkur Case*,1971).

The right to the availability of judicial examination is a precondition for fair hearing. The right to a fair trial provides for its general features, which include the operation of judicial bodies, including those wide parameters according to which, ultimately, it becomes possible to judge about fairness of the examination of a particular case. But before making such an assessment, an individual is, first of all, to be able to achieve the consideration of his case. The European Court of Human Rights has considered several cases on securing the possibility of examination of a case of an individual by a court. In these cases, which concerned the violation of the right to court proceedings, there was a reference to one important principle that the state is not entitled to limit or prevent access to court in certain fields, or with respect to certain category of persons.

The French academician *Maury* considers that none of the principles of French positive law directly renounces the role of judicial practice in its capacity as a source of

[20] *Gomien/Harris/Zvaak*, Law and Practice of the European Convention on Human Rights and the European Social Charter, Council of Europe Publishing, 1998, 305-309.

law.[21] In our opinion, such opinions of the French scientist are not justified. According to Article 5 of the Civil Code of France, a judge is to justify his decision through reference to normative acts that may not be limited to judgements delivered with respect to already considered cases (practice). The doctrine of the sources of law does is not divided into basic and optional sources. As a rule, recourse to one of the constituents of the system of the sources of law is not sufficient for the regulation of legal relations.

Even more stringent is the approach of the Georgian legal system towards judicial practice. The Organic Law of Georgia on Normative Acts differentiates two types of legal acts. These are normative and individual legal acts. A normative is an act that embodies a general rule of conduct of permanent, provisional, or multiple application. As for individual legal acts, of which one type are court judgements, under this conception they are single occasion acts, and they must be compatible with a normative act. An individual legal act is adopted (issued) on the grounds of a normative act, and within the framework provided by the former. In fact, the non-recurrent nature of a court judgement in its capacity as an individual act, as well as its mandatory compliance with normative acts precludes the existence of case law (as a source of law).

Currently there are on-going attempts to change this situation. A draft Law on Amendments to Civil and Administrative Procedure is under consideration, which would provide for a new approach to the basics of limiting civil and administrative appeals. According to the submitted draft, the subject of appeal may be only those cases in which the judgement of an appellate court diverges from the practice of the Supreme Court, or which is a matter of principle for routine judicial review. However, even this approach to the problem has one deficiency. The question, of whether there is an obligation to follow judicial practice in Georgian law, remains unanswered. We do not employ the principle of *stare decisis*, under which previous judgements should be followed in order for similar cases to be resolved in a similar manner without a relevant provision or principle. But with the help of procedural legislation, we would introduce the non-observance of judicial practice as one of the grounds for the dismissal of a case. But still unanswered is the question, "Where is such an obligation and who imposed it?" Introduction of such a requirement without a material provision or specific principle would have be devoid of legal grounds. In the opinion of one group of experts, the problem can be remedied by adding the following language to our legislation: "in the event of the essential similarity of circumstances (facts) between two cases, a court must deliver a judgement, identical to its own earlier judgement or judgment of a court of higher instance, unless otherwise necessary to secure the protection of rights and freedoms".

Consequently, in view of current circumstances, the primary purpose of the Supreme Court of Georgia should be the guaranteeing of dynamic, progressive and unifying interpretations of law that will play a decisive part in the reinforcement of legal security.

---

[21] *Maury*, Observation sur la Jurisprudence, 378.

With a view to attaining this purpose, essential is the detailed reasoning of Supreme Court and Constitutional Court judgements, in order that these judgements reflect the applicable legal and constitutional provisions, as well as those practices, developed by the courts.

The Supreme Court must exert control over the Constitution and legislation, including international instruments of legal importance such as the European Convention for the Protection of Human Rights, which will finally result in the unification of law. Taking due account of these functions, the Supreme Court must become solely a court of appeals, the main function of which would be the dynamic interpretation of a statute, and thereby securing the uniformity of judicial practice, the maintenance And protection of fundamental rights.

9. Precedents in the Practice of the European Court of Human Rights

How close does the European Court of Human Rights follow the doctrine of *stari decisis* and is it bound by its earlier judgements? In the opinion of the Chairman of the Court, *Lucius Wildhaber*, this issue has seldom been disputed.[22]

There are many reasons for following precedent. As stated by the Strasbourg Court in the *Koss* case, this is done "in accordance with legal certainty and the Convention, with a view to regular development of case law". Differencing settlement of similar cases may lead us to inequality of citizens before the law in some manner. As a result, the legal interests of those who depend on courts for their protection may be violated. Different settlement of similar cases means the disregard of self-restraint on judicial power, a concept that derives from the principle of separation of powers, as the principle of the rule of law. Thus, the practice of following the precedents is not only compatible with the independence and impartiality of courts, but also is the manifestation of this judicial policy. According to the English doctrine of precedent, each court is to be guided by *ratio decidendi* of a similar case resolved by a superior court, while appellate courts (excluding the House of Lords) are bound by their previous judgements.

Researchers of the law of continental Europe often state that the English system is very static and mouldy. Probably, they do not notice that there are substantial exemptions from the principle of *stare decisis* (mandatory force of precedent).

Within the framework of the common law system, judges always try to justify their decision while, treating the facts of the case impartially. On the other hand, judges of the continental European legal system rationalise their decisions wilfully, based on the abstract provisions and principles of law.

Since 1966 the House of Lords has been entitled to deviate from its earlier judgements, if so required (actually the House of Lords has overruled its previous judge-

[22] *Wildhaber*, Case Law of the European Court of Human Rights (Russian translation), 2001, 12.

ments 8 times during the period 1966-1996). The differences between the facts of two cases, within reasonable limits, enable the court to consider them as different from each other, and thus avoid the application of the principle of mandatory compliance with the precedent. On the other hand, the English jurists may be misled by European authors and judges who assert dogmatically that only a series of court judges may become legally binding, as this is the way of formation of customary law, and that judges are thus not and must not become lawmakers. According to the *Wildhaber's* assessment, such observations must be considered as unilateral. In such cases, it is not taken into account that judges from continental Europe regularly and habitually follow the rules of precedent, both their own and those developed by the courts of appellate jurisdiction.

There is definitely a difference of opinion among authors as to whether court judgements are to be regarded as a source of law. They often attempt to stress the primacy of statutory law, manifested in legislative acts, over the court judgements. As soon as this primacy is admitted, the majority of the authors of continental Europe agree that, for practical purposes, court judgements are *la loi du moment*, (statute for specific cases)[23], *une autorite de fait* (actual power)[24] and have "implied", "limited" or "conditional", mandatory force. They are ready to admit that it is mandatory and natural to follow precedent.

There is nothing mechanical in the doctrine of precedent. The Court of Human Rights has stated that it will deviate from its earlier judgments when there are "credible grounds" for this.

"In order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions" (*Cossey case*, 1990), other courts as well have stated that they are ready to deviate from precedent, if it is necessary. The House of Lords of the United Kingdom admitted that "very strict protection of the rules of precedent may lead us to unfairness in a specific case. It also restricts the due development of law without any grounds".

The Supreme Court of Australia has stated that it was ready to create new precedents if any court judgement was "manifestly wrong and its observance would have been detrimental to public interests". The Swiss Federal Court replaced the earlier existing criteria – "doubtless indisputable grounds" with "material and objective reasons" for overruling its previous judgements. The German Federal Constitutional Court requires "new facts", "fundamental change of living condition or legal concepts", in addition to a "change of social ideas".

The Supreme Court of the United States requires "force majeure", "special circumstances" or "special reasons" for deviation from and non-observance of previous judgements.

These issues are also discussed within the European Court of Justice. There are frequent disagreements with respect to the issue of whether it is necessary to follow the

[23] *Zambeaux*, Le Precedent Judiciaire en Droit Penale, 198, 354.
[24] *Jean*, Le Precedent Judiciaire en Droit Prive, 198, 124.

court's earlier decisions. It is not unusual for an international court to apply numerous international rules and traditions. Also, opinions may differ about the idea of a precedent itself: it is possible to make recourse to a single case as a precedent, or whether there must be a series of decisions; when case law becomes customary law, how can we define and find the *ratio decidendi* (reasoning of the judgement); is the generalisation the essence of precedent or rather must specific facts of each of the cases be stressed. There are also different opinions concerning how frequently precedent must prevail: always or ordinarily. In *Wildhaber's* opinion, it is not surprising, that the case law of the Strasbourg court does not give precise answers to these questions. *Wildhaber* considers that precedent should be followed regularly, but not permanently, as it was elaborated in the case of *Mirehouse v. Rennell* – "for the sake of attaining uniformity, consistency and certainty", precedent should be followed habitually, unless they are "plainly unreasonable and inconvenient". One major case, such as the *Marck Case* (1970), *Klass Case* (1978), *Sunday Times Case* (1979), etc. may make one particular decision equal in value to an entire line of minor cases. Precedent should be followed even before it is possible to be sure whether it has indeed already become customary law. Sound judicial deliberation requires a decisive and logical justification of the decision of the court, and that it be worded in such a manner as excessive deviation from the particular facts does not become common.

Finally, it can be said, that the routine regime of the European Court of Human Rights is to follow its own precedents. If the facts of a new case qualitatively differ from previous cases, the court actually separates itself from earlier cases and delivers a new judgment.