LEGAL TRENDS

The Role of Judge-Made Law in the Development of Law and Access to Justice

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On 1-2 December 2003, Tbilisi hosted the Second International Conference of Judges on the "Role of Judge-made Law in the Development of Law and Access to Justice". The conference was held under the initiative of the Supreme Court of Georgia and with the support of the *Deutsche Gesellschaft für Technische Zusammenarbeit GmbH* (GTZ) regional project – Support of Judicial and Legal Reforms in the Countries of the South Caucasus.[1]

The conference aimed at sharing the experience of South Caucasian and German courts and elaborating general approaches on this basis. German, Azeri, Armenian and Georgian judges, lecturers from Tbilisi State University and representatives of international and non-governmental organisations participated in the Conference.

1. The Role of Judge-Made Law in the Development of Law (Spokesperson Lado Chanturia)

In his presentation the Chairman of the Georgian Supreme Court *Chanturia* referred to the significance of judge-made law. Historically laws had to meet strict requirements. They should be overwhelming and clear in order to limit the almost unrestricted power of judges. However, such attempts led to no consequences. The main reason was the difficulty in regulating everyday relations by laws written in a language comprehensible for the public.

However, a common understanding of legal texts is difficult for both ordinary people and lawyers. This has its historical reasons. For example, how should a norm created decades ago be understood today?

Prevailing opinion is that the law is an attempt at regulating a relationship in such a way that comes to a legislator's mind in a particular case. Only practice can show later how this or that norm of the law has worked. Law-regulated relations change as well. A lawmaker is not able to immediately change the law, which in turn leads to a practical need to bring the

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[1] The project was founded in 2001 and is the realisation of the idea of Ms. Heidmarie Wichorek-Zeul, the Minister of Economy, Development and Co-operation of Germany.

law into compliance with new circumstances. This problem raises a practical question. How do we fill a gap in law in such a way to enable a court to settle the dispute?

The easiest solution would be to declare the dispute unsettled due to the existing legal regulation. However, such a situation is fairly called the bankruptcy of justice. The Civil Code of Georgia like the Civil Code of France does not entitle the judge to such right.

To avoid this a judge should be entitled to application of the law in every case by way of interpretation. Indeed according to Article 4 of the French Civil Code, judges are obliged to do so. The same norm is present in the Georgian Civil Code.

When the interpretation of a law oversteps the framework of grammatical interpretation and falls within the scope of logical interpretation, we practically deal with the formation of a new norm, which in fact is law-making. If the legal system permits, it should also be stipulated who has the right to interpret the law. *Chanturia* points out several practical possibilities:

a) Delegate the right of interpretation of the law to a special body or commission;
b) Provide the country's Supreme Court with the right to adopt compulsory interpretations for the courts of lower instances. Such a system was adopted in the Soviet Union and still exists in some Post Soviet countries. The concept does not comply with the principles of judge-made law of the continental Europe and restricts judge's independence to some extent;
c) Granting to the judge the right to develop the law or fill the law by way of interpretation of the law is the most frequent practice.

In *Chanturia's* opinion, while interpreting the law it is essential to determine whether views and wishes of a lawmaker should be identified or the law has "its own life". Under long legal practice in continental Europe advantage was granted to the verification of the circumstances of law-making. In the minutes of Parliamentary sessions, they looked for tangible material for the proper interpretation of the law. Such a procedure has never been used in England due to historical traditions.

Recently prevailing opinion is that the history of law is less useful for its interpretation because the rule of the law is applied in different circumstances. For that reason it is unjustified to search historically for the interpretation of a law adopted decades ago, which served as basis for adoption of a certain norm.

Modern codes entitle judges to settle the dispute not only by way of grammatical interpretation of the law but also by its logical interpretation.

Interpretation of the law is the description of vague norms of the law and verification of the meaning of a word. It has its own principles without application of which interpretation would become a self-willed explanation. The following are the principles:

a) Principle of objectivity: interpretation should be based upon the literal meaning of the law and on this basis the essence of the law should be made as clear as possible and further developed;
b) Principle of unity: every norm should be read together with the text and not separately. Something particular should derive from the general and the general from the particular;
c) Principle of genetic interpretation: during interpretation of the text, its origin should be taken into account, as well as objective, linguistic, cultural and social preconditions for making of the law and particularities of its authors;
d) Principle of comparative interpretation: this principle aims at a comparison of the texts of the law created in the same field and at one time.

While discussing the role of judge-made law in the development of law, it also should be taken into account that the compulsory nature of judge-made law radically differs from the compulsory nature of the norms of the law. The norm of judge-made law develops at the moment of the court decision's entering into force. Its application is limited to the fact that other courts, while considering a similar case might be guided by a decision that already exists. However, it is not compulsory and thus courts may derogate from the norms of judge-made law. Continental European countries are not familiar with case law unlike the Anglo-Saxon legal system, which develops mainly through judge-made law. However, despite the radical difference between continental European and Anglo-Saxon legal systems, the input of the judge-made law in the development of both legal systems is evident. This circumstance explains that the French Civil Code adopted two hundred years ago and the German Civil Code adopted one hundred years ago are still viable.

For contemporary law it is natural that laws leave many questions unanswered or give only unclear answers. Indeed a law should not be perfect. The judge is the person who in practice copes with such imperfections and since he is obliged to settle any dispute whether directly regulated by the norms of the law or not, the necessity of judge-made law in the effective functioning of legal systems becomes evident.

2. Interpretation, Analogy and Development of the Law: Delicate Separation of the Judicial and Legislative Powers (Spokesperson Rolf Knieper)

Professor of Bremen University and Head of GTZ Project Bureau "Legal Reforms in Transitional Countries" – *Knieper* – argued that in legal methodical teaching and practice the interpretation and analogy of law and the development of the law through them has been occupied one of the central places from the times of great civil-law codifications. Opinions cover the scope from judges' obedience to the literal meaning of the law to the legitimatisation of law-making. The latter in particular cases even justifies adoption of a decision contrary to the law.

The first opinion derives from the Age of Enlightenment and is based upon the *Montesquieu* doctrine of separation of powers. According to this doctrine "In the republican government it is the nature of the form of government by which judges obey the literal meaning of laws". "National judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour".

However such an approach should not be considered only as a problem of legal understanding but should always be seen in the light of historically caused extraordinary social conditions.

When economic and political relations are firmly established the non-confidence in judges automatically decreases. Perhaps this was the reason why already by the end of the nineteenth century the German legislator said what was already earlier known: "No law is perfect enough to offer the norm applicable directly to all relations". Consequently, the German Supreme Federal Court at present openly and confidently declares its task of bringing the written law in compliance with the social requirements and moral values of society. However, it adds that judges shall always treat this matter delicately because "the farther the judges distance from the word of law the more their legitimacy lessens". Judges must always have a clear idea of "when they apply the law, when develop it and when correct it, i.e. not to be law-abiding".

In the view of *Knieper* in every country oriented towards democracy, separation of powers and market economy, especially transitional ones, the interpretation of laws and normative acts must be the key professional task of courts. However, with interpretation and analogy of law, the court enters the territory of so-called "mined border line" between the legislative and judicial powers. A judge can successfully and safely navigate throughout this line only if he follows the methodology of law-interpretation in good faith and explains the grounds of his decision transparently. In order to justify the analogy, the deficiency of law should actually be present and it could only have been eliminated by methods that fall within the system of laws. The result should not go beyond the limits of positive law. Generally, the aim of using expressions like "nature of the case", "changing of values", "principles of natural law" is to give priority to the personal thought of some judges about values over the thoughts of the parliamentary majority. However, only the latter is authorised by elections to guide itself with personal views.

And finally *Knieper* concludes that panacea is not so much the provision of courts with a wide scope of law-interpretation as understanding the necessity of a delicate separation of powers among three powers and the constant updating of relations based upon mutual respect, modesty and self-confidence.

3. Access of Poor People to Justice (Spokespersons Winfried Rothweiler, Maia Mtsariashvili, Mamuka Mamaladze, Vidadi Mirkamal, Vartan Avanesyan)

The principle of state based upon the rule of law prohibits the sole and violent exercise of one's right. Every disputable matter must be settled in court. Consequently, the state should not only theoretically but also practically make the court accessible for all. Every democratic state constitutionally guarantees a person's right to apply to court for the protection of his rights and freedoms and ensures their equality before the law and court regardless of a person's property status.

The way of Implementation of such guarantees by a state is to be determined by the state's legislation. In practice there are many models such as compulsory insurance or even free trials i.e. the state pays the court or other expenses for every party.

As shown from the presentations, a similar model applies in all three countries of the South Caucasus. The socially unprotected layer of the population is exempt from state fees. In Georgia disabled persons and their public organisations, as well as educational institutions and associations are exempt from state fees. The following certain types of applications are also exempt: claim on payment of alimony, violation of labour conditions, unlawful criminal prosecution. The Armenian legislation provides for similar benefits as well.

In all three South Caucasian countries legislation entitles a party to apply to the court on full or partial exemption from the state fee or on postponement of payment. Further, the court has the right to satisfy or refuse to satisfy such applications with due consideration of the party's financial status.

In South Caucasian countries, the fee for civil cases fluctuates between 2-4% of the value of the object of dispute according to the instances.

As for the free public lawyer and legal aid, in all three countries they are available for criminal but not civil cases. It should be mentioned that according to the Civil Procedure Code of the Republic of Azerbaijan, the appellate court shall consider the appeal only in a lawyer's presence. In its Decision of 14 June 2002 the Constitutional Court of Azerbaijan decided that since an appeal case was considered only in the lawyer's presence, the same norms that were prescribed for the appointment of free public lawyer for criminal cases should be applied to civil law cases in order to protect the indigent citizens' rights. However, *Mirkamal* states that legislative change has not yet been made in this regard.

The situation in Germany is different where the "Green Form Scheme" (*Prozesskostenhilfe*) is applied. Two preconditions should be met to receive this: 1. Party's poor financial status and 2. Party should have chances of success according to the court's assessment.

If solicitation is satisfied, the party is exempted from both state and lawyer's fee. Both expenses are covered by the state. However, if the party, although exempted from expenses, loses he must cover the opponent party's expenses.

4. Recommendations Elaborated by the Participants of the Conference

Based on presentations and discussions at the Conference the following recommendations were concluded:

1. Decisions of the Supreme Court must be published. This is especially necessary for the establishment of common court practice and its development, transparency and its acceptance by the public;

2. Interpretation of laws is the key task of judges of all instances. For the fulfilment of this task, judges must possess relevant methodology of law-interpretation;

3. Legislative initiative is not the task of courts;

4. Every citizen must be able to apply to the constitutional court when having their fundamental rights violated. However, it should not become the supra-cassation instance;

5. Applications lodged to the court must be distributed according to once determined criteria and not by the Chairman of the Court in every individual case;

6. The bar association shall be set up as an independent, non-governmental body. Today the laws on the bar serve this aim and need implementation as soon as possible;

7. The state must ensure access of poor people to justice both theoretically and practically. The accessibility of justice should not depend on one's financial standing.