
ARTICLES

From the History of the Creation of the Civil Code of Georgia*

BESARION ZOIDZE**

1. Essential Principles of Codification

States base their codification either on their own or some other state's experience or on the both of them.¹ For their own experience to become the basic component, at least three conditions should be met. A country developing a Code should have: firstly, the legislative traditions that would at least partially reflect the principles regulated by the codification; secondly, abundant judicial practice that would display the demand for the regulation of the civil circulation in a new manner; and thirdly, a well-elaborated doctrine that would prove the urgency of codification. Unfortunately, Georgia and, it could be said that all the former Soviet states do not have such requirements.

a) Legislation. After becoming a Soviet Republic the only legislation Georgia disposed of was the one that regulated the Socialist economy. However, owing to inertia, legislation regulating a market economy was still present in Company Law for a short period, but soon disappeared.² During the two years of independence civil legislation remained unchanged. The main concern of Soviet legislation was to regulate relations between Socialist organisations. Many normative acts were adopted in this field, the majority of which had the status of sub-legal acts. No mechanism existed for verifying their constitutionality. The major deficiency of this legislation was the rejection of such fundamental principles of private law as the freedom of property and contract. It could not be said that the whole legislation of that period was sent to a waste paper basket. This could not be said about those provisions of the Soviet Civil Code, which were taken from German Civil Law.³ However their number was so small, that they had no material importance for the new Civil Code. The Commission responsible for the elaboration of the Code looked through these individual provisions and took account of those, which were more or less valuable. Some things looked better in this code than in the follow up Soviet ones. Namely, the title "The Law of Things" was still valid and mortgage fell within

* The current article will become a part of the study regarding the history of creation of the Civil Code and the issues of reception of the European Private Law in Georgia.

** Deputy Chairman of the Constitutional Court of Georgia, Professor.

¹ For the issues of codification in Post Soviet Countries See: *Knieper/Boguslavski*, Konzept zur Rechtsberatung in Transformationsstaaten, Eschborn, 1995, 1-57.

² It should be mentioned that the first Soviet Civil Code contained many provisions regarding partnership associations, the major part of which were dedicated to the provisions establishing the joint stock companies. In 20-ies of XX c., even a guidebook in Trade Law was published (See: *Japaridze*, Trade Law, Tbilisi, 1925).

³ Professor *Sergo Jorbenadze* considered, that the positive feature of the Code of 1922 was its western experience (See: *Jorbenadze*, The main problems of Georgian Civil Code – in: Law Reform in Georgia, Tbilisi, 1994, 141).

the framework of this law as well. The right to build did not seem to disappear from the code. Despite this, Soviet legislation had well demonstrated what Civil Law should not look like. It was a good example of the alienation of an individual from the law and thus could be considered only as a negative source of a new code.

This kind of legislation prevailed before the adoption of the new Civil Code of Georgia. However, its enactment was preceded by the adoption of a number of new normative acts.⁴ However, they could not serve as a source for the code. Firstly, the code and the normative acts were elaborated concurrently, and secondly they regulated such private relations that could find no room in the new code.

b) Judicial practice. The Soviet court served only the enhancement of Soviet justice. No judge-made law actually existed in the Soviet era. The resolutions of the Supreme Court Plenums could not do any good either, as they were limited to the interpretation of the effective law and the establishment of common judicial practice. Legislation of those times did not allow judges to act independently. In such a situation conflict and alienation between the inherent beliefs of a judge and the effective legislation was apparent. No case law was admissible. The courts limited themselves to the word for word interpretation of the rules. They were to see only the positive law of the mirror of the law and its manifestation in a non-judicial sense was considered as a “phantom”. Existence was understood only as material existence. Hence court practice was itself the demonstration of judicial materialism. In certain cases the resolutions of the Supreme Court Plenum were considered as a source of law, but actually resolutions containing some rules were so scarce, that even the textbooks of those times stated that they were not the source of law.⁵ The Soviet Court failed to reach the level of Georgian courts of the feudal era. As historical sources demonstrate ‘parliament’ enabled a judge to improve effective law. There were cases when the court granted a child born out of wedlock with a part of heritage, while positive law, both secular and ecclesiastical, did not allow this either in Georgia, nor in any other Orthodox country.

c) Civil Law Doctrine. The great codifications of civil codes could be considered as a certain summary of the Doctrine. An important theoretical source for the Napoleon’s Civil Code was French science.⁶ This is even more the case with German civil law that can be considered as a memorial to the reconciliation of contradictory legal ideas. Some German Lawyers supported the idea of codification, while others were against.⁷ Still the elaboration of the Code was considered as a remarkable monument of the spiritual culture of the German people. The Civil Code reinforced the statehood of Germany. A legislator was less conservative towards the Doctrine, than after the adoption of the

⁴ E.g. The Law on the Principles of the Law on Entrepreneurial Activities, The Law on Entrepreneurs, The Law on Property Rights, etc. Some of these Laws were abolished after the adoption of the Code.

⁵ See: *Tkesheliadze*, Judicial Practice and the Criminal Law (in Russian), Tbilisi, 197 5, 29-45.

⁶ Works of *Daumat* and *Pothier* turned out to be particularly important for the establishments of codification principles. Independent legal language was developed in France already in XVIII c. (See *Chanturia*, Introduction to the General Part of the Civil Code of Georgia, Tbilisi, 1977, 26).

⁷ See: *Chanturia*, Introduction to the General Part of the Civil Code of Georgia, Tbilisi, 1977, 26.

Code. Once the tradition was developed the legislator followed in its footsteps faithfully. An example of this is that a century has already passed from the adoption of the Civil Code and a German legislator tries to keep up with the novelties of civil circulation mainly through additional laws. It was only at the end of the twentieth century that it was acknowledged, that the provisions, envisaged by additional laws might be included in the Code. The initial policy – from Code to additional laws was considerably changed through the transposition of the provisions of certain additional laws into the Code. For the time being the legislator favours the doctrine. This was shown in setting up the Commission for the Reform of the Law of Obligations that included both judges and celebrated civil law specialists.

Starting from nineteenth century the German Doctrine has proved to be so well advanced that it became a theoretical source not only for German law, but for others as well, including Georgians. The abstract way of thinking, typical for this Doctrine matched well Georgian perception. This was demonstrated in the 1930s.⁸

Unfortunately, Soviet Civil Law doctrine could not be considered as a theoretical basis for new civil codes. Indeed new legislation is mainly a rejection of this doctrine. Anything that matters now was done in pre-Revolutionary Russia. From the beginning of the nineteenth century until 1917 Russian civil law specialists managed to handle the most complicated problems of the Civil Law and even attained a level playing field with European scientists. Contemporary civil law specialists gave new life to “the forgotten science” and started publishing their ideas. The benevolence of Russian Tsars towards European culture promoted the development of legal science in Russia. It was even planned to receive the French Civil Code, but Napoleon’s invasion foiled this idea. Thanks to this high doctrine Russia could freely develop its own Civil Code. However, it failed to and when the revolution happened there were a number of volumes of a draft Code. One of the reasons for a conservative attitude towards the Doctrine was that the latter was far more advanced than Russian legal consciousness and people’s feeling for law and order. This legal consciousness was actually the communist legal consciousness. The spirit of Roman private law was unfamiliar. The elements of communal structure were maintained until the twentieth century. Thus there was a contradiction between the Doctrine and the people’s feeling for law and order. The legislator took less account of *Pokrovski* than of a mere mortal. When at the end of nineteenth century scientists offered the legislator a draft Law on the Expansion of Inheritance Rights of Women, the law failed as it lacked two or three votes.⁹ When looking through contemporary Russian Civil Law I doubt whether this Doctrine was paid due attention. What is more, new Russian legislation is devoted to Soviet Doctrine. The concepts of ‘operational governance’ and ‘full economic management’ are sufficient evidence of this, along with types of property. However, I do not intend to

⁸ See: *Surguladze*, State Power and Law, Tbilisi, 2002 (in Georgian). This study was published in the German language in 1925, and only in 2002 it was published in the native language; *Naneishvili*, The validity of the Law and the Attempt of Proving Some Normative Facts.

⁹ See: *Zoidze*, Old Georgian Heritage Law (Comparative-Legal Study), Tbilisi, 2000, 178 (in Georgian).

diminish the major achievements of the Russian Civil Law. Fundamental studies were developed in the field of the Law of Obligations, namely concerning culpability, liability, and offence. Wrong methodological guidelines often led to misdirected study of the problem. My doctorate concerned liability issues and when I was working on comments to the Civil Code I had to re-conceive the concept of 'culpability'. Rather often the progressive initiative of the Doctrine was considered benevolent towards "bourgeois" science and remained as a proposal only. Though Soviet civil law scientists favoured the idea of the introduction of 'a third party liability' into Soviet Law, nobody supported them.¹⁰ The same could be said about moral damages as well.

Civil Law Doctrine followed the same route of development in Georgia. Soviet legal ideology did not allow for a different mode of thinking. *Naneishvili* and *Surguladze*, who took up the German way of thinking, became the victims of Soviet repression. Law textbooks were similar to those in Russia. To put it another way "it was the Russian cannon to fire in the Republics". And this cannon used to fire so well that everything was turned upside down even at the shooting place. The Georgian Doctrine was a twin brother to the Russian one, like the Doctrines of other Soviet Republics. The influence of German civil law science could be detected in Georgia only 1920s and 1930s and was concerned mainly with such theoretical and philosophic issues, as the essence of ownership, the correlation between a case and the law from the point of view of the Civil Law. Communists' endeavours were of a paradoxical nature. In a sense it was German Law without German Doctrine. The Doctrine was more like Baron *Munchausen* who managed to save himself from the Moors without anybody's help. The second paradox was that the influence of the German Doctrine was far stronger in criminal law, though the influence of the law was rather insignificant in this field.¹¹ However this Doctrine could not significantly affect the legislation. It deemed that the role of criminal science was always stressed in the culpable society and this science is always of main interest for the state. After regaining independence the subjects have essentially changed their place and civil law science acquired the upper position in the legal hierarchy. The adoption of the Civil Code became the first priority for the independent state, and it did not make any rush to accelerate the elaboration of a Criminal Code. The latter was enacted three years after the adoption of the Civil Code.

3. Legal Consciousness during the Codification Process

Georgian legal consciousness, where the specific understanding of private interests is particularly stressed, played a major component in the development of the Civil Code. This sense united everyone from ordinary citizens, who were the beneficiary of the code, scientists, who developed it and to the legislators who passed it. This private law type of legal consciousness is notable throughout the whole history of Georgian statehood. Historical sources demonstrate a particular verve of

¹⁰ See: *Zoidze*, For the Issue of Mandatory Insurance of Third Party Liability of Vehicle Owners, *Sabtshota Samartali* (Soviet Law), 1985, No.4.

¹¹ See: *Gamkrelidze*, Influence of German Criminal Law on the Georgian Criminal Law, *Samartali* (Law), 1996, No.3-4, 41-42.

private interest in Georgia. Who knows when Georgians would have developed the civil code, if not that its history was full of the reversals of fortune? Had it followed the inertia, which produced the Book of Law of Vakhtang VI, it would have been possible to see Napoleon's Civil Book in Georgia at least a century ago. Why could not the desire, which revealed itself back in the nineteenth century in Russia, where mainly the public law type of legal consciousness prevailed, originate in Georgia as well? Neither two hundred years of the Russian Empire, nor Soviet rule could change this sense. During the Soviet period Georgia was considered to be the republic where private-owner psychology flourished. When nobody was allowed to sell freely even at the market, the *Lazishvili* family managed to create clandestine private companies. Georgia was punished several times for this. The Central Committee of the Party adopted the famous Resolution on the Fight against the Private-Owner Ideology as an example to Georgia. But legal consciousness would not be so if it were so easy to change it. One may change laws, legal dogmas, but the legal consciousness of a people can hardly be changed. Legal consciousness is the manifestation of people's culture and if the positive law fails to adjust to it there will always be the permanent alienation and contradiction between them, as was the case during the Soviet era. While the outdated law will always be a foreign matter for progressive legal consciousness, the advanced law may become a stimulator for outdated legal consciousness. The history of a number of Muslim countries may serve as an example of the latter, when the transposition of progressive laws resulted in the elevation of legal consciousness. However, no one can deny that the reception of some outdated laws may be obstructive and prove a time-consuming process.

The new Civil Code turned out to be quite acceptable for Georgian legal consciousness. It easily found its place. The alienation between legal consciousness and the law was removed. This private law psychology is like a blustering river, which may wash away everything unless confined to its bed and reasonably controlled. Otherwise society would rather perish than follow the route to a market economy. The Civil Code contains "restraining" mechanisms as well, the application of which should be comprehended by our legal consciousness. Otherwise people will consider this mechanism as a restriction of freedom.

Russian legal consciousness is quite different. Even Russian philosophers consider that their legal consciousness has always been of a communist nature and of a public law type. Russia always based its statehood on this legal consciousness. This legal consciousness made the private life of people public. It is better to expand the territories of the country than to enjoy its wealth. It is a pity, that the state held the upper position in the hierarchy of values. By this one means the state with its negative meaning – with the mechanism of coercion and not in its positive manifestation – as an institute securing social welfare. This legal consciousness has partially found itself in the Civil Code as well as some traces of public law regulation. Nevertheless, Russia loves its civil code. Legal consciousness could not be counted as a main source of Russian civil law. The determinants were the Doctrine and the legislator. In short, Georgia could be considered as the state of private legal consciousness, while Russia – of a public one. Neither side is universal independently.

3. Codification in Parts. The Code and Additional Laws

When we were in the process of drafting the code we did not face the problem of codification in parts, as was the case in a number of countries. The Civil Code of Netherlands has been elaborated for forty years and the process is still not complete. The Russians “imitated” the Dutch example, when they first adopted the General Part of the Code and then the Special one. This model of codification in part was criticised even in Russia. Actually the General Part of a Code only matters when the Special Part follows it. Otherwise its functional implication becomes vague. This drives us to the conclusion that the codification in parts has its own rules. As far as a Code is a single normative body, only the codification of relatively independent institutions could be subjected to the codification in parts. Russia has not adopted the Book on the Law of Inheritance as yet, but this caused no damage to the body of the Code. In any case, the codification of functionally interrelated parts of the Code separately would be unreasonable. What is the good of adopting a Book that does not work without the other ones? The Dutch practice is relatively different and the process of elaboration of their Code is rather stretched.¹² Georgia followed the traditional mode of codification. We knew that the code was to be written not during forty but within five years. Against this background the codification in parts would be sheer nonsense and the Commission for the Elaboration of the Code never thought about it. All the Books of the Code were enacted simultaneously.

As for the body of the Code itself, it hosts the traditional institutions of private law relations, though a number of relations remained outside. If we take the Law of Obligations as an example, the situation was the same there. The standard conditions of a contract were included in the General Part and there was no need for the regulation by means of a separate law, as is the case in a number of countries. The Code fully covers the sale; the same is true with rental and lease. There was an attempt to regulate lease in a separate law, but this idea was not supported, as this would be a duplicate regulation. However, it was possible to adopt a contradictory law on the Promotion of Leasing Activities. The Code failed to fully cover insurance law and thus it became necessary to adopt some special laws.¹³ The duplication of some provisions in these laws is evident. The carriage relations that in many other countries are regulated by separate laws are fully incorporated in the Civil Code. In the Soviet era, the majority of normative acts were adopted just in this field. Along with the regulation of securities in the Code we have the laws on Promissory Notes and on Cheques.¹⁴ These laws were adopted before the enactment of the Civil Code. Initially the law of Copyright and Related Rights was included in the Code as the Book on Intellectual Property, but later on it was taken out and regulated by a separate law. This Book is retained in the Code only symbolically. The

¹² In 1947 it was decided to elaborate the new Dutch Civil Code (See: *Hondius*, Das Neue Niederländische Zivilgesetzbuch – AcR, 191 (April 1991), Heft 1-2, 397)

¹³ Such Laws are: Law on Insurance, Law on Medical Insurance, Law on Mandatory Fire Insurance, etc. In the European Law the Insurance Law is mainly left beyond the Civil Code and comprises of a rather long list of special laws.

¹⁴ These Laws together with the Law on Entrepreneurs gave start to the legal framework of securities. The adoption of the Civil Code was the temporary end to the creation of this framework.

Commission for the Elaboration of the Code still considers that it was a groundless decision. Furthermore, we would have done better had we adhered to the position of Professor *Jorbenadze* and made Book III of the Code fully cover intellectual property law. Family law comprises only a few laws, mainly related with the public law regulation of child adoption procedures. The law of Inheritance is an exhaustive one and is not supplemented by any additional laws.

Parliament chose the mode of a reasonable combination of regulation within and outside the code. It is necessary that the code and additional laws be well balanced so that the code does not undertake the whole responsibility, or delegate it to anything else. In our opinion we were right in our choice. In this respect the recommendations of German experts were very useful for the Commission. The law of Obligations shows that there is much similarity from the point of view of the interrelation between the code and additional laws. The Minister of Justice of Germany noted in one of his speeches regarding the possible changes to the Civil Code (BGB), that one of the first priorities was the integration of additional laws into the civil code. Among these were mentioned the laws on Standard Contractual Terms and on Product Liability. During the elaboration of the Civil Procedure Code in Georgia due account was taken of the experience of German legislative practice. In this case additional laws become a significant source of the code. However one should not allow additional law to become a testing area for the code's provisions.

It is not admissible for the code to contain only general provisions, similar to the Constitution and not to regulate some relations fundamentally. During the elaboration of the Model Code of the Commonwealth of Independent States, there was an opinion that the code should include only fundamental rules, and allow other laws to regulate relations in detail. Georgian civil law specialists did not follow this trend. Professor *Chanturia* considered that such an approach would have made the code lose the nature of a law and would become a legal glossary. Also it would have resulted in double regulation and ambiguity.¹⁵ The Georgian parliament made the decision that the scope of the code was to be as wide as possible and there was to be nearly no room for additional laws. The law of real property was elaborated in such an exhaustive manner that no room was left for separate laws on the Right to Build,¹⁶ on Apartment Ownership in a Block of Flats, on Hypothecation. Furthermore, the laws regulating ownership relations, such as the laws on agricultural lands and land registration were not included in the code. Initially it was supposed to regulate apartment ownership by a separate law, but owing to the opposition of certain forces it failed to reach parliament. The reason was that the law would have necessitated the revocation of the Soviet Apartment law and it was apparent that Soviet officials could not bring themselves to agree to that.

¹⁵ See: *Chanturia*, Results and prospects of private law reform in Georgia, in: Path to Novel Jurisprudence (in Russian), Berlin (Arno Spitz), 1998, 35-41.

¹⁶ Primarily the Soviet Law also acknowledged the right to build. The elements of this right could be traced in old Georgian law as well, where it is tied with rental and lease.

4. Interrelation between National and Supranational in the Code

The members of the Commission were well aware that it was impossible to develop a purely national civil code. It was a long time ago when the law was considered as the product of the historical development of a nation. The great legislative processes of the nineteenth century were followed by the commonly acknowledged idea that legislation should be national.¹⁷ The historical school of law,¹⁸ which lasted for a long period, played an essential part in the development of the essential principles of law codification. The fight for national law supported the creation of national consciousness. Every people tried to develop law that was compatible with national character. Methodologically we also followed this viewpoint. Moreover, as Georgia had just regained its independence all the values were assessed from a national standpoint. In this respect the civil procedure code is still criticised. Even before the start of the activities of the Commission it was apparent that the civil code would not be national, as the contemporary civil circulation was not national itself. The sense of time and space does not matter for this circulation any more. The internationalisation of law has drawn states close together and thus it is impossible to develop a national code. It is impossible for institutions that sprang up and developed on the grounds of Roman law to be still of a national character. This is a matter of principle, because in the civil code we have some very national provisions as well. I would like to recall the words of the German expert, *Rolf Knieper* who said that we could not co-operate in the field of family law and the law of inheritance. Indeed, these areas managed to maintain a relatively national character. It is easy to show the national character in these fields as the scope of their application is rather narrow and the demonstration of the national character does not cause any conflict with the rest of the world. When working on the marriage contract, I quoted more than 60 articles from German law and the Commission approved only a few of them. These rules would not work in Georgia due to their national character. The reason was that the relations regulated in Georgia by our traditions and ethics, are regulated by the civil code in Germany. Nationality in this case is conditional. The process of internationalisation has revealed itself with a very simple point. Commonly acknowledged human rights have acquired international protection. Referring again to the German example we can say that by virtue of the influence of the European Court of Human Rights, many provisions related to the rights of a child born out of wedlock, included in the BGB as national rules, were later changed.¹⁹ States that adhere to the European Convention on Human Rights are obliged to harmonise their laws with this Convention.²⁰ Again this situation is against

¹⁷ See: *Knieper*, Some ideas about the implementation of the reform in the field of Public Law in Georgia – publication of the Academy of Sciences of Georgia Matsne (Law Series), No.1, 1998, 75.

¹⁸ See: *Wieacker*, *Privatrechtsgeschichte der neuzeit*, 2. Auflage, Göttingen, 1967, 348-430.

¹⁹ According to the opinion of the European Court of Human Rights the concept of family is related not only with the family based on marriage, but with the “de facto family” as well (See: *Ellger*, *Europäische Menschenrechtskonvention und deutsches Privatrecht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Band 63, 1999, 649).

²⁰ In the opinion of *Jurgen Basedow* the system of values embodied in the Convention on Human Rights is the basis for the development of future European Private Law (See: *Basedow*, *Europäische Menschenrechtskonvention und Europäische Privatrecht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Band 63, 1999, 412).

national law. It was not difficult for the Commission to choose the right direction. This was mainly the direction of harmonisation of laws that has been followed by Georgia from the beginning of its history. Someone might consider it as showing off, but according to German colleagues the harmonisation of laws could be detected in Georgia even at the level of feudal law. The above is proved by the Book of Laws of Vakhtang VI, which is an outstanding example of codification. Georgia made use of not only the monuments of purely national law, but those of foreign law as well that were considered as an integral part of Georgian legislation. These were the monuments that united the Eastern Orthodox countries under a common system of law. The practice of using these monuments is one more proof of the fact that even in those times, the law was not acknowledged as a purely national institution in Georgia. There were cases in court practice when judges used to refer not only to Georgian law when settling a dispute, but to similar rules from the laws of other peoples as well. This meant that the rule applied for the settlement of a dispute was not the invention of the Georgian parliament, but that it had a supranational nature. Many countries resolved similar cases in a similar manner. Judges made their decisions sound more compelling. This historical background turned out to be a good basis for the unification of the law with Europe. Special mention should be made of the fact that the rules of a national nature took due account of the interests of the non-Georgian population wherever possible. When working on the rules regarding the prohibition of marriage, the draft provision stated that the marriage between relatives, including four generations should be prohibited as well. But during parliamentary hearings account was taken of the situation that the adoption of this rule would limit the rights of those people who traditionally admit marriage between close relatives. Thus the code does not contain any clause regarding this issue. This means that where such marriage is allowed, people will get married and where it does not, they will not. Court practice interprets this in a non-positive mode. In this case we would not be able to make use of the well-known stipulation of the law: "whatever is not prohibited is allowed". The decision is still the subject matter of a dispute. I do not consider this as a correct way out of the problem. I would like to recall the words of one MP who said that the Nobel Prize should be awarded to the person, who can make people break this outdated habit. I cannot say what the Constitutional Court would have done if this had been approved, but one thing is apparent. The purpose was noble. In time it will be assessed in the same positive manner as Justinian's Institutes in Armenia with regard to the rules of inheritance.²¹

The process of legal harmonisation took up such a pace that its ignorance would do no good to any state, irrespective of its legal culture. Various religious cultures accept this process, even Muslim fundamentalists. This process is such a swerve of the wheel of history that will involve everyone though some may not want it. It is difficult to claim the national character of civil law when a state fully and completely transposes its law

²¹ These Novels demonstrate that a woman of VI c. does not enjoy the inheritance right in Armenia. She is not entitled even to the dowry. *Justinian* tries to remedy the situation and equalise man and women in inheritance relations (See. *Adonts*, Armenia in the Era of Justinian (in Russian), Erevan, 1971, 180-183; *Nadareishvili*, From the History of Georgian Family Law, Tbilisi, 1965, 100-101).

to a totally different state and does not criticise the areas that have no grounds for being transposed. In case one can mention Turkey that changed the provisions transposed from Swiss family law and returned to the national basis. Roman law originated as the law of Christian states and during the Byzantine Empire and later developed as Christian law. The reception of Greek-Roman Law occurred in the countries of the Orthodox East. Historically the religious element has played one of the leading parts in the determination of the scope of reception.

Georgia is the country of various religions irrespective of the predominance of the Orthodox religion. As mentioned already this fact was taken into account to the greatest possible extent.

5. Legal System and Legal Culture

According to its legal system Georgia belongs to the family of German law. Through the development of the civil code, Georgia joined this family not for the first time, but restored a "broken" bridge. Historically, Georgia has always been at the crossing point of European and Asian cultures. Hence it cannot be considered as a country of only European or only Asian culture. It is a kind of synergy of these two cultures and even today serves this mission functionally. The Asian elements of culture can be detected in the everyday family relations, in folk art, and poetry. The law, however, has had a European touch from the outset. First of all this could be said about its relation with the Greek-Roman law.²² Georgia was within the orbit of Greek-Roman law for a long period. The result was the reasonable reception of Greek-Roman law. This first of all refers to Syrian-Roman law. In the opinion of scholars this was the operational law in the early feudal era. This monument is a remarkable example of old Roman law. The famous monument of the Orthodox world – the Great Book of Law had been applied in Georgia from the thirteenth century. Family law and the law of Inheritance were mainly based on the old Law. The so-called Greek law that was developed during the decadence of the Byzantine Empire was applied in Georgia until the first half of the fourteenth century. This does not mean that the rules of specific Georgian background were retarded in comparison with the foreign ones. On the contrary, often Georgian rules were much more progressive in nature. Georgia never had the types of capital punishment that existed in the Byzantine Empire.

The reason to stress the existence of links with Greek-Roman law is to demonstrate the lack of alienation that reveals itself in the event of the transposition of some foreign Law. Contemporary Roman-German law developed as a result of the reception of Greek-Roman law. Georgia was left with its old law only because of historical reverses of fortune. The development of Europe was studded with roses in this respect. The process of the reception of Roman law was particularly difficult in that part of France where customary law was powerful.²³ The Germans, who were not aware of

²² The Monuments of Georgian Law, I. The texts were published, by *Dolidze*, who supplemented the addition with the research and dictionary (in Georgian), Tbilisi, 1996, 578-602.

²³ See: *David*, Major Legal Systems in the World Today (in Georgian), Tbilisi, 1993, 39-134.

the phenomenon of will, comprehensively regulated it by means of civil law. In my opinion Georgia has less ground for alienation from the point of view of legal culture than other parts of Europe. The transposition of legal systems was much easier. Legal culture is being improved according to this system. What do we mean here under culture? If it is the attitude of people towards legal values, there will be no problem in this respect. But if we understand legal culture as *Feldbrugge*²⁴ does, then our assertion may become questionable. Three main elements could be distinguished in this culture. It could be as a participant of the circulation, state and legal order or as a participant of the circulation as the main value in the hierarchy of values not only from the point of view of the legal system, but from the point of view of culture as well. Even in the case of outdated law, it is still the main figure. In the law of Vakhtang VI a serf was not subject to liability if he killed his master for the violation of the sexual moral of his family. Without discussing this issue it is the case that the law safeguards the moral principles of the state and society when it protects a pheasant. The same should be said about capital punishment. When it raged in Europe, Georgia did not even apply it. Such an approach towards a human being has always been idiosyncratic for our culture. In this culture the state seems to be most oppressed. An individual and the state are alienated from each other. This situation became particularly apparent during the Soviet period, when an individual was considered to be a subject serving the state and not vice versa. The reality was presented in such a manner as to make one think that it was the state that granted an individual with fundamental rights and not nature. Soviet law was the legal system but it failed to fit the legal culture of the people. The sense of statehood was not absorbed by the people. It was the sense of culture that prevailed with us and not the sense of statehood. The state existed to the extent it was necessary for the existence of the culture. Such an attitude failed to develop the solid grounds for creating a strong state. Feudal lords were against the monarchy and promoted the decadence and splitting up of statehood. Georgian statehood is still suffering from this attitude. The process of developing the sense of statehood is rather painful and it will take a long time. No legal system will be successful until this psychology is assimilated in us. This is first of all related with the sense of legal order. It is easy to transpose a foreign law. However, transposing the legal order of a state is impossible. One should either have it or develop it. One may have a good tax code, but there may be no culture of tax collection. In such a case the law is more like a show and will do no good. The alienation of legal culture with relation to the law is conditioned by many factors and in certain cases it can be easily overcome.

Two sessions of the Commission for the Elaboration of the Civil Code were dedicated to the system of the code. The Commission wanted to clarify from the outset what route to take in future and what system to apply. The choice of the direction was not a poser for the Commission as it was historically established. There was no doubt that no one would desire to introduce common law in Georgia. However, there were still some misunderstandings, mainly given the lack of comprehension of the state of affairs. The main thing was to work out which European system we should support, institutional or pandect. The

²⁴ See: *Feldbrugge*, The significance of foreign laws, in: *Path to Novel Jurisprudence* (in Russian), Berlin (Arno Spitz), 1998, 164-168.

institutional system was rejected though the first civil code in Europe, painlessly received by certain continents, was based on this system. Furthermore, it managed to coexist with other different systems. The State of Louisiana in the United States of America is an example where the French civil code is still effective. It was quite possible both for Georgia and Russia to become the states of the institutional system and to transpose Napoleon's Code. While the old forethought of Russia was respect towards the French culture, it had other implications in Georgia. Respect of French people was conditioned by their assistance in the restitution of independence. The institutional system could hardly be rejected. The whole set of institutions of the code are united by such a logic that it resembles a live organism. Primarily the individual dominates as the subject of law. After this there is property, being the wealth that individuals enter into relations for and finally the modes of acquiring this property whether that is things or obligations. Through this classic triad it becomes possible to unite the relatively independent, from the point of view of pandect law, values in one Book. Individuals include all people and the whole of family law is incorporated therein. The same could be said about property as well. Each piece of wealth is subject to circulation, be it material or immaterial. The way of acquiring property makes the major part of this system and includes the law of obligations, part of family law and the inheritance law. This system explicitly states that civil circulation is focused on the property. The deficiency of this system, transposed from Roman law, namely from the Institutes is the absence of a general part. However, it definitely has some general provisions scattered throughout the whole code.

Being influenced by old tradition, the Civil Procedure Code in Georgia is based on the pandect system that was invented by the Germans. This system was developed by the famous German pandectists. The outstanding studies of *Windscheid* underlie German civil law. There was a proposal to give due consideration to the Civil Code of Germany, as we did in the Soviet era. The Soviet code of 1992 was based on this system. The introduction of this system was forethought in pre-revolutionary Russia as well. The elements of this system could be detected earlier times as well in the Book of Civil Laws of Russia. The material innovation of this system is a general part of the code that not only functionally serves the other parts of the code, but mainly contains fundamental provisions for a private law normative act, in the absence of special rules. This considerably simplifies the legislative technique that is rather complicated in common law. The general provisions are repeated over and over again in every normative act. The classic example of this is the Uniform Commercial Code of the USA that incorporated the general provisions into the sales article. However, this does not mean that these provisions regulate only sales. There was an attempt to transpose the legislative technique accepted in common law. Some endeavours were successful. International practice is aware of such an approach towards the system of laws, but one can find the justification thereto, as far as such an act has a double implication given its nature. An example is the Vienna Convention on Sales. According to the established rules in Georgian law, it is inadmissible for general provisions of one and the same type to be duplicated in different normative acts.

The importance of the general part is also shown in the fact that it outlines the subject of the regulation of the given field of the law from the outset and contains fundamental provisions that to a certain extent exceed the scope of this field. They are of a general legal nature. This part of the civil code includes not only the individual, but transactions and other institutes as well. The body of the general part has the following succession. There are general provisions that outline the scope of application of the civil law and list the most general principles of its essence. Then there is the definition of the individual, whose life in civil circulation is considered by this code. Finally and what is most important, this is the source of the civil circulation, the force that establishes civil relations – transactions. The pandect system particularly stresses that the only purpose of civil circulation is not the acquisition of the property. Thus, transactions are not only the source of purchasing property. If the initial principle of civil circulation was only the origination of the property, its concept would be rather narrow. In this situation, the title of the main Book of the Code based on the institutional system becomes rather striking – the Means of Acquiring Property. It is natural that such an approach towards property might have been right before the origination of industrial society. However, this would inevitably cause a revelation. Finally, the general system ends with two important values. They are the time frame and the exercise of the right. The rather strong logic of parliament is again shown here. A right originates and disappears within certain time frames. The limitation period informs the subject about the period within which his violated right could be subject to judicial remedies. The culmination of this philosophy is self-defence. Legislator lists all the cases when a person, whose rights have been violated, may “take out his sword and put to death anyone who violates his property dignity”.

The Second Book of the Code is the Law of Real Property. This distinguishes it from one of the German sources – the German Civil Code, where the Law of Things makes the Third Book of the Code, while the Second one is the Law of Obligations. This approach is justified by German dogma that gives priority to the obligation, as the type of property movement, where the positive meaning of the property is also partially disclosed. We did not follow this direction and we were right in doing so. According to our standpoint, the obligation right may not precede the property one. Even in the case of a primitive civil circulation, the sense of property right is well developed in a human being. It seems that the initial disposition of the origination of the property played its part in this situation. The initial source of origination of property was not to be a contract. Apart from this, the property right has a rather negative meaning that makes it more independent than the obligation. The Law of Things occupies a similar position within the institutional system as well. Property comes after the individual. In the system of the Law of Things, it first gives a definition of property and then of other institutes, such as possession, ownership, property rights on the other person's things, apartment ownership and credit collateral. This system looks very much like the German system of the Law of Things. An impressive number of provisions are transposed from there. The difference is that many provisions of the BGB, mainly the outdated ones, were not transposed. We do not exclude the existence of faulty provisions either, but parliament should improve them. Only the Georgian civil code regulates the apartment ownership. The Law of Property is

not a “heavenly” right that no other right could ever be equal to. Both other property rights and obligation rights bind the property.

A separate Book of the Soviet Code was called the Law of Property. The Commission deliberated about this issue and offered that the Law of Things was not only the Law of material things, in its literal meaning, but the Law of non-material wealth as well. The addition of the word “property” to the title makes it more apparent what is discussed. The significance of this system is that it rejected the institutes acknowledged by Soviet Law.

6. Delimitating Private and Public Law

One of the purposes of the Commission was to delineate private and public law. The goal was the development of a code that would be free from public law provisions. The urgency was conditioned by the Soviet legacy. Soviet Law did not make much delimitation between private and public laws and accepted *Lenin's* famous statements as the basic principles. The Soviet Civil Code was not a purely private law piece of legislation. It contained a lot of provisions of an administrative nature and thus was a merger of private and public law. *Rene David* made mention of this. Whatever the Communists transposed from the German Civil Law could hardly be rejected. The only thing that polluted the Civil Code was the provisions of their own creation. There were a lot of such provisions in the law of Obligations. Good examples are the supply and contract agreements. Such provisions were included in the existing normative acts on supplies and sales and turned the fundamental principles of civil law upside down. The development of the Economic Code was a classic example. Theories were created to prove that “a sheep and a wolf” might graze together and how incompatible things could be reconciled. The aspiration of the Commission was not to allow a repetition of this and to develop from the sterile point of view of private law a civil piece of legislation. We managed to succeed and the general profile was embodied in the very first article of the code, which states, that: “This Code regulates property, family and personal relations of a private nature.” However, there were some disputes about specific issues. One part of the Commission demanded the inclusion of such consequences of a void transaction as the inadmissibility of restitution. The Soviet Civil Code also contained similar provisions, when for certain cases, it was established that nothing would be granted to the parties in the case of an invalidation of a transaction and everything would be transferred to the treasury. Our Commission concluded that this issue was not to be regulated by the civil code. The Civil Code is to regulate only those issues that refer to the relations between the parties. In this event the issue of the seizure of property was established by an administrative act. Old approaches can be detected in the Civil Codes of some of the former Soviet Republics. For instance, in Russia this issue is still regulated by the Civil Code. Furthermore, the Code retained the administrative supply agreement. An explanation for this situation might be that public law principles are rather strong in Russia and parliament often fails to remain within established limits. However, the subject of regulation is perfectly outlined in one of the Articles of the Code of this

state. In certain cases the personal relations of public and private law were mixed. The Ukrainian Civil Code includes constitutional human rights that have nothing to do with a civil code.

Our assertion should not be understood that we rejected the co-operation between private and public laws, as the Western researchers say so often nowadays. Such a co-operation can be detected in the Civil Procedure Code of Georgia, when one and the same relations may be regulated both by private and public laws. Some of the concepts the public law have the same features as private law, such as an administrative transaction. Such a specific field of private law, as the Labour Law is also rather close to the law on the Civil Service.