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GEPLAC was established in 1998 by Tacis in order to support economic and legal reform in Georgia. Activities under GEPLAC's programme include besides GLR the edition of Georgian Economic Trends (GET), establishment of a library and the provision of economic policy and legal advice to the Parliament and Government of Georgia.

About Georgian Law Review

This is the first edition of Georgian Law Review which is prepared in Georgian and English languages. It enables legal specialists and other interested persons to become informed on the development of Georgia's legal system and the legal systems of EU and its Member States. Georgian Law Review is free of charge and also available through the Internet:

http://www.sanet.ge/geplac

Georgian Law Review aims to encourage the legal reform currently conducted in Georgia and to promote current Georgian law. Readers may quote any information used provided it is properly acknowledged.

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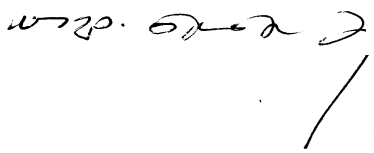
The first edition of the “Georgian Law Review" plays a very important role in the legal scene of Georgia and is an event of great importance. The legal landscape in Georgia is undergoing thorough changes including the strengthening of international relationships.

The existing national publications in this sector may not support this process adequately. Furthermore international interest in Georgian legal affairs has grown and readers are eager to be informed about national and international questions concerning legislation.

It might be interesting to note how legal surroundings have changed historically. At the end of the last century a certain Russian legal publication dealt mainly with the description of legal practice and customary laws of the Caucasus region. Today the Georgian Law Review is using a broader approach, serving as an international forum for national and international legal matters and being published in both Georgian and English: this reflects the future of an independent Georgia and its link to Europe. The GLR will contribute to the establishment of a contemporary Georgian legislative framework.

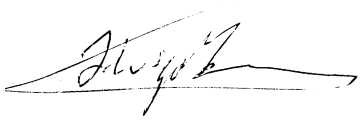
Good luck for the future !



Tedo Ninidze
Minister of Justice of Georgia

The Parliamentary Committee for Constitutional, Legal Affairs and Rule of Law welcomes the Georgian Law Review as a forum for contributions to any kind of legal matters relevant for the ongoing legal reform process in Georgia. We hope that the Georgian Law Review will provide a forum for discussion for lawyers, not only those from Georgia and the European Union but also from other countries. Thus it should serve as a means for strengthening Georgia's international relations. This is of utmost importance to our country, especially in view of the Partnership and Co-operation Agreement recently concluded with the European Union and the envisaged accession of Georgia to the World Trade Organisation.

Hopefully the Georgian Law Review will develop freely and independently, in line with the spirit of the new Georgian society, and become one of the most respected publications on Georgian law reaching an audience far beyond Georgia's borders !



Mikheil Saakashvili

Chairman of Parliamentary Committee for Constitutional,
Legal Affairs and the Rule of Law

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INTRODUCTION

The legal reforms that Georgia went through in the past couple of years have already gone so far that the whole picture of the country's legal society has been changed. A huge number of modern legal acts have been adopted and important decisions have been made in many areas of society. The new legal system that has been developed despite very difficult conditions will not only serve as a basis for increasing stability and prosperity within Georgia but will also help Georgia to find its place in a community of States with common values, based on democracy and market economics. This is vital to enable Georgia to cope with the challenges constantly arising in an increasingly internationalised world. The recently concluded Partnership and Co-operation Agreement (PCA) with the European Union and Georgia's impending accession to the World Trade Organisation (WTO) are milestones in Georgia's progress towards the 21st century, which will see the restoration of Georgia's traditional role as a gateway between east and west and south and north. By continuing to open up and strengthen her liberal traditions, Georgia has excellent chances of becoming a model of an open society with modern social and legal structures.

The Georgian European Policy and Legal Advice Centre (GEPLAC) aims to facilitate the current development by providing advice to governmental bodies on economic and legal matters relating to the PCA and the WTO. Thus the Georgian Law Review (GLR) issued by GEPLAC offers a forum for dialogue, not only between Georgian and European legal experts but also for all interested lawyers, evoking Georgian interest in Europe as well as European interest in Georgia. Thus it will strengthen Georgia's position in the global community.

The GLR will include essays on Georgian legislation as well as that of the EU and its Member States, which are related to the reform process in Georgia. It aims to foster knowledge and understanding of Georgian law and the legal reform process in Georgia. Whilst it will serve primarily to inform the Georgian legal community about new developments in the field of law and provide a forum for debate on issues vital to the reform process, it will also inform and educate lawyers in other countries about Georgian law and the legal reform. Moreover, it will report on and discuss issues and developments in EU Member States which are relevant to Georgia in order to strengthen and deepen the relations between Georgia and the European Union.

We hope that all the work of Georgian and European authors, legal specialists and translators will not only increase understanding but also encourage people to participate in and develop this dialogue !

July 1998, Tbilisi

Maik S. Masbaum
Acting Legal Team Leader

Alexander Barnewitz
European Legal Expert

BESSARION ZOIDZE*

THE SYSTEM OF THE CIVIL CODE OF GEORGIA**

I. Introduction

On June 26, 1997 the Georgian Parliament unanimously adopted the Civil Code of Georgia, which had come into force on November 25, 1997. This was one of the most important events in reforming the country's laws. Unfortunately, due to its tragic history, Georgia has not even had the right to discuss legal reform since the Code of Laws of *Vakhtang VI*.

As a philosopher might put it, the Georgian Civil Code is an expression of national identity, but the Commission for Drafting the Code, headed by the famous specialist on civil law, *Sergo Jorbenadze*, did its best to ensure that the new Civil Code would also be appropriate to the needs of the XXI century[1]. The implementation of the law will show the extent to which we have attained this goal. But certainly, the Code integrated Georgian law into the European legal community and Georgia has become a full member of the legal family of continental Europe.

The most important issue for us concerning the adaptation of foreign law was to approximate and harmonise Georgian law with the law of various countries. Consequently, the Code is the result of a combination of different legal systems and we have not simply adapted the law of one particular country. In addition it is very typical for Georgian society to regard the law as a cultural value. The process of unifying and harmonising laws can be traced back to the feudal period, to the Code of Laws of *Vakhtang VI* [2] and also the adaptation of Greek-Roman law has a long tradition in Georgia. These conditions provide an excellent basis for approaching the development of a modern legal system[3].

The Georgian Civil Code establishes private law, which is strictly distinguished from public law. The groundwork for the implementation of modern private law in Georgia turned out to be fairly well-prepared. This was greatly assisted by the importance that Georgian culture attaches to private interests and also in practice by Georgia's non-compliance with the requirements of Soviet legislation. The leaders of the Communist Party had to do their utmost to restrain the psychology of proprietors from people's minds. Hence, it is impossible to find even a single provision of public law in the Civil Code of Georgia.

The Georgian Civil Code is the result of five years hard work of Georgian and foreign civil legal specialists. Our foreign colleagues tried to avoid the shortcomings of modern European Codes. On this

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** Translation from Georgian language by *GEPLAC.*

1 *S. Jorbenadze*, Basic Principles of the Future Civil Code of Georgia, in: Legal Reform in Georgia (Georgian), Tbilisi, 1994, pp. 139-154.

2 *B. Zoidze / R. Kandelhard*, Historical Fundamentals of the Civil Law Reform in Georgia (German), Recht in Ost und West (further: ROW), 1997, No. 2, pp. 41-46.

3 *L. Chanturia*, Introduction to the General Part of the Civil Code of Georgia (Georgian), Tbilisi, 1997, pp. 31-35.

basis we co-operated closely with *Rolf Knieper*, Professor of Bremen University[4]. I intend to pay more attention to this and to other aspects in my book on the history of the drafting of the Code, which is currently under preparation.

The Georgian Civil Code is divided into six Books:

Book One: "General Provisions of the Civil Code" (Articles 1-146);
Book Two: "Property Law" (Articles 147-315);
Book Three: "Law of Obligations" (Articles 316-1016);
Book Four: "Intellectual Property Law" (Articles 1017-1105);
Book Five: "Family Law" (Articles 1106-1305);
Book Six: "Inheritance Law" (Articles 1306-1503);

and the "Transitional and Final Provisions" (Articles 1504-1520).

By contrast the first Soviet Civil Code consisted of only four Books[5]: Book One – "General Provisions", Book Two – "Property Law", Book Three - "Law of Obligations" and Book Four - "Inheritance Law"; later the scope of the latter was restricted and of the property law only property rights, mainly the State's property rights, remained. Later versions of Soviet Codes mainly copied the first Code, with only one difference – they included the laws "On Inventions" and "On Copyright" and several provisions regulating international private relations and they abandoned "Family Law", which still exists as a separate Code in some of the former Soviet Republics. One of the main achievements of our Code is the integration of Family Law into the Civil Code.

Below we analyse each Book of the Code separately.

II. B o o k O n e: "General Provisions of the Civil Code"

The first Book is preceded by "Introductory Provisions" that define the subjects of civil legal relations and the order according to which the rules should be applied. From the very first Article it is clear that the Civil Code defines relations of a private nature on the basis of equal rights of individuals. Principles that until now existed only in textbooks on the theory of law and legal practice were also incorporated into the Code (e.g. conflict of law, analogy, and the presumption of the knowledge of law). Most of these provisions are new for the codification of civil legal relations.

In short, the Code defines the terms of civil legal relations - stating the necessity for their regulation, the means of regulation to be used, objects and subjects, and freedom of contract within the entire territory of Georgia. The second section of the first Book concerns 'persons'. It is apparent from the embodied doctrine that the essential characteristic of a subject of civil law is legal capacity. There were long debates concerning the capacity to act.

Some members of the Commission insisted that the capacity to act should be fully incorporated into the doctrine on persons, as an essential of a legal entity. The other members, based on the

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4 *R. Knieper*, Methods and Concepts of Codification in the Countries of Transitional Period (Georgian), in: Legal Reform in Georgia, Tbilisi, 1994, pp. 176-181; *R. Knieper* / *M. Boguslavski*, Concept for Legal Advice in the Transitional Countries (German), Eschborn, 1995, pp. 1-57.

5 Civil Code, Tbilisi, 1950.

experience of the German Civil Code (BGB), insisted on the regulation of this issue in the Chapter on juristic acts. After long debates, we managed to reach a compromise which practically divided this legal value into two parts: only the Articles referring to the inability to declare one's will were placed under the Chapter juristic acts.

The doctrine on legal entities was developed in two ways: it reflects the general concept of a legal entity and it includes common and specific provisions for associations and foundations. The Code does not provide for the common and specific provisions for entrepreneurial organisations, as the law "On Entrepreneurs" already defines their legal status. Hence only the general provisions refer to organisations and other legal persons.

The Code establishes equality and freedom of legal persons in civil legal relations. The State no longer constitutes a special subject of civil legal relations with the privileges that Soviet law gave it. Instead it participates in civil relations on an equal basis with legal entities of private law (Article 24, par. 4). The development of civil legal relations is promoted by the rule of the Code, according to which "A legal person of private law (commercial or non-commercial) is authorised to be engaged in any type of activity not prohibited by law, irrespective whether this activity is authorised by the charter of the enterprise" (Article 25, par. 2). The Commission decided unanimously to place juristic acts under the General Part of the Code, as in Germany's BGB. After long discussions a juristic act was defined as the declaration of the will to establish, amend or terminate legal relations (Article 50).

Particular attention is paid to the principles of invalidity of juristic acts. Nearly all the principles of invalidity that are embodied in the German and the French Codes and in the Swiss Law of Obligation were considered.

The Georgian Code partly follows the same approach of the German Code when it considers the legal capacity to conclude contracts as the prerequisite for the validity of a transaction (Article 63-67). This also applies to the right of representation, which was also placed under the section on juristic acts.

The Code provides many possibilities for a minor's will to be declared, and frees minors from ungrounded guardianship and custody of parents. It is established that "If a legal representative assigns the right to manage an enterprise independently to a minor who has reached the age of sixteen, the latter acquires the unlimited capacity for legal relations in this field" (Article 65, par. 2, sentence 1). The Code defines formal requirements for juristic acts. The principal provision in this case is the necessity to respect mandatory formal requirements established by the law when declaring a juristic act. However, if these requirements are missing, the parties themselves are authorised to establish their own formal requirements (Article 68).

The Code defines disputable (issued by mistake, deception or coercion) juristic acts in detail. The definition of an 'essential error' is basically the same as in the Swiss Law of Obligations.

Conditional juristic acts and consent in juristic acts (Articles 99-102) are also defined by the Code.

The Code's section on juristic acts does not set out the consequences of an invalid juristic act on the property relations. Instead this is treated in the Chapter on unjust enrichment and the provisions on tortious liability. Moreover, all the provisions of the Soviet Codes that considered the State to be the beneficiary of the results of an invalid juristic act were abolished. In cases where the invalidity of a

juristic act leads to confiscation, the respective provisions of public law and not the Civil Code are applicable.

An important section of the General Part of the Code is dedicated to the execution of rights (Articles 115-120). After major debate, Article 118, which defines the pre-conditions for self-help, was integrated into this chapter. According to this Article, the action of the person should not be considered illegal, if the latter, for the purpose of self-help, takes away, destroys or damages an object; or with the same purpose captures the responsible person who may escape; or turns down the resistance of the responsible person against the action to be performed, in case the assistance of competent bodies is delayed and without immediate intervention a danger for exercise of a right exists, or its exercise would be significantly complicated, which actually is the reception of § 229 of the German BGB. The main intention of the Article is to underpin personal freedom as well as to protect one's rights. For this purpose self-help is not unlimited. The very first paragraph of Article 119 states that the "self-help should not exceed the minimum action necessary to evade the danger".

The calculation of time limits and statute of limitations (Articles 121-146) also contain much that is new. The Code acknowledges the principle that the limitation period is not applicable to personal non-property rights, unless otherwise provided for by law (Article 128, par. 2). It also stipulates the general statute of limitation (ten years) and the contractual statute of limitations (three years), and provides for a statute of limitations of six years for contractual rights with regard to immovable property (Articles 128-129). The principles for suspension and interruption of the time limitation are set out in detail.

III. B o o k T w o: "Property Law"

The second Book introduces an entirely new legal concept[6]. According to this concept property law is regarded as an unified organic system of property rights. The influence of German BGB is clearly evident here, and it would be not a mistake to say that this is basically an adaptation of the German model concerning the various relations. For instance, the first section of this Book begins with the definition of property and objects, the latter being covered in the General Part of the German law. As regards the 'property' itself, the term applies to "every object and non-material property, that physical and legal persons are able to make use or dispose of, as well as to acquire in unlimited quantities, provided this is done within the law and is not against moral principles" (Article 147). Under the German BGB the term 'object' means only a material object (§ 90). Under the Code, non-material property includes entitlements and rights that could be assigned to other persons, or that could bring material profit to its owner, or that give him the right to demand something from other persons (Article 152).

The next item that the Code deals with is 'possession'. This is the first time that this concept is fully defined by the Civil Code. Discussions about the concept of possession and its place in property law lasted for two years. One difficulty was that the Soviet law largely miscomprehended this legal value: in fact, possession in Soviet reality was quite often understood as the surrogate of property and was in many cases considered the same as the right. Moreover, possession was usually understood as one of the elements of property. This approach could never be reconciled with the regulation of

6 *L. Chanturia*, Basic Principles of Property Law in the Future Civil Code of Georgia (Georgian), in: Legal Reform in Georgia, Tbilisi, 1994, pp. 226-242.

possession independently from property. Finally, the Commission came to the conclusion that possession is the exertion of actual control over an object (Article 155), and thus it is absolutely admissible for possession to exist independently of property. In short, possession was understood as the fact, with or without the implication of a right. The Code is in line with the old Roman legal rule, according to which the "possessor of a thing is deemed to be its proprietor" (Article 158, par. 1).

For justifiable reasons usucapion was integrated into the provisions on ownership as an absolutely new concept that was unknown under Soviet law. Though usucapion is one of the sources of creating property, it is the result of ownership limitation. Even before the Code was drafted this concept was introduced in the law "On Property Rights".

The positive understanding of the notion of ownership was underpinned by the customs of ancient Georgian civil legislation, which was basically in conformity with Roman law. This led to great controversy when the Soviet Civil Code was imposed on Georgia.

Property is the basis for property law. This concept was significantly impaired during the Soviet period. The Code gives a positive understanding of property, and the idea that there should be various kinds of property was rejected. The Code defines property as a unified concept, as already defined by the law "On Property Rights", which upset many economists.

"Freedom of property rights" in the Code is limited by law and contractual constraints. Property is limited by its social functions; the greater the social value of the subject of the property, the bigger the limitation. Therefore the social function of the civil law was mainly reflected in the concept of property[7]. Along the other rules, the above said is also stated by the resolution of the Code, that "law may establish the obligation of usage or maintenance and preservation, in case the non-usage or non-maintenance of this thing violates the general public interest" (Article 170, par. 3, sentence 2).

The fact, that the notion of property does not imply the attitude of Robinson Crusoe towards the environment, who lived isolated on an uninhabited island, is proved by the existence of neighbour law. Neighbours' obligations of mutual tolerance ensure the preservation of civil peace among them. Although conflicts between neighbours were quite frequent in Soviet times, none of the Soviet codes recognised neighbour law. Conflicts were generally settled according to general rules, preserved in the conscience of the people and particular legal acts. The strong tradition of neighbour law in ancient Georgian legislation should also be noted. The principles of neighbour law of Georgian legislation, which were based on Roman law, were mainly preserved in the conscience of the people: consequently many principles codified for the first time have actually already been applied to settle conflicts between neighbours in the past.

The necessity of neighbour law became obvious in cases where the disruption of civil life has aggravated relations between neighbours. For instance, when there are frequent shortages of electricity and heating the population has had to use rules to settle conflicts between neighbours in order to satisfy everyday environmental problems such as noise, smell, soot, smoke and vibration. In these cases the maintenance of good civil relations has depended to a very large extent on the informal exercise of neighbour law.

[7] *B. Zoidze*, Social Function of the Rights on Objects, in: Person and Constitution, 1997, No. 1, pp. 25-31.

The issue of acquisition of property became quite a serious problem during the drafting of the Code. Despite the adaptation of a couple of principles derived from German property law, the Commission decided against introducing the principle of abstraction. According to the new Code “for the purpose of acquisition of an immovable property, the relevant document is required to be certified by a notary and by the registration of the purchaser in the Public Register” (Article 183, par. 1, sentence 1), while “on assigning the rights on movable property, the proprietor is obliged to transfer the object of transaction to the purchaser on the basis of an existing right” (Article 186, par. 1).

Unlike traditional Civil Codes, which consider the assignment (cession) of the claim and the acceptance of the obligation of a third person as institutes of the law of obligations, the Georgian Code regulates these issues in the law of property. This decision of the Commission for the Drafting of the Code was based on the fact that the exertion of these institutes does not change the contents of the civil legal relations but the subjects of the rights and duties. The exchange of the subjects in particular is considered to be subject to the property law and the law of objects.

The Civil Code addresses the ownership of an apartment in a block of flats in Articles 208-232 and acknowledges the reality of living conditions adequately. At a first glance the regulation of the legal status of an owner of an apartment seems surprising, as his status is largely enriched with psychological functions of property, but the peaceful co-existence of inhabitants would be impossible in a block of flats, where private and common interests may be contradictory. Therefore, even the provision of the Code that obliges the owner of an apartment to alienate it in certain cases does not astonish (Article 222).

The “limited usage of another person’s property” extends to all traditional rights concerning other persons' property (building, usufruct, servitude, pledge, and mortgage).

In introducing the principle of ancient Roman law that the ownership on real estate extends to its essential parts (Article 150, par. 2; Article 170), the Code acknowledges the right of a third party to build. This is considered to be the highest ranking among the rights of non-proprietors in the list of property rights in the public register (Article 237), and was also acknowledged by the first Soviet Code. It is an important right as it rather mitigates the above mentioned rule of Roman law and in practice authorises the non-proprietor to exercise all proprietary rights on a building that has been erected on somebody else’s land.

The legal rules on usufruct and servitude restored property rights of ancient legislation that had been preserved in the conscience of the people, and introduced them to the new legal system. Ancient Georgian practice was well aware of the principles of servitude.

Whereas the Soviet Civil Code included pledge in its section on the law of obligations (as an obligatory legal means of securing claims), the Georgian Code treats pledge as a proprietary means of securing claims. Only the first Soviet Code correctly included pledge in the provisions on property law.

The first attempt to codify pledge comprehensively was initiated in 1994, when the Georgian Parliament adopted the law “On Mortgages”. Under this law pledge was regarded as a kind of rental and was directly defined. Although rather ineffective, this law represented some progress in that it enabled immovable property, including real estate, to be used to secure claims.

According to the new Code, movable objects and non-material property may become subject of pledge (Article 254).

The Civil Code includes a special chapter regulating mortgages which supplements the law "On Mortgages" and deals with mortgaging immovable property in general terms. Separate laws define specific types of mortgages; for instance, the law "On Agricultural Lands" regards agricultural real estate as a guarantee for loans.

The Public Register is established as the Code's last chapter of Property Law. It is not simply a means of registration, but is also needed in order to finalise transactions on property. Transparency of the Public Register, and the presumption of accuracy and integrity, are of utmost importance in fostering good civil legal relations.

The Book on Property Law does not include a separate chapter on land ownership, and the Code provides only general provisions. Specific laws can define specific fields, and the law "On Agricultural Lands" is the first such law that has been passed.

IV. B o o k T h r e e: "Law of Obligations"

This is the most extensive Book of the Code[8]. Although many traditional characteristics of old Georgian law were retained, various parts of this area also demanded approximation and harmonisation with the law of other countries. The Committee made use not only of the achievements of various developed countries, but also of models for a common law of obligations for the countries of continental Europe that has not yet been adopted. Comparing Georgia's Law of Obligations with the legislation of some specific countries, the influence of German, French and Dutch legislation is clearly evident.

It seems best to tackle this issue starting with a view of the general before discussing the specific parts of the Law of Obligations. The main characteristic of the General Part (Articles 316-477) is the shift of focus away from the notion of responsibility for impairment of performance towards the idea of fulfilment of original obligations. This part of the Code is based on the principle of contractual freedom. As the freedom of property is accepted within the limits of normal legal constraints, the same rule can also be applied in the case of freedom of contract. Thus contractual freedom remains the basic principle of the Code and its restrictions take the form of exemptions to the Code. Article 319 is an example of the protection of the essential rights of society and individual persons, stipulating that the validity of an agreement sometimes depends on the State's permission. Where a party enjoys a dominant market position, it is obliged (within the market concerned) to offer agreements and is not authorised to discriminate between contracting parties without providing conclusive argumentation of the reasons for doing so. A similar form of obligation may also apply to other contracting parties.

The general terms and conditions of contracts are completely new phenomena for Georgian legal practice with respect to obligatory legal relations. Their key characteristic is that they do not allow scope for negotiation between contracting parties concerning the terms and conditions: any party is

[8] Z. *Akhvlediani*, Law of Obligations, Tbilisi, 1998, see: On General Directions of the Reform of the Law of Obligations (Georgian) p. 205; *W. Ernst*, Fundamental Questions of the Reform of the Law of Obligations (German), Juristenzeitung 1994, No. 17, pp. 801-810.

obliged either to accept the proposed general clauses and to conclude an agreement, or to reject them and not to conclude an agreement. The section establishing the general terms and conditions of contract was based on German law. One year after entering into force of the new Code, experience has shown that the general terms and conditions of contracts are frequently used by contracting parties.

One of the manifestations of free will in contractual relations seems to be the concept of breach of contract, which ensures that the contract should not be an unbreakable bond between the parties and allows the parties to cancel the contract in case of breach of contract. According to the basic principle of breach of contract, the injured party should be able to recover its costs and associated damages from the guilty party.

As already mentioned, the Code considers the fulfilment of the contract to be of utmost importance. In this respect the Georgian Civil Code is in line with ancient traditions and also with European legislation, which considers fulfilment of a party's contractual duty to be the most basic responsibility; pecuniary compensation is of secondary importance.

A new concept concerning Georgia's contract law is that a delay in delivery caused by the recipient party is considered to be an impairment of performance rather than a breach of contract. Thus, the Georgian Civil Code, like the German Civil Code, regulates delays by recipient parties under the section on obligations, whereas the delays by delivering parties are regulated under the section on breach of obligations. Also concerning breach of contract, it is notable that the Code is strongly in line with the principles of classic European legislation (the principle of liability), but that at the same time the Civil Code's regulation of obligations considers that a moderate liability for the performance of the obligation is applicable. Generally, the means of allocating liability between risk and fault varies from one country to another.

The main change in the institute of liability is the shift towards the fulfilment of obligations. According to this concept, a creditor is not authorised to refer immediately to the liability based on the breach of contract. The debtor has the right to correct his failings in due course, i.e. to fulfil his side of the contract (Article 405).

The Code pays considerable attention to the impossibility of fulfilment as one of the pre-conditions for the release from liability. Even in this respect, the Code gives priority to fulfilment of the original obligation. In this context the Code stresses the importance of adjusting the contract in response to changed circumstances when necessary. Parties are obliged to adjust the contract to changed circumstances and only have the right to cancel the contract if they fail to agree on a satisfactory adjustment (Article 398).

The main characteristic of the idea of breach of contract is the preservation of the original obligation. Cancellation of the agreement and liability for the performance of the contract are considered to be "necessary evils".

The General Part of the Law of Obligations regulates both compensation for property and non-material damages. This applies not only to the law on torts, but to contractual relations. The new feature is the principle of moderate compensation for non-material damages, as in German law. Thus Article 413 of the Code provides for compensation according to the monetary value of non-material damages only in cases that are explicitly stipulated by the law, and only under fair and reasonable

conditions. As a result of this provision, a tendency to compensate reasonable moral damages is evident in current court practice, and a particularly important feature is that there are very few lawsuits of "vindictive" plaintiffs.

The Special Part of the Law of Obligations regulates traditional and new types for contract relations. To a certain extent the Special Part fills the gaps of the General Part. The right to impound objects, which is provided for in the section on “purchasing”, might serve as an example. Nearly all of the Special Part reflects efforts to approximate and harmonise Georgian law with European law. In particular the regulations on purchasing have already prevailed over a differentiated approach of other legal systems. The right to buy is also defined in this chapter, whereas the legislation of several countries deals with this issue under the chapter of Property Law.

The Code defines the legal relations of rent and lease in detail. It is interesting that there is a marked tendency of approximation of these rights towards property rights. This particularly refers to the lease of agricultural real property. The social significance of these relations is also underlined. Leasing and franchising are absolutely new phenomena in Georgia. The significance of these concepts for civil legal relations has already been documented despite the limited experience of market conditions. The regulation on contracts concerning tourism is designed to foster the settlement of the present chaotic situation in this field. Georgia is keen to become an important centre of tourism and consequently the rights and obligations in this field have to be stipulated. The Code also regulates transport and other traditional civil legal relations.

A separate kind of contract is the trust. This is not completely the same as the Anglo-American concept of trust, but the differences are relatively small. The Georgian Civil Code renounced the concepts of “operational management” and “full self-financing”; instead it pays attention to usufruct and trust, regulating the broker separately. The law “On Entrepreneurs” provides for a similar institute (the institute of a mercantile broker). The difference is that the regulations on the mercantile broker take into account the characteristics of entrepreneurial relations. In a market economy, special interest is given to the concept of deposit, for example a deposit in a warehouse. The Code provides for a separate regulation on this item, together with the general principles of deposit. The concept of insurance is also found in the Special Part. The insurance of liability is fairly new in our country. At the time of the abolition of the Soviet legal system little support for this concept existed. The first letter expressing support for insurance of liability was published in the early 1960s and I was one of its supporters. There is no doubt that it is outside the bounds of possibility for the Code to tackle all varieties of insurance. A number of other normative acts will be needed to define all these specific legal relations. Special attention was also given to banking services. The influence of Anglo-American legislation is noticeable in this field. A bank guarantee secures existing business relations and is given special attention by the Code. As already mentioned the Georgian Civil Code also regulates non-material property law. Property and obligation law respectively regulate these topics. An example of the latter are the obligations that stem from the issue of financial securities.

Another new feature of the Code is the regulation of statutory civil relations in a separate section under obligation law. One of the most important among these relations is the institute of unjust enrichment, which regulates all kinds of unjust enrichment including the legal consequences of cancelled transactions. Soviet civil legislation took a different approach in respect to restitution. It is no secret, that some of the post-communist countries stick to the old traditions.

Tortious obligations are regulated by the Code separately (Article 992-1016). The Code made a concerted effort to make a distinction between contractual and tortious claims. One new feature of the Code is the difference between contractual and tortious liability in respect to the age at which people become liable for damage that they cause. A completely new and essential addition to the law is the regulation of compensation for damages caused by things, animals, etc. It is worth mentioning that ancient Georgian legislation included a detailed regulation of a number of torts. The principles of compensation for damage related to buildings and other constructions has already been widely applied in legal court practice. A lawsuit is still in progress against *Coca-Cola* concerning compensation for damage caused by the collapse of advertising hoardings. Although this lawsuit is still not finished the judicial practice has already begun to develop the provisions of the Civil Code on daily basis.

The final part of the contract law defines liability for damages related to goods of low quality. This chapter fully reflects the harmonisation of legislation with international practice. In the future it may be necessary to adopt a specific law on this topic, but at this stage the above principles are being introduced into the practice of modern law quite slowly. The causation and realisation of damages seems to be so difficult to determine that even quite often a person suffering such damages is unable to assess the reason for the damages and their extend. Unfortunately, a substantial amount of goods are low quality even in Georgia, too. To date, nobody has borne responsibilities for any of the cases of death that have been related to goods of sub-standard quality.

We have only analysed some kinds of contractual relations included in the Special Part of the Civil Code, and it is obvious that the Code is not able to cover all types of contract. The validity of contracts that do not contradict the essence of the present Code is also ensured. The most important characteristic of the Special Part of the Code is that it is based on the principles of market economics.

V. B o o k F o u r: "Intellectual Property Law"

A special characteristic of Book Four is that it is entirely adapted from foreign laws. The greater part of this Book is dedicated to copyright law, which includes many legal relations previously unknown to Georgian law, such as the right to use the data of computer programs. The Commission considered it expedient to define copyright-related rights in great detail, e.g. the execution of these rights for commercial purposes. The Book pays particular attention to the protection of intellectual property, because the wide range of possibilities to reproduce intellectual property call for special mechanisms of protection.

On the other hand the Code contains only six Articles concerning industrial property (which is one of the kinds of intellectual property). Due to the specific nature of these relations it was considered expedient to regulate them using special legal acts.

VI. B o o k F i v e: "Family Law"

Family Law is the part of the Georgian Civil Code that is the least influenced by foreign legislation[9]. This is due to the fact that family law exists in an area where domestic legislation is dominant.

[9] *S. Chikvashvili*, Family Law, Tbilisi, 1998, p. 315.

Nevertheless the process of unifying laws is still detectable in some aspects of family law. The issue of adoption may be one example of this, as it is not regulated exclusively by national law, but has already become a subject that is of common concern to various law systems. The Code, as well as other normative laws concerning this issue, complies with this. Another particular feature of the Code is that it did not establish a family law that is based exclusively on the principles of Orthodoxy. The Code respects the traditions of various other religions (Islam, Judaism, etc.) that are present in Georgia - the ever-tolerant nature of Georgian people was expressed even in this regard. Under Book Five's provisions, civil law and not ecclesiastical law regulate family relations. The introduction of marriage contracts is completely new and provides husband and wife with wide opportunities to consider rights and obligations which are related to marriage but that are not regulated by the law. The marriage contract is not itemised; thus, in contrast to the Codes of some other countries, the Code avoids the creation of unenforceable laws on subjects such as aggression within families. I worked intensively on this part of the Code and was amazed that under the German BGB nearly all details of property relations between husband and wife are regulated by the law. Although we followed German legislation in respect to many topics, very few provisions concerning marriage contracts were introduced. At least to some degree this issue should be regulated by ethics and national traditions.

One other peculiarity of the family law is the non-prevalence of the common interests of a husband and wife over their individual interests. An optimum distinction between the individual interests and the family interests is made, with each individual permitted to be the independent subject of private relations. On the other hand the common interests also have an impact after the termination of a marriage by divorce, particularly regarding the obligation to pay alimonies. The Code provides for equal rights of husband and wife and excludes any possible discrimination on the basis of wealth, race or nationality, or any other reason. A significant problem arises in respect to the determination of paternity if an unmarried father denies paternity. According to the law, paternity may be determined in various ways; medical advice is the most likely means of determination, though the Code does not explicitly mention it.

National traditions and ethnic relations play an important role in Georgian family law. Life poses more rights and duties on participants in these relations than the Code provides for. Taking relations between parents and children as an example, the law does not oblige parents to support their child after reaching the age of majority, but in reality the younger generation stays under the guardianship of the family for far longer. History is also important: since ancient times Georgian family law was significantly influenced by Greek-Roman law, and we did our best to take this into account when drafting Georgian family law.

VII. B o o k S i x: "Inheritance Law"

The Code defines inheritance law in comprehensive detail[10]. Only 40 Articles of the Soviet Code regulated these rights, whereas the new Code includes 200 Articles. One feature of this Code is the

[10] *Z. Akhvlediani*, Georgian Succession Law, Tbilisi, 1997, p. 105.

account taken of traditional Georgian inheritance law whilst also establishing new terminology. Whereas in the past intestate inheritance dominated and the scope for inheritance was restricted by Soviet law, the new Code increases the options to establish testamentary inheritance according to the principle of freedom of last will. In contrast to the Soviet law, which only recognised last will when certified by a notary, the Code recognises various types. I do not intend to further enlarge on inheritance law, as this subject has already been covered by various papers. I shall conclude merely by noting that, as with family law, national traditions had a strong impact on the design of the law on inheritance.

ROLF KNIEPER*

LEGISLATIVE DRAFTSMANSHIP**

I. Introductory Statement

All newly independent countries, which are on the way to become market economies, democracies and ruled by the law, understand economic reforms in terms of legal reform. This has resulted in an intensive development of all different kinds of legislative acts, such as constitutions, laws, decrees and legal decisions. Objectively speaking, the numerous legal acts adopted in the first few years after the beginning of the reform process did not always achieve the intended purpose and did not always mirror the latest level of methods of codification, frequently contradicting themselves and other legal acts; consequently they did not lead to practical results. Complaints that the new legislation is not implemented properly are increasingly common.

Such progress is not without danger as the confidence of the people in the new state structure may be shaken after the destruction of the old state structure. The resulting lack of direction might endanger the stability that is necessary for successful long-term economic development. Like numerous other issues, the approach to legislation is very important and a matter of great interest during this process. This is of particular concern to “everyday” legislation and of less significance to legal fields related to capital-intensive foreign investments, which are relatively well developed.

II. Restraint and Freedom of the Law-maker

Since its independence Georgia has declared a clear commitment – affirmed in the Constitution since 1995 - to democracy (Art. 1), market economy (Art. 30) and the rule of law (Preamble), and has made serious efforts to implement these objectives in social reality.

Thus, the basic decisions concerning the orientation of legislation have been made, and have been laid down with an agreeable (and compared to other constitutions rare) degree of clarity. It is also good to see that these basic decisions are legally binding on both the people and the State (Art. 7). As necessary for open societies and democracies, in which the pursue of particular interests and the settlement of related disputes is legitimate and legal, the Constitution stipulates the rule of law and in doing so abolishes a system that was characterised to a large extent by party-related legal measures and particular political decisions.

At the same time, guided by the principle of equality before the law, the Constitution places under the authority of law not only citizens and private persons but the State and its different bodies as well. The "hierarchy of legal acts" is based on the basic principles of the Constitution and establishes the classification of laws, decrees and particular decisions that corresponds to the classical system of legal acts in accordance with the democratic theory of law. At the same time, the Constitution confirms unambiguously the authority of the legislature over the executive with regard to legislation, as well as to presidential vetoes (Art. 68). With regard to the categorisation of laws a further

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hierarchical classification can be observed, e.g. according to organic laws as well as to other laws, as it exists in other constitutions of the east and the west as well. Experience shows, that, apart from the different procedures required to pass the laws, such distinctions (Art. 66) have little substantial meaning and simply complicate the process of legislation; but such distinctions can by no means establish a consistency comparable to the Constitution. Thus all ordinary laws have the same status, even if different requirements in respect to the voting procedure are fixed.

This constitutional background has direct consequences for the law-maker: no law can give itself a superior rank or predetermine the contents of future law. This is in contrast to Art. 3 of the Russian Civil Code and the Model Civil Law of CIS which states that the acts of civil law to be adopted in future should not contradict the “mother law”. Such an attempt to restrict the future law-maker contradicts the clear text of the Georgian Constitution and probably other constitutional principles as well. Consequently, it is unnecessary, on the one hand, for ordinary laws to repeatedly state that they fall within the scope of the constitution or, on the other hand, issue instructions addressed to the law-maker with respect to the adoption of future laws: the first is evident, the second is not binding. Referring to parts of the Constitution might imply that other parts of the Constitution are not applicable, which would make the law unconstitutional. It is also demeaning to the authority and dignity of the Constitution to be repeated partly in ordinary laws, such as in Civil Codes that list fundamental rights or in many laws that "recognise" international agreements. These matters are for justified reasons already regulated by the Constitution (Art. 6), and accordingly any repetition must be considered redundant. However this is not to suggest that law-makers should avoid attempting to establish a system that is consistent, free of contradictions and coherent. That is another aspect of the problem, which is discussed below.

The Constitution assigns the difficult task of legislative draftsmanship to the Parliament, which has to consider both freedom and constraints. The constraints are as follows:

1. The Constitution itself is the highest ranking and most important restriction of freedom of legislation: laws must not be in open or concealed contradiction with it. Thus, any law that establishes one particular religion as the state religion would contradict Article 9 and would have to be considered as a violation of the Constitution, and any regulation that forced only women to wear a yashmak must be considered as un-constitutional (Art. 14).

It is more difficult to find concealed examples of legislative infringements of the principle of priority of the Constitution. This will be a task of the Constitutional Court in the future (Art. 88). As examples we can discuss the following: it is commonly accepted that not only budgetary matters might be regulated by the tax law but also economic and political issues. If a tax law stipulates 100 % or nearly 100 % profit taxation, this would be a real violation of the Constitution, because it would in effect exclude market-oriented activity and the use of private property (Art. 30 and Art. 21). I believe that this could also occur if a law excluded entirely or unreasonably restricted the liability of a proprietor, regardless of whether the proprietor were the State or another legal person.

2. A further constraint on the law-maker are the rules of physical and biological facts of the world. I quote some examples taken from books on legislative techniques namely *V. C. Crabbe*, “Legislative Drafting”, London, 1993 and *P. Noll*, Gesetzgebungslehre, Hamburg, 1973. They justifiably state that it is impossible to define by a law that coal is gold (this would be alchemy) or to change the seasons of the year and times of the day by law. It is also impossible to stipulate by law that men and women are the same, or that a dog is the same as a cat. According to the law it is only

possible to connect physical and biological differences normatively. This could be expressed (as was done in the Georgian Constitution) by stipulating that men and women have equal rights or by using a generic legal term that bridges the differences, for instance the term "domestic animals" that extends to dogs and cats, or the term "party of the agreement" that equally extends to investors, consumers and legal or physical entities. Finally, different seasons or times of the day might be linked by equal or different characteristics as was done in the provisions on the prohibition of work during night-time.

3. Although the restrictions mentioned in the first and the second paragraphs are more or less understandable and clear, there are others that are less precise or unambiguous (especially in not closely related issues) but which nevertheless exist. Such restrictions are described as: social reality, structural contradictions, un-enforceability, and logical relationship. They are less serious than an infringement of the Constitution and do not intend to distort the reality of natural science. However they deviate from social and individual interests, mentalities and structures to such an extent that they do not have a chance of being implemented and are therefore completely deniable. A similar consequence might occur if rights and duties are established but at the same time legal institutions are not constituted to ensure their observance. A number of such laws that existed during the first years of transition are very dangerous because they tend to undermine awareness of the law and to evoke cynicism and legal nihilism. This category includes certainly some of the post-communist laws on privatisation as well as purely moral appeals for people to behave in a socially responsible way, to omit monopolistic activities or to observe the rationality of market economics; such appeals exist in many laws of the first generation. For reasons that concern the structure of the legal concept of liability, it seems unacceptable if the State denies liability for enterprises that are in effect state-owned. It is similarly unacceptable if other participants in the market are denied the opportunity to enforce their contractual, tortious or other claims against the State.

4. Although they are difficult to define, there are also constraints on the law-maker that are imposed by the principles of the rule of law. One case is explicitly mentioned in Art. 68, par. 6, and thus exempts it of lacking accuracy: laws and other legal acts can only enter into force when they become available to the public.

Related to this matter is the requirement for the law-maker to issue laws that are understandable and precisely formulated, so that the legal consequences are predictable for the persons to whom the law is addressed. This refers to complex problems, which may be extremely difficult to understand. This extends from linguistic recognition of the necessity of inaccuracy of linguistic communication and formulation of terms to the definition of the addressee: for instance, is the law addressed to the layman or is it acceptable for him in cases of difficult circumstances (and thus complicated laws) to have to make use of a professional-legal assistant ? In order to prove that this is an old problem that is still not entirely and satisfying solved, we refer to a quotation from the treatise "Utopia" of *Thomas Morus* (1516), in which the judicial system at that time is described as follows: "They have very few laws … above all they criticise other nations for not being able to get along without countless laws and interpretations. Further they refuse advocates, because they conduct their cases in a cunning manner and interpret them in a wily way."

It is very difficult to find a systematic solution to this problem. *Morus* assumes a moral people without significant clashes of interest. Such a people probably would not need a complex distribution of risks. The Soviet law was also less complicated than "capitalist" law because it denied the existence of

antagonistic clashes of interests. However, it was supplemented less by morality than by appeals to (socialist) morality which rarely had any real meaning. In context of taxlaws, fiscal, industrial-political, social and economical aspects do clash; corporate law interests of shareholders, creditors, debtors, employees, and the public are to be balanced. The differences must be resolved; not according to the principles of morality, but in a political compromise that is expressed by the law.

III. Facilitation by Experience: History of Law, Comparison of Law, Study on Legal Facts

The above statement of *Thomas Morus* shows that the problems of legislative draftsmanship are old. In 1748 *Montesqieu* introduced seven principles:

- The style of a law should be simple and precise: magnificent and rhetorical sentences only distract attention.

- In order to minimise the possibility for individual interpretation, the terms used should be as far as possible absolute and not relative.

- Laws should stick to reality, be up-to-date, and avoid using hypothetical and metaphoric expressions.

- Laws should not be too complex as they are made for people with average intelligence; they should not be an exercise in logic but correspond to the simple flow of thoughts of an average citizen.

- The essentials of a law should not be overloaded with an excessive number of exceptions, restrictions and amendments.

- Laws should not include any argumentation. It is dangerous to quote exact reasons for a particular law, because they might open the door to controversy.

- Above all, laws should be carefully considered and be useful in practice. They should not offend the principle of common-sense and the feeling of justice, nor the nature of things. This is because weak, useless and unjust laws may discredit the entire legislative system and can undermine the system of legislation and the authority of a State.

Similar arguments are advocated by *Bodin*, who added that although it depends upon the law-maker to amend laws according to his political conception, he should avoid repeated changes as this would undermine law with regard to the law's capacity to be understood, implemented and trusted.

According to *Crabbe* every editor of law should consider the following questions: how should a specific law operate; what should be regulated by means of this law; when and under which conditions should it operate; where or in what kind of circumstances should it operate; who is considered to be the addressee of particular rights; why is the law to be adopted and what are the political motivations behind it.

In particular the old statements might sometimes sound naïve in view of the complexity of modern social relations. Nevertheless they often express concerns that are still relevant today and can often be related to contemporary issues of great importance. We could add the following considerations:

1. Experience shows that legal rules that are having effect in future are not able to completely foresee future conditions or encompass every possible occasion. Consequently, interpretation is a necessary aspect of the implementation of legislation. The prohibition of the interpretation of law, which was to be applied in France and Prussia and was repeated by some socialist and post-socialist legal systems, is not realistic in practice. Interpretation of law has proved effective in actual cases and thus, being bound to constitution and ordinary law, enables the law to develop and to evolve, which might be consolidated from time to time by the adoption of new laws. Thus in respect to the rule of law it is generally a mistake to assign responsibility for updating of law by interpretation to special governing bodies, such as plenary sessions at supreme courts or as governmental commissions. All such institutions which establish general rules, are performing a task which actually should be a task of the legislature.

2. Experience shows that it is useful to classify laws roughly into different categories. One way that this may be done is to consider whether laws are substantive or procedural; a distinction may also be made between the large fields of administrative law and public law on the one hand and private law on the other hand. This approach helps to promote the clearness of law and facilitates the application of law. This is not to advocate the idea of methodological puritanism. Many laws, for instance the law on competition and the laws on patents and other law of intellectual property, contain on the one hand procedural norms and on the other hand also substantive provisions, as well as both public and private law. The classification and approach should be understood as an approximation.

Another approach, which in the 1920s played an important role in Germany and afterwards in the Soviet Union (and even today is of some importance in countries such as Ukraine) must be rejected. This suggests that all distinctions should be eliminated in favour of complex laws, which consciously mix public and private law, and substantive and procedural law. The advocates of this approach support a strict "mirror theory" of law towards the society, and believe that a so-called "mixed economy" needs a "mixed law". Consequently, the supporters of this approach propose a complex economic code as distinct from a commercial code. They do not consider that there are clear distinctions between the sphere of market activities and public, sovereign and State activities. In particular the idea of a code for business law ignores the fact that the State can participate in the economy, both as an authority and as an entrepreneur with differing respective goals. This leads to dangerous contradictions, confusions, and misunderstandings; this opens the door to corruption and the waste of public property as well as to systematic discrimination against private participants on the market. Fortunately the Georgian Civil Code has emphatically rejected this approach (Art. 8 and Art. 24).

3. Despite the principle of parliamentary freedom and the need to adapt the law to changing social circumstances, the law-maker should try to avoid contradictions in law and ensure the consistency of the whole regulatory system. All experts on legislative draftsmanship agree upon its high value.

The guiding principle in this context is that “the law-maker knows the law”: new legislation should be adopted in accordance with the existing law. Even in complex societies this is a difficult task which is

not always observed, even in societies with long democratic traditions. Nevertheless, it should be observed as far as possible.

Before planning a new regulation, the law-maker has to consider which legal acts that have already been adopted apply to the issue, in which ways he intends to change the already existing legislation, and what the consequences are for different aspects of the new regulation (in particular what costs are imposed on public budgets and private legal subjects). Thus the new law should try to be coherent with the existing legal system. This requirement is violated by the permanent drafting of new laws on identical topics, as for instance, happens in the field of competition law. In this context the habit of passing comprehensive laws and supplementing them with numerous specific laws should also be reconsidered. For example, contract law is not always defined by many Civil Codes, but also by laws on leasing, travel contracts, franchising and other contracts. This creates a legal situation that is unintelligible and depends on numerous references. Hopefully the Civil Code's attempt at a comprehensive codification of private contract law will be accepted by the Georgian law-maker himself, as well as by foreign experts who frequently try to "sell" their specific subjects.

If a new law contradicts an older law of equal standing the law-giver must be guided by certain general principles. He must ensure that the particular new law repeals older law and that the law with the more specific provisions with respect to a subject prevails over law with the more general provisions.

Moreover, the requirements of the rule of law are met if the social issues to be regulated are completely and comprehensively tackled by a single law rather than by various laws. It is only admissible to delegate the adoption of technical details to the level of decree if explicit indication is made in the law itself.

A different legal approach, which is particularly characteristic of the Soviet law-maker, has continued to a large extent in modern, post-socialist legislation; for example this is evident in the Model Civil Code of CIS. The approach sets up general principles, which afterwards are put more precisely and further elaborated by a number of special laws. This has to be explained by a tradition of regulation by single-case-decisions, whose essential characteristics were orientated towards economic planning and not towards the market. Consequently laws that are aimed at having effect in the future were only able to give vague indications, and ultimately it was not generally possible to regulate conflicts of interests. This is not compatible with the principles of the rule of law, such as predictability and legal transparency, and can lead not only to practical difficulties and inconsistencies but also to a basic problem if (for instance) the Model Civil Code contains provisions concerning legal entities, in respect to bankruptcy securities etc. and the elaboration of these definitions is conferred with a laconic phrase to specific laws. It is good that the Georgian Civil Code has broken definitely with this Soviet tradition.

The problems of legal ambiguity and vagueness are closely related to this issue. In this respect the German Federal Constitutional Court has pointed out that: "undoubtedly it is not possible to avoid in a legal regulation all kinds of vagueness and uncertainties from the beginning. But it must be demanded that the law-maker completely clarifies at least the primary conception, i.e. the purpose of his legislative will." If this is not done the Constitution might be violated. Similar considerations seem to apply to the Georgian Constitution. It is evident that the law-maker uses sometimes unclear, general and meaningless formulations, hoping that they will be clarified by court practice at a later stage because in the present situation a completely clear solution to the problem is impossible because the balance of power in the parliament is unfavourable. This results in laws with a purely

symbolic character or in laws which are marked by compromise. Such laws often have a dilatory or ineffective impact, and sometimes serve no purpose other than to mimic the work of the law-maker.

Finally it contributes to the consistency of the legal system if the law-maker makes up his mind about the short-, medium- and long-term goals of the legislation. On the one hand these might be declared in statements of the government, which are not considered as legal acts; on the other hand it is helpful to consider general principles. Such principles can be found in the hierarchy of the legal system, in the relationship of general to specific provisions, or drawn from experience. In this context a lot went wrong during the recent history of legislation in many transitional societies. In the absence of a tradition of legislative draftsmanship and co-operation between the executive and legislative branches of power, legal acts have been subject to the advice of legal experts and donor organisations with different cultural backgrounds and not always very high professional standards. The resultant legal acts were adopted with the aim of accelerating the transition to a market economy and democracy as quickly as possible; as a result they did not always have significant legislative contents. Most can only be characterised as pure political declarations, which call for the introduction of a market economy, the privatisation of state enterprises or the encouragement of private investments.

Many such laws had little or no practical meaning. Consumer protection and competition laws were passed but the law provided no procedure for implementing it. A law on joint-ventures did exist, but there was no general corporate law. Laws on bankruptcy were adopted, but there was no general civil procedural law. It is plain that legal development should have been the other way round. In Georgia the process of consolidation is evident but not yet complete. Additionally “privatisation” of economic activities has been carried out without the introduction of necessary state controls, for instance in banking and insurance sectors. In the future the legislature should pay attention to the introduction of a framework of general provisions prior to the introduction of special provisions, and to the adoption of texts on a higher hierarchical level prior to texts on hierarchical lower level.

IV. The Process of Legislation

Laws must address real social problems and should offer solutions that are acceptable to the majority of the addressees and have a real chance for realisation.

For this purpose legal institutions must be established to administer the law. General proposals that are frequently made with respect to the establishment of competent authorities are inadequate in this respect.

Even if the future is uncertain, the authorities concerned with formulating a law should not shrink from issuing predictions of its implications. Services should be established as well which are able to issue an ex post evaluation, i.e. to observe the fate of the law and its practical consequences for social life after adoption. Just to mention two examples, excessively high tax rates according to the law can decrease tax revenues because the risk of evasion seems to be acceptable or excessive requirements concerning the formal written procedure lead to the formal invalidity of many contracts, thus leading to socially undesired mechanisms for conflict-settlement.

In order to comprehend the consequences, it is important to consider whether the problem to be regulated is already addressed in some way and whether the new legislation is really necessary. As

already mentioned, a premium should be placed on stability and the continuity of existent positive legislation; sometimes it might be better to leave imperfect legislation in force and to develop it by the interpretation of the judges, than frequently adopt new laws that many people would have little faith of remaining in place for long.

Another problem that should be taken into consideration is the cost of implementing legislation. It is one thing to adopt a law on mortgages and another to implement it. For this purpose a land-register system is needed, an adequate public register, which extends to the whole country and demands well-trained public officers. The mere production on laws on mortgages in several transitional countries has until now led to nothing more than a waste of paper.

In order to test the acceptability of a planned law, it is advisable from a certain stage of preparation on to organise consultative public hearings. For this purpose drafts of laws should be widely distributed and afterwards the concerned addressees should be given the opportunity to comment on them. This might be done either in written form or in hearings that have to be organised by parliamentary committees. Such hearings should not be confused with the ill-reputed idea of lobbying.

A further method which has been approved as appropriate for dealing with complex and politically-controversial matters is the invitation of a public audience with special knowledge to provide alternative draft laws to be compared with the government's drafts. This way the real political confrontations and perspectives can be tested, which otherwise could easily be lost in political rhetoric.

A further means of facilitating the application of new laws in unstable transitional periods is to give the law a time limitation. This might happen in two ways. On the one hand a testing period might be introduced, committing the law-maker to re-evaluate the law after a certain period and under certain circumstances to adjust it to unpredicted circumstances and developments in order to enhance its implementation. Another more radical method is the introduction of a time limitation in advance as in Germany concerning the increase of taxes to assist the reconstruction of the former GDR.

Prior to the adoption of every law, the law-maker should think about the consequences which relate to acceptability of its impact and associated costs. In respect of the art of draftsmanship, *Pareto's* statement about science seems appropriate: "all sciences make progresses when the people discuss the results instead of quarrelling about the principles."

V. Contents of the Laws, technical Rules

Every law should provide the addressees with a completely clear and understandable presentation of the topic concerned, and in particular should state what the duties, rights and tasks are. The law should address a genuine problem and should look for the means and solutions that are as effective as possible, have the least possible side-effects, and bring objectives and means into an economically reasonable relationship. An example might be the need to ensure that economic development is environmentally sustainable. Demands to cease the destruction of the tropical rainforest or to renounce off-shore oil exploitation, because such activities might damage the environment, do not offer a reasonable balance between means and purpose.

The above statements show that it does not seem sensible to include political declarations and intentions in legislation, as has frequently occurred in the laws of transitional countries. Such laws rarely have any more impact than the political intentions themselves. It appears more reasonable to stipulate legal consequences as precisely as possible and to connect them to the facts. Law should basically be a conditional program which says that this or another legal consequence will follow from this or another set of conditions. This does not mean that symbolic laws, laws based on compromises and laws regulating only one issue should be excluded entirely, but it should be borne in mind that they have little legislative substance.

On the subject of "conditional programs", it is advisable that factually connected issues should be settled in close proximity to one another. A question and an answer, a statement of facts and a legal consequence should be as near to one another as possible.

From our experience we can state that a number of technical rules facilitate to achieve these objectives. The following section includes some that have been suggested by various legislative practitioners:

1. Before drafting the law the team of editors should determine the logic of the **plan** related to the issue to be regulated, and afterwards develop the legal structure of a law. In respect to larger legal projects it is advisable to discuss the possibilities of including a part devoted to general issues in a law, which significantly is able to contribute to its clarity and the shortening of laws. Such plans should pay attention to the internal consistency as well as to consistency with other laws.

2. a. In respect to **divisions** it is advisable to make a distinction between:

- rights and duties of private persons;
- rights and duties of the State administration/State;
- organisation of the State administration if necessary (e.g. patent office);
- eventual penal provisions;
- eventual tax provisions;
- transitional provisions including the date of the enactment of a law. For comprehensive laws it is advisable to separate the entry into force from the publication of a laws, in order to enable the addressees to become acquainted with the new regulations.

b. Law-makers should get used to applying a rough structuring to comprehensive laws, e.g. according to book, title, chapter, section, part and finally to article. In this respect the articles in the law should be numbered continuously.

c. It is strongly recommended to give every article a title. This title takes part in the legal power of the law, if regulated explicitly, or is just introduced to facilitate work.

d. In respect of large sections it became common approach to observe the following internal structures:

- from the general to the specific;
- from the simple to the complex;
- from the important to the less important;
- from the rule to the exception;

- from the duty to the sanctions with regard to a violation of duties.

3. Following the method favoured by American contract lawyers, it has become common practice to introduce laws with a section on definitions. This is by no means a requirement; it is not at all advisable to attempt to introduce a section with definitions if there is not an obvious need for it. However such a section may be required when the law often repeats terms that have a special meaning. It is misguided to suppose that it is possible to increase the clearness by defining abstract terms because very often the descriptive characteristics given in the definitions have abstract meanings themselves; this is a problem of linguistic communication in general. It is much more important to ensure that a legal term always has the same meaning and that differing terms are not given to the same concept. An example of poor legislative practice is the muddled and interchangeable use of the terms “citizen” and “natural person” in civil codes.

According to prominent practitioners of legislation definitions should be used only to:

- indicate that a word is used to mean something other than its normal meaning;
- avoid unnecessary repetitions;
- indicate the use of a new and unusual word, such as a Latin technical term.

Furthermore it is strongly recommended that:

- the definition should never contain rules or statements concerning the application of the law;
- the definition should never introduce an artificial or archaic meaning of a word or expression;
- the once applied definition is kept throughout the entire law;
- different expressions or words are never used to express one and the same matter in the same law.

The term “labour” provides interesting examples of both good use and misuse of definitions. On the one hand, the “Clayton Act” of the United States from 1907 defined that labour is not a commodity: this carried the socially-important implication that labour unions should not be effected by cartel prohibition and consequently the definition was very much required. On the other hand, if for general humanitarian reasons a solemn normative statement is made that labour is not a commodity, working people are not assisted in practical terms and such a statement can even be counter-productive in the sense that it may make the application of regulations on social protection more difficult.

4. **References** are an additional tool of legislative draftsmanship. Again they can become necessary and helpful in extensive and complex legislative projects, but at the same time they can become absurd. The following rules should be considered:

a. If a law is structured according to the basic principle of sub-division into general and special parts, it is absurd for the general parts to refer to the special parts. The essence of a general part is to establish the provisions that are generally applicable before the sections that deal with specific issues.

b. According to considerations related to the principles of the rule of law and respect towards parliamentary freedom, it is completely inappropriate to refer to future legislation and even to fix the rough content of future laws. The future law-maker knows best what his task should be.

c. Only in exceptional cases should be made reference to another law that has already entered into force, because laws usually regulate a specific field comprehensively and therefore have another purpose than the law referred to; moreover the law is extremely difficult to apply if it is necessary to jump from one law to another.

d. If a reference seems to be unavoidable, it is strongly recommended for practical reasons to indicate not only the article or the number of the laws but also to give a short summary of the provision that is referred to.

5. **Imaginative constructions** can be a means of technical assistance to keep far spread practices as perceptions during periods of fundamental changes of legislation or to trigger during difficult circumstances automatically the legal consequences that are related to the actions of one party. An example of one form of application, might be a provision in the law of an oil-producing country in which gold has been detected. In order to bridge over the specific lack of legislation on gold, the provision could rule that gold in the context of petroleum law should be considered as oil. An example of a second use of imaginative construction might be where a permission requires a governmental activity. In order to provide the licensing authority concerned with an incentive for speedy administration and to prevent corruption, the law might state that after a certain period, in case of silence or inactivity of the state authority a license should automatically be considered to have been awarded. This principle could be applied also for private activity and for private declarations of will.

6. *Crabbe's* book on "Legislative Drafting" dedicates not less than 28 pages to the selection of words and another 20 pages to punctuation. It insists that such words as: "mentioned", "the same", "above said", "whatsoever", "wherever" and all unnecessary decorating adjectives should be avoided. He insists on the use of short words with commonly-used meanings, which always express one and the same thing; that laws should be written in present tense and without complex literary constructions, and that symbolical expressions should be avoided. He shows that the words "and" and "or" have opposite meanings and also that punctuation has a regulating function; its wrong application can reverse the sense of a phrase. He quotes *John Locke* with the observation that language can be a magnificent means to bring people together, but might also separate them.

VI. Amendments, Revisions, Corrections

Legislation is a continuous process that should keep up with social change. Consequently, amendments of laws are unavoidable but should be commenced with greater caution than is the case, especially in transitional societies. The frequent amendments of law in transitional countries may also reflect lack of confidence in the development of law through interpretation by judges.

Above all it is necessary to provide the persons applying law and the addressees of law with an entire new text of the law, if amendments become inevitable. In practical terms it is intolerable and a source of permanent confusion if the documentation of a law that has been amended still circulates in a crudely altered version with revisions added sporadically glued or pencilled in by people who are seeking for systematic information. Thus it is necessary to elaborate a revised version of the entire text of the law: for this purpose digests based on unbound sheets or computer versions could be used.

If amendments are carried out or laws on an identical issue are adopted, it is necessary to indicate as precisely as possible at the end of the new law which provisions or which laws the new law repeals. The frequently used provision, that older laws that contradict the present law are invalid, is correct; however, in practice this provision tends to make application of the law very difficult. Instead of requiring each individual concerned to carry out the task on his own behalf, parliament itself should have a clear idea and knowledge and fix it in the law. Of course it is ultimately possible to use a general clause to declare that other laws that could not be found are obsolete.

In this context a parliamentary, or maybe even a private, publishing service should be instructed to search digests for obsolete, no-longer-used, revoked or other laws and to correct them accordingly.

With respect to extensive reform projects it is strongly recommended to establish a commission for law reform, either on an ad-hoc basis or as a permanent institution. In such a commission the different state powers and also, under certain circumstances, social organisations should be represented.

TENGIZ LILUASHVILI*

BANKRUPTCY PROCEEDINGS ACCORDING TO THE NEW LEGISLATION OF GEORGIA**

Contents:

On June 25, 1996, the Parliament of Georgia adopted the law "On Bankruptcy Proceedings", which came into force on January 1, 1997. However, only the adoption of this law is an insufficient step because in practice no law, even the most detailed, has any real impact unless it is properly implemented. The application and implementation of a law are two factors ensuring its efficiency. In addition, the present generation of judges in Georgia (and not only the judges) is unfamiliar with bankruptcy legislation for understandable reasons. Consequently there is concern that the new law "On Bankruptcy Proceedings" will not be applied and will continue to exist only on paper. Court practice seems to confirm this concern: few of the bankruptcy lawsuits that have been brought before courts have been carried out in conformity with the law. Therefore specialised seminars, conducted by the Training Centre of Justice of Georgia, are specially designed to avoid such failures. Foreign experts (professors, judges, trustees in bankruptcy, etc.), along with Georgian lawyers, participate in these seminars, more of which will be held, especially for those judges who are to be appointed (after passing examinations that are in progress now) and who will be assigned to conduct bankruptcy court cases.

In this essay, we will briefly discuss issues that, in our view, will make the reader aware of the key objectives and main goals of the Georgian law "On Bankruptcy Proceedings".

1. The Objective of Bankruptcy Proceedings

Every law is adopted for a particular purpose. The purpose of Georgia's law "On Bankruptcy Proceedings" is stipulated in its first Article, which states that "the objective of the law "On Bankruptcy Proceedings" is to resolve the economic and financial difficulties of an insolvent debtor by means of judicial reorganisation or judicial liquidation".
The resolution of economic and financial difficulties related to bankruptcy may be carried out in two different ways: by reorganisation, or by liquidation. However, the law prohibits the liquidation of an

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enterprise (legal entity) unless the court carries out a thorough examination of all the possible ways of reorganisation. If the examination comes to the conclusion that it is impossible to solve economic and financial problems of the insolvent debtor through reorganisation, the court is authorised to liquidate it.

The Georgian law "On Bankruptcy Proceedings" provides for measures to avoid delays to the liquidation of an insolvent debtor that might result from unjustified and unrealistic reorganisations. This means that the court must examine every possible form of reorganisation in order to evaluate how realistic the options are and whether they are able to improve the financial situation of an insolvent debtor.

2. Types of Reorganisation

The law "On Bankruptcy Proceedings" distinguishes between judicial reorganisation and extra-judicial reorganisation.

The extra-judicial reorganisation is regulated by Article 10 of the law, according to which the court, on the basis of a debtor's application or by its own initiative, may require from a debtor the submission of a plan for reorganisation. If a debtor submits the plan of reorganisation to the court within the time limit set by the court, the latter may postpone the start of proceedings for a maximum of three months in order to allow the debtor to prepare the extra-judicial reorganisation. The law provides for the following requirements for the conduction of an extra-judicial reorganisation:

- the debtor shall name a guarantor in the plan of reorganisation;
- the guarantor himself shall apply for the postponement of the bankruptcy proceedings;
- before the end of the period of the postponement of the bankruptcy proceedings, the debtor shall provide the court with the reorganisation agreement or the agreements on reorganisation concluded with all creditors.

If all these requirements are met, proceedings will be adjourned (or, to be more precise, proceedings will not begin). However if any of the requirements are not met, bankruptcy proceedings must commence.

The other type of reorganisation is judicial reorganisation, in other words a composition procedure might be proposed. The application for a composition procedure may be filed either by the insolvent debtor, the bankruptcy creditor, a meeting of creditors, any partner or shareholder or by the trustee in bankruptcy. The trustee in bankruptcy should propose the terms of the composition procedure, though this may also be done by the court.

The law defines how the terms of a composition procedure should be proposed. In particular, the proposed terms should indicate how the demands of the creditors should be addressed. At least two thirds of the demands of secured and privileged creditors should be satisfied, and all creditors of the same category should receive equal treatment. In addition, the proposal may suggest to maintain the activities of an enterprise by the insolvent debtor with or without implementing reorganisational measures; it might also suggest the transfer of an enterprise to a third party in order to enable the enterprise to survive. The proposal must be approved by simple majority of votes of both

** Translation from Georgian language by *GEPLAC*.

secured/privileged and non-privileged groups of creditors. The creditors, voting in favour of the proposal shall consolidate at least two thirds of the total demands of the secured and the privileged creditors and consolidate at least three quarters of the demands in the non-privileged group. The composition proposal should be approved by a court decision, and the approved and enacted composition agreement is applicable to creditors that have not participated in the voting or have voted against the proposal.

3. Subjects of Bankruptcy

The law "On Bankruptcy Proceedings" clearly defines the subjects against which the bankruptcy proceedings should be conducted. For example, according to Article 2 of the law, the rules on bankruptcy proceedings are applicable in cases of insolvent natural persons or legal entities established under private law.

Consequently, bankruptcy proceedings against legal entities established under public law are inadmissible. The issue of who is considered as a legal entity of private or public law is defined by Article 1509 of the new Civil Code of Georgia. Legal entities under private law are:

a) associations, b) foundations, c) joint liability companies, d) limited partnerships, e) limited liability companies, f) joint stock companies, g) co-operatives and h) state enterprises.

Bankruptcy proceedings can be filed against any of these. According to the same article of the Civil Code, legal entities under public law are:

a) the state, b) self-governments, c) legal entities established by the state on the basis of specific legal acts, other than the organisational types defined in the Civil Code and the law "On Entrepreneurs", d) state organisations or state foundations not established in compliance with the Civil Code or the law "On Entrepreneurs", e) non-governmental organisations established under specific legal acts in order to pursue objectives of public interest (political parties, religious associations, etc.).

These legal entities are not subject to bankruptcy proceedings.

4. Reasons for Opening of Bankruptcy Proceedings

The law "On Bankruptcy Proceedings" clearly and comprehensively defines the conditions under which bankruptcy proceedings may be started. These are:

- insolvency of a natural person or a legal entity under private law and
- indebtedness of a legal entity.

According to the law "On Bankruptcy Proceedings" insolvency is considered to be the incapacity to fulfil financial obligations (the debtor is unable to pay off his debts), which is an objective condition, as well as the cessation of payments by the debtor which is a subjective condition. The point is that debtors sometimes for some reason cease to pay their debts even if actually capable of doing so. Cessation of payments by a debtor is the basis for the presumption of insolvency. Therefore, if the

creditor proves that a debtor ceased to pay off debts, the court has to consider insolvency of a debtor as proven.

The other reason for opening bankruptcy proceedings is indebtedness of a legal entity, i.e. where the debtor's property (assets) does not cover his obligations (liabilities). This is to be determined by judicial evaluation of debtor's assets and liabilities.

5. The Bankrupt's Property and its Definition

In order to commence bankruptcy proceedings the exact size of the bankrupt's property (the quantity and value of the assets owned by the insolvent debtor) needs to be defined. The bankrupt's property is defined as the total property of an insolvent debtor which he owns at the point when bankruptcy proceedings begin. This includes property in Georgia and abroad, excluding those things that cannot be used as a means of payment and consequently are not subject to enforcement.

In order to define the bankrupt's property, the court shall first request the debtor to compile and present a comprehensive list of his assets indicating the estimated value of each item. If necessary the court may appoint an expert to examine the accuracy of the estimation of the values. In addition, the court may, on its own initiative, check the completeness and accuracy of the list submitted by the debtor. In this respect, the trustee in bankruptcy is of great importance: immediately after appointment he must draw up an inventory of the assets and a balance sheet, and submit both documents to the court.

Together with the complete list of assets, a debtor must submit the materials documenting the accuracy and completeness of the list. One of the main guarantees of the accuracy and completeness of the list of debtor's assets is criminal responsibility for any perjury committed by debtors, whether natural persons or managers acting on behalf of legal entities.

An insolvent debtor is also requested to submit to the court the list of debtors, indicating existing claims, names and addresses of the debtors. The insolvent debtor shall also indicate the assets of persons liable to him in the list which shall similarly include the amount of each claim and the particular form of commercial activity that this claim is derived from (loan, sales, rent, lease, etc.).

6. The Trustee in Bankruptcy and his Functions

The court is entitled to appoint a trustee in bankruptcy. The appointment of a trustee in bankruptcy must be declared in connection with the decision on whether to commence bankruptcy proceedings. Even if the creditors' meeting rejects the trustee in bankruptcy appointed by the court, the court is not obliged to accept this decision and may refuse to appoint a person elected by a meeting of creditors. Prior to the appointment of a trustee in bankruptcy, the court may appoint a temporary official receiver, if that is necessary for the protection of the bankrupt's property.

Great authority is invested in the trustee in bankruptcy. He is responsible for taking over the management of the bankrupt's property without delay and must manage and dispose of bankrupt's property such as movable property, real estate, lots or buildings possessed or used by the debtor. Accordingly, the trustee in bankruptcy may conclude contracts with regard to the bankrupt's property.

Such transactions must be aimed at solving the economic and financial difficulties of the insolvent debtor, thus meeting the objectives of the law "On Bankruptcy Proceedings".

The trustee in bankruptcy may maintain some of all of the operations of the enterprise for a certain period. However he is not entitled to carry out activities, that might complicate or hinder the long-term prospects of the enterprise.

One of the most important duties of the trustee in bankruptcy is to set up a property inventory and to draw up a balance sheet. The trustee in bankruptcy shall submit both these documents to the court. The trustee in bankruptcy has the right to cancel labour contracts on behalf of the insolvent debtor, notwithstanding the normal time period required for notice of termination. Furthermore, he is allowed to terminate lease or rental contracts concluded by the debtor. The contract may be terminated regardless of the time period of rent or lease.

As mentioned above, bankruptcy proceedings may end on the basis of a judicial reorganisation (a composition agreement). A trustee in bankruptcy as well has the right to apply for a composition procedure. The application on the proposal for a composition shall include suggestions on the following items:

- how to satisfy creditors;
- whether or not creditors are to be secured and if so how to proceed;
- to satisfy at least one third of secured and privileged creditors;
- whether to allow an insolvent debtor to maintain the operations of the enterprise;
- whether to transfer the enterprise to a third person in order to proceed with its activities.

The trustee in bankruptcy has wide authorisation to sell bankrupt's property and distribute revenues according to the final schedule.

It should be emphasised that a trustee in bankruptcy performs his functions under supervision and administration of the court.

7. Recognition of foreign Bankruptcy Proceedings

According to Article 34 of the law "On Bankruptcy Proceedings", all decisions concerning real property and bankruptcy creditors in Georgia must recognise foreign bankruptcy proceedings or compositions, except in cases where the court considers that (1) the case abroad is not competent under Georgian legislation or (2) that the proceedings abroad violate essential principles of Georgian legislation, particularly concerning the rights of individuals.

The question of a court's competence does not relate to the level of qualification or the status of a foreign court concerned, but to the authority of the jurisdiction. A foreign court shall not be considered competent if the examination of the particular case was already under the competence of a Georgian court. Georgia's law "On International Private Law", recently adopted by the Parliament of Georgia and due to enter into force on October 1, 1998, regulates the conflict of law and the competence of Georgian courts to decide disputes with international contacts as well as defining the competence of courts examining the particular case abroad.

Bankruptcy proceedings abroad do not preclude the start of separate bankruptcy proceedings against a branch or an agricultural entity operated under the management of an insolvent debtor who is subject to bankruptcy proceedings abroad. In such cases the separate bankruptcy proceedings in Georgia covers only the real estate of the insolvent debtor; only those creditors whose claims derive from the operation of the subsidiary or enterprise that produces agricultural products may participate. This is called by the law “particular bankruptcy proceedings”.

The application for bankruptcy proceedings may be made by a trustee in bankruptcy who has been appointed abroad or by creditors whose claims are derived directly from the operation of the subsidiary or enterprise that produces agricultural products. Moreover, it is not necessary to examine or to certify the reasons for the opening of bankruptcy proceedings. Creditors having participated in the examination of such cases abroad are permitted to participate in "particular bankruptcy proceedings in Georgia if they prove their exclusive interest”.

Finally, a local trustee in bankruptcy should be appointed for the "particular bankruptcy proceedings", who is closely linked to a trustee in bankruptcy appointed by the foreign court. In addition, a foreign trustee in bankruptcy may appear in "particular bankruptcy proceedings" as a representative of the interests of bankruptcy proceedings abroad and may file any proposal or application that might benefit the case, including applications for composition procedures. If there is any property left after liquidation and payment of creditors, it should be passed to the foreign trustee in bankruptcy.

This is a brief outline of some aspects of the law “On Bankruptcy Proceedings” of Georgia. Its proper implementation by the Georgian courts is necessary to achieve its goals and objectives.

EDDY DE SMIJTER*

THE RECENT DEVELOPMENTS IN THE LAW OF THE EUROPEAN UNION: THE TREATY OF AMSTERDAM

The most important step in the evolution of European law last year was taken with the signing of the Treaty of Amsterdam in October 1997. In this contribution, I therefore would like to analyse this new Treaty of Amsterdam, its objectives and its content. Indeed, this reform of the EU constitutional order is also important for the Georgian economy. Since Georgia has significant economic relations with the European Union, it is vital for Georgian lawyers and economists to know how the EU is functioning. No longer can the different EU Member States be approached separately on meaningful economic issues: the EU is the only negotiation partner left, a stronger partner after the Treaty of Amsterdam.

1. THE OBJECTIVES OF THE 1996 INTERGOVERNMENTAL CONFERENCE

The Treaty on European Union (TEU) provides in Article N that "a conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of [the EU] Treaty for which revision is provided". The previous intergovernmental conference (IGC) of Maastricht indeed was not able to conclude on a coherent new Treaty. The economic components of the negotiations were properly dealt with (the gradual realisation of the single economic and monetary union is a major European event), but there was no consensus on the more political aspects of the European Union. Therefore it was provided that in a later stadium these gaps would be filled in by a future IGC, which is the formal mechanism for revising the Treaties on which the Union is based. This was one of the initial objectives of the 1996 IGC. By the time the IGC was convened (April 1996), though, other objectives were added to the initial one. These new objectives gave the 1996 IGC a more autonomous character.

There was first of all a need felt to modernise the European Union; to adapt it to the necessities of the modern society. For each one of its three pillars the European Union is to be equipped to address the challenges ahead. The first pillar (the European Communities) does not have the essential legal methods to fight the growing unemployment on a European level, which appears to be the major concern of lots of European citizens. Member States are not willing/able to take the necessary national measures to cope with this problem, because they fear this might lead to a loss in the competitive position of the country towards the other Member States. A sincere national employment policy should therefore get the moral and financial support of the European Union.

The second pillar (the Common Foreign and Security Policy – CFSP) suffered from an image difficulty. The CFSP is generally considered not to be an efficient instrument to come to a genuine common European foreign and defence policy. The attitude of the European Union in the crisis in ex-Yugoslavia and its apparent inability to come to a reasonable solution for a problem geographically nearby, painfully underlined this weakness. Strengthening the CFSP would of course automatically influence the national sovereignty of the Member States. Striking a new balance between the two concerns was the main challenge of the IGC in that respect.

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Finally, also the third pillar (the Co-operation in Justice and Home Affairs), although responsible for already a fair number of conventions in the field of asylum policy, the fight against organised crime and against drugs, the co-operation of national police forces, is no longer adapted to the specific demands of the modern society. Mainly the unanimity requirement in this pillar led to low profile legislation, which could not cope with the technical intricacy of reality.

A second set of objectives concerns the affinity between the European Union and its citizens. The negative result of the first Danish referendum on the Treaty on European Union made clear that there exists a gap between the Union and its citizens. For a lot of European citizens the European Union is something faraway, peculiar or even hostile. One also has the feeling that the European Union is mainly an alibi for the national governments to take measures on the European level, which they can not or dare not take at the home front. Such an abuse of the European Union could be the result of the poor democratic control at the European level, since there is no real counterbalance for the power of the representatives of the Member States in the European decision-making process.

Bringing the European Union closer to its citizens would therefore first of all mean a raise of the checks-and-balances in the European decision-making process. It also means that the process should be made more transparent to the public. The latter objective should be realised as well in the phase of the preparation of the European decisions as during or after that decision-making process with respect to the official documents. A last element in this section relates to the kind of subject-matters dealt with at European level. It is already stated that being a member of the European Union is often (ab)used to enforce measures on the national scale. The EU is also often (ab)used to justify an absence of national measure being taken. Making the European Union more relevant to its citizens and more responsive to their concerns should therefore mean that the EU is actively involved in addressing those concerns: the raising unemployment, the general feeling of insecurity and the seemingly ecological imbalance being three top priorities.

A third general objective of the IGC was added shortly before its start in March 1996. The European council of Copenhagen (June 1993) had virtually opened the doors of the European Union to the countries of Central and Eastern Europe. The conditions linked to this future enlargement of the European Union were both socio-economic (the Central and Eastern States have to fulfil a set of basic requirements in this respect) and institutional (the European Union has to be able to absorb new Member States). With regard to the latter condition, the European Council of Madrid (December 1995) stated that the IGC had to provide the European Union with the necessary institutional backbone for a Union of 20 up to 25 Member States.

This objective was gradually considered to be the central topic of the 1996 IGC. Reality however forces us to admit that the future enlargement of the European Union was merely an '*a fortiori* argument' during the negotiations. The European Union, its constitutional system and its substantive field of application, had to be adapted anyway to be ready to face the challenges of the new century, *all the more* if it was going to enlarge to the East.

2. THE MAIN ACHIEVEMENT AND DEFICIENCIES OF THE TREATY OF AMSTERDAM

2.1. The European Union substantially equipped to address the future challenges, notably with a view to further enlargement

2.1.1. The European Communities

2.1.1.1. The social policy

The 1996 IGC did not succeed in fundamentally changing the content of the European social policy. This however does not mean the IGC failed in bringing more social corrections to the liberalised economic system of the European Community. Indeed, after the victory of the Labour party in the British elections in spring 1997, the United Kingdom accepted to join the so-called social protocol.

This protocol annexed to the Treaty of Maastricht, allowed the other Members States to have recourse to the institutions and the procedures of the European Community to elaborate a further going social policy. The opting-out by the UK threatened the fair competition on the European market (e.g. once the first measure on basis of the social protocol was taken, French and Belgian companies fled to the UK) and was therefore not fully used. The full integration of the social protocol in the EC Treaty (TEC) guarantees in itself a better social protection in the European Community since it will stimulate the Member States to take significant action in the field of social protection, without any fear of unfair competition.

2.1.1.2. The employment policy

Another achievement in the socio-economic sphere is the European employment policy. Although not new as such (the European Community already had the power to deal with employment matters for a long time - see the big Employment Summit in Luxembourg in November 1997, which is before the Treaty of Amsterdam came into force), the IGC chose to dedicate a new chapter on the employment policy, which mainly has to underline the political will to fight the unemployment at a European level. Although crucial in allowing the European Community to deal with matters of great concern to the European citizens, most Member States, however, did not want to transfer too much sovereignty to the European Communities in the field of employment. The EC chapter on European policies on European employment policy therefore only speaks about co-ordination of national employment policies.

Although a harmonisation of national legislation and thus a genuine European employment policy is excluded by the EC Treaty, the IGC left some possibility for future action in the field. Indeed, the Member States are under an obligation to yearly report to the European institutions on their national (un)employment situation. The European Community can then adopt incentive measures with respect to employment matters. It is obvious that when these measures will be accompanied by some financial support, they will constitute an important means at European level of persuasive influence on the national employment policies.

2.1.1.3. The common commercial policy

In the framework of the IGC, it has been envisaged to extend the concept of common commercial policy (Article 113 TEC) to the domain of services and intellectual property rights. In its 1994 opinion on the ratification of the Uruguay Round agreements, the Court of Justice had stressed that those two subject-matters did not fall under Article 113 TEC. Different suggestions were made during the IGC. A

first solution was to give the Commission a negotiating monopoly while maintaining a role for the Member States in the implementation. A second solution was to extend the powers of the Commission but with a long list of exceptions. The precise definition of these exceptions was that difficult that it appeared impossible to reach an agreement. The solution that was finally withheld simply provides that the Council by unanimity can extend the scope of the traditional negotiating procedure to services and intellectual property (Article 133(5) TEC).

From a technical point of view, this solution has the advantage of simplicity. It avoids a new constitutional debate in each area. It will, however, certainly not be easy to reach agreement on such extensions. From a political point of view, the failure of the revision of Article 113 TEC implies that the existing, complicated negotiating procedures will be maintained for the new round of negotiations in the framework of the World Trade Organisation.

When it comes to the procedural gaps in the former Article 228 TEC, the new Article 300(2) TEC comes up with an answer. It is stated that the procedure to conclude an international agreement will also be applicable with respect to the provisional application of the agreement, its suspension and the adoption of a position on behalf of the Community in a body set up by an association agreement, that can take decisions having legal effect. The main difference with the procedure to conclude an international agreement though is that no intervention whatsoever of the European Parliament will be required. It is said that the European Parliament will be informed of the decisions taken.

2.1.1.4. The environmental policy

As far as the remaining policies of the European Community are concerned, the protection of the environment seems to be the most striking accomplishment. The Treaty of Amsterdam integrates this objective in all sectoral policies. This means that for whatever measure to be taken considering the internal market, an environment impact study needs to be made.

The protection of the environment moreover will be one of the sole grounds to justify a national hindrance to the free movement of goods. The possibility to take national measures which are hindering the free movement is made more restrictive. This is the result of a Danish initiative in September 1996 that was supported by many countries. The Danish proposal was concentrated on the protection of the environment. Under the reformed Article 95(4) (currently Article 100a) TEC, the procedure and the argumentation differs according to the maintenance of national measures existing before the European harmonisation rules or the taking of new measures. Ones a harmonisation rule is taken by the Council, a Member State can maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment. In this case, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

When a Member State wants to adopt a new measure that did not exist at the time of the European harmonisation, the national provisions should be based on new scientific evidence, relate to the protection of the environment or the working environment and concern a problem specific to that Member State arising after the adoption of the harmonisation measure. The extent of this new provision is thus restricted by the many conditions. If these conditions are fulfilled, the Member State notifies the Commission of the envisaged national provisions as well as the grounds for introducing them (Article 95(5) TEC).

For both the maintenance of existing national measures, as for the introduction of new national measures, the Commission has six months (or more in case of complex matters) from the notification on to pronounce itself: it can approve or reject the said national measure. In the absence of a reaction, the national provision is deemed to be accepted (Article 95(6) TEC).

2.1.2. THE COMMON FOREIGN AND SECURITY POLICY

One had a half year after the coming into force of the Treaty on European Union, the Common Foreign and Security Policy proves to be the least efficiently functioning pillar of the Union. Part of that shortcoming can be explained by the unanimity voting requirement in the Council and by the lack of uniform representation at the international plane. Both aspects have been addressed by the IGC and found a (partial) solution in the Treaty of Amsterdam.

2.1.2.1. The decision-making process

New in the decision-making process of the CFSP is first of all the type of measures that can be taken in this framework. At this moment the Council can adopt common positions or joint actions, the difference between the two forms of measures not being very clear. The Treaty of Amsterdam has specified the distinction between the two forms of measures mentioned: a common position defines the approach of the EU to a particular matter of a geographical or thematic nature, whereas a joint action addresses specific situations where operational action by the Union is deemed to be required (respectively Articles 15 and 14(1) TEU).

The Treaty of Amsterdam also introduced a new form of measure, namely the common strategy. This type of measure, taken by the European Council, sets out its objectives, duration and the means to be made available by the EU and its Member States in areas where the latter have important interests in common (Article 13 (2) TEU). The new type of measure is important in the framework of the objective to make the CFSP more efficient. Indeed, the Council can take whatever decision based on such a common strategy by qualified majority. It is however foreseen that a Member State can for important and stated reasons of national policy, block the decision-making process at the level of the Council. Only the European Council can then take the proposed measure, be it by unanimity (Article 23(2) TEU).

Another important novelty in the CFSP decision-making process is the technique of constructive abstention. Once the Treaty of Amsterdam enters into force, abstentions will no longer prevent the Council from adopting a decision. It is however obvious that such a decision normally also binds the Member State that abstained. The constructive abstention is an exception to this consequence. During the vote, a Member State then formally has to declare that it does not want to apply a proposed measure. In that case, the decision is taken, but the Member State concerned is not obliged to apply it. This Member State can however not take an action which is likely to conflict with the decision taken (Article 23 (1) TEU). This possibility will obviously also improve the efficiency of the decision-making process in the CFSP, since it gives on the one hand Member States the possibility to escape from a proposed binding obligation under the CFSP, without paralysing the whole decision-making process. On the other hand, the Member States that wish to have a stronger mutual co-operation in matters of foreign policy can do so at an *ad hoc* basis, without being hampered by those who do not want to go further in their European commitment.

2.1.2.2. The representation of the European Union

The presidency of the Council represents the European Union in matters falling under the CFSP. The presidency can be assisted by the former and the future president of the Council; together they form the so-called troika. The Treaty of Amsterdam changed the composition of the latter. In the future, the troika will consist of the actual presidency, the next president and the Secretary-General of the Council, who shall exercise the function of High Representative for the CFSP (Article 18 (3) TEU).

The EU thus has a Mr./Mrs. CFSP, who will be the guarantee for a continuous and coherent European foreign policy. (S)he shall assist the Council through contributing to the formulation, preparation and implementation of policy decisions. To this end, the Secretary-General of the Council can rely on a policy planning and early warning unit. The Secretary-General of the Council may also be asked to conduct political dialogue with third parties on behalf of the Council (Article 26 TEU). (S)he will thus become the representative of the EU in its international political relations, whereas the Commission will continue to represent the EU in the foreign economic matters.

2.1.2.3. The Western European Union

A last aspect of the CFSP concerns the common defence policy. The Western European Union (WEU) was already an integral part of the development of the EU, providing the latter with access to an operational capability with regard to the security of the EU. Some Member States wanted to establish a stronger form of co-operation between the EU and the WEU, but no consensus was found on this point. The only changes in this respect worthwhile mentioning are the extension of the field of action of the EU to the Petersberg tasks (humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking) and the quasi-obligation for the WEU to take action whenever the EU asks for it. The Member States promised to reopen the debate on a genuine common defence policy within one year from the entry into force of the Treaty of Amsterdam (Article 17 TEU).

2.1.3. THE COOPERATION IN JUSTICE AND HOME AFFAIRS

Since the Treaty of Maastricht, the European Union is also competent to deal with justice and home affairs (Articles K to K.9 TEU, sometimes referred to as 'the third pillar'). This title of the Treaty on European Union, though, is operating along inter-governmental lines. This means that decisions by the Council on justice and home affairs are taken by unanimity, with a minor intervention of the Commission and the European Parliament and without any power for the Court of Justice to control the legality of the decisions taken, nor the enforcement of those decisions.

The unanimity requirement in the Council and the absence of the constraints as they arise from the legal order of the European Communities resulted in a tardy development of the European policy on justice and home affairs. Some Member States therefore agreed amongst each other to conclude an international agreement on some aspects of the third pillar outside the Eu framework. The so-called Schengen Agreement is now in force between all EU Member States, except for Denmark, Finland, Ireland, Sweden and the United Kingdom. The other ten Member States (with a temporary transition period for Greece) accepted a set of rules which guarantee the free movement of persons between them, both for their own nationals and to some extent for third country nationals. A common information system (SIS) and some kind of police co-operation have to make sure that criminals cannot profit from this free transit zone.

The institutional requirements of the third pillar and the fact that the Schengen Agreement is developed outside of the EU framework is of course not contributing to the efficiency of the common European Policy concerning justice and home affairs. The Treaty of Amsterdam therefore tried to adapt the EU Treaty somewhat more to the needs of the current society.

The new Treaty establishes an area of freedom, security and justice. Part of that area, namely the visas, asylum, immigration and other policies related to the free movement of persons, will be further developed under a new title in the EC Treaty (Articles 61 to 69 TEC). This shift from the third to the first pillar does not mean that for these policies the intergovernmental features they had under the third pillar will automatically disappear. Rather on the contrary: for the first five years from the coming into force of the Treaty of Amsterdam on, the decision-making procedure will remain principally the same as it is right now. Only after that period of five years the procedure will become more "communitarian", meaning that decisions in the Council will be taken by qualified majority and according to the codecision procedure with the European Parliament. Also the role of the court of justice in this new title of the EC Treaty differs from the general principles. The Court will thus e.g. not be competent to pronounce itself on aspects which concern the internal security of the Member states, nor will it be possible for national courts other than the highest national courts, to ask preliminary questions to the Court of Justice on the interpretation or the validity of the decisions taken on basis of this new title. The other part of the area of freedom security and justice, i.e. the remaining subject-matters of the third pillar, now renamed "provisions on police and judicial co-operation in criminal matters", will basically continue functioning under the same conditions as they do at this moment.

The Treaty of Amsterdam is also incorporating the law of the Schengen Agreement, the so-called *Schengen acquis* in the Treaty on European Union. The Council will decide which elements of this *Schengen acquis* belong under the first pillar (e.g. the new title on visas, asylum, immigration and other policies related to the free movement of persons) and which elements rather belong to the realm of the slimmed third pillar. It is obvious that this assignment decision is not without any importance. The thoroughness and efficiency of further elaborating the *Schengen acquis* will largely depend on the pillar a given subject-matter will be categorised in.

We finally have to mention the specific arrangements made for Denmark, Ireland and the United Kingdom with regard to the new title on visas, asylum, immigration and other policies related to the free movement of persons. In a protocol attached to the Treaty, Denmark has specified that it will not take part in the decision-making in the framework of that title, nor that it will be bound by the decisions taken therein. An exception can be made for decisions built upon the Schengen *acquis*, though that will then be considered to be a simple obligation under international law. Ireland and the United Kingdom will for their part consider for every measure proposed or taken on basis of the said title whether they will join the decision-making procedure or not. These exceptional arrangements have definitely not simplified the understanding of Community law for the European citizen.

2.2. The European Union institutionally ready for the future enlargements

It is clear from the above analysis that the Treaty of Amsterdam did not make a fundamental change to the substantive powers of the European Union. Indeed, it was said from the beginning of the IGC that this round of negotiations might not lead to a substantive transfer of power from the Member

States to the European Union. The main objective of the IGC was rather to optimise the present powers of the European Union by making the functioning of the European institutions more efficient, more democratic and more transparent. The Treaty of Amsterdam therefore mainly focused on the institutional aspects of the EU legal order. This will not come as a surprise, knowing that the enlargement of the European Union will only be possible once the necessary institutional adaptations to the EU Treaty are achieved. It is therefore justified to thoroughly analyse the institutional dimension of the Treaty of Amsterdam.

2.2.1. THE EUROPEAN PARLIAMENT

2.2.1.1. A strengthening of the role of the European Parliament in the codecision procedure

The changes introduced by the Treaty of Amsterdam strengthen the position of the European Parliament towards the Council. The Council and the European Parliament are now on an equal footing when it comes to the decision-making according to the codecision procedure. Where e.g. the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted, without any possibility for the Council to come back on its initial common position. This means that if the Council wants a final decision, it will have to look for compromises with the European Parliament in the conciliation Committee.

The appraisal of this revision cannot be fully positive though. In fact, not that much of the power of the European Parliament as such has been increased, but rather the power of the Members of the European Parliament (MEP) sitting in the Conciliation Committee. Since these members are mostly those who followed a particular file for the European Parliament, they are both expert and stubborn to stick to their proposed amendments. Not much flexibility is to be expected from these MEPs in the Conciliation Committee, now that they know that their veto in the Conciliation Committee could mark the end of the decision-making procedure. Maybe it would have been better to leave the final word to the European Parliament, who can than exercise some control over its representative MEPs.

There are two arguments in favour of this latter option. The first argument is of a more procedural type. The final say for the Conciliation Committee could lead to a total paralysis when both interests groups in the Committee remain unable to come to a compromise. The second argument is of a more political nature. Leaving the MEPs in the Conciliation Committee such a decisive power is contrary to the general desire to enhance the democratic character of the European Union. It is indeed possible that the full European Parliament has another interest than some of its members. Both arguments thus come in fact down to one, namely the fact that when acting in the decision making process, the full European Parliament takes into consideration a broader view on European politics, whereas its individual members focus more on one specific issue. Democracy is probably more about improving the general interest.

2.2.1.2. An extension of the scope of the codecision procedure

The Treaty of Amsterdam generally replaced the co-operation procedure and also to some extent the consultation and the assent procedure by the codecision procedure. The consultation procedure though is left for still quite some provision, whereas the assent procedure is now restricted to the

(quasi-) constitutional issues. The co-operation procedure only remains for the provision of the economic and monetary union, since this issue was explicitly left out of the 1996 IGC agenda. Also in series of new fields of the EC Treaty (employment, social exclusion, equality of opportunities, transparency, fraud, customs co-operation, protection of data) the codecision procedure is required.

The Treaty of Amsterdam also realised the parallelism between a qualified majority voting and the codecision procedure. The codecision procedure becomes the general rule for all subject-matters voted by qualified majority and it is sometimes foreseen for subject-matters for which the Council has to decide by unanimity. For this category of subject matters the transfer to qualified majority has been proposed by some Member States, but that suggestion was finally not accepted by the IGC.

2.2.1.3. A stronger intervention of the European Parliament in the appointment of the members of the Commission.

The Treaty of Amsterdam strengthens the role of the European Parliament in the appointment of the president of the Commission. The nomination of the president first has to be approved by the European Parliament. The Parliament thus intervenes at an earlier stage than at this moment, which gives the president a legitimacy separate from the one of the other members of the Commission. The other members of the Commission are nominated "by common accord" between the Member States and the nominee for president. Finally the whole Commission is approved by the European Parliament. The Parliament thus not only interferes at the beginning, but also at the end of the procedure, as it did before.

Such a procedure allows the European Parliament to have an important influence on the nomination of the President. When this procedure would have been in force in 1994, when the current Commission was established, maybe the debates would have ended differently. This procedure will moreover have an important influence on the relations between the European Parliament and the president of the Commission, who finds its role democratically strengthened.

2.2.1.4. A stronger parliamentary grip on the budgetary procedure for the CFSP

The Treaty of Amsterdam made a definitive arrangement for the CFSP budget. The EU Treaty now states that administrative expenditure for the institutions shall be charged to the budget of the European communities. Operational expenditure shall also be charged to the budget, except for such expenditure arising from operations having military or defence implications, and cases where the Council acting unanimously decides otherwise. The execution of these principles are subject of an interinstitutional agreement between the European Parliament, the Council and the Commission regarding the CFSP financing. The agreement is annexed to the new Treaty.

In this agreement, the Council and the European Parliament have tried to frame the establishment and the execution of the budget in such a way to achieve two goals: to preserve the efficiency of the budgetary procedure and to guarantee at the same time an effective control. There are therefore all kinds of mechanisms foreseen to avoid possible obstacles in case of the establishment or the execution of the budget. The Commission is also given an important role in the fixation of the budget, but its influence has been weakened as far as the execution of the budget is concerned. Finally, there are mechanisms foreseen to regularly and adequately inform the European Parliament.

2.2.2. THE COUNCIL

2.2.2.1. The voting by qualified majority

The Treaty of Amsterdam did not achieve a significant progress in this respect. The minimal extension of the qualified majority voting is beyond any doubt the most serious failure of the 1996 Intergovernmental Conference. For a long time it appeared impossible to even submit proposals on this sensitive issue. Finally, the Dutch presidency proposed a compromise. They proposed a qualified majority voting for a number of existing and a number of newly introduced provisions. In the light of the future enlargements this was a very modest list.

On the European Council of Amsterdam, however, this list of the presidency was even further reduced. In the list of the existing provisions only "research" moved from unanimity to qualified majority voting. In the list of the new provisions merely half of those proposed were finally accepted. In any case, all rules concerning visas, asylum and immigration will fall under the unanimity rule. As has been stated earlier, this decision of the last minute could weigh heavily on the development of Community initiatives on this field.

The maintenance of the unanimity rule in a series of social and economic subject-matters, directly or indirectly linked to each other, clearly proves the main weakness of the Treaty of Amsterdam on the economic and social level. This decision will have important consequences on the economic and social matters, where lots of Community measures ask for a stronger legal framework.

2.2.2.2. The weighting of the votes

During the Summit of Amsterdam, the Dutch presidency presented a reweighing that was favourable for the big Member States, but with some modalities which led to specific problems, amongst others in the Benelux. There was moreover the problem that in the Dutch proposal a qualified majority could be reached with only 7 Member States voting in favour, which means not even a simple majority.

The negotiations on this point were aggravated by the link between the change of the weighting of the votes and some other subject-matters. According to some Member States, the said change had to be linked to a reform of the Commission. According to other, the change had to be linked to a broader use of the qualified majority voting. Finally, it was impossible to find a solution. A special protocol on the future institutional reforms postponed the debate to a later date.

2.2.3. THE EUROPEAN COMMISSION

2.2.3.1. A strengthening of the legitimacy of the president of the Commission

The Treaty of Amsterdam not only strengthened the role of the European Parliament in the nomination of the commissioners. It also strengthened the position of the president of the Commission towards her/his colleagues. The role of the president of the Commission in the nomination of the other members of the Commission has changed from "consultation" to "common accord" between the Member States and the nominee for president. The position of the president is thus strengthened: (s)he is not only consulted, but has to agree with the nomination of the other members of the Commission. This greater involvement of the president also strengthens her/his position within the Commission, since (s)he has a binding influence in the nomination of her/his

colleagues. This however will not be sufficient to guarantee a better co-ordination of the activities of the Commission, since it only marginally refers to the role of the president within the Commission.

2.2.3.2. A strengthening of the president of the Commission in the management of the Commission

The Treaty of Amsterdam changed the position of the president in the management of the Commission, but maybe not sufficiently. From now on, the Commission shall work under the political guidance of its president and the IGC considered in a declaration (!) that the president of the commission must enjoy broad discretion in the allocation of the tasks within the college, as well as in any reshuffling of those tasks during a commission's term of office. It can however be regretted that the IGC did not provide in the Treaty for a stronger disciplinary role of the president or her/his interference in the division of the tasks amongst the members of the Commission.

One can however question whether the EC Treaty is the best place to solve this kind of issues. Indeed, a change in the Rules of Procedure would be sufficient and one cannot ask from the IGC that it arrange into detail the functioning of each one of the institutions. It is therefore not remarkable and moreover not unwise to refer the details to a different forum. The Commission intends in any case to recognise its tasks within the college in good time for the Commission which will take up office in 2000. Although this ambition is not legally binding, it witnesses at least the good intentions of the Commission to use its own powers in the restructuring of the services.

2.2.3.3. The factual non-responsibility of the Commission

The Treaty of Amsterdam has not changed a word on this issue. During the IGC, there was a total lack of attention for the responsibility of the members of the Commission towards the European Parliament or towards the Council. The lack of real responsibility of the Commission threatens to jeopardise the strengthening of its powers. This could be even more deplored since the lack of a disciplinary competence of the president in reality takes every responsibility of the members of the Commission away. The enlargement of the European Union will lead to a rise in the number of commissioners, which will affect their individual responsibility. A larger Union can only function with a stronger Commission, but this is difficult to achieve when the Commission seems to be less and less controlled. The introduction of a specific form of individual responsibility for the commissioners, according to different formulas is therefore an unavoidable condition for the strengthening of the Commission.

2.2.4. THE COURT OF JUSTICE

The Treaty of Amsterdam slightly amended the powers of the Court of Justice. Although the second pillar remains excluded from any judicial control, the Court will have some powers under the third pillar. Those powers though will be restricted and thus not similar to the powers the Court has under the first pillar. Also with regard to the new EC Treaty title on visa, asylum and immigration policy, the powers of the Court of Justice are limited. The main limitation with regard to the powers of the Court of Justice under the third pillar and under the new title on visa, asylum and immigration policy is that the Court can not interfere with the maintenance of law and order and the safeguarding of the internal security of a Member State.

With regard to the new title on visa, asylum and immigration policy, the normal full jurisdiction of the Court of Justice is applicable, be it that the preliminary rulings procedure is somewhat different. The

Council, the Commission or a Member State may request the Court to interpret the said title or a decision taken on basis of it. The resulting answer can of course be of no influence on the already passed judgements of the courts of the Member States. Besides that possibility, only the highest national court is allowed to ask a preliminary question to the Court and not the lower judiciary.

Under the third pillar, the Court of Justice can answer preliminary questions on the validity and the interpretation of decisions taken in the framework of the third pillar. This power, however, is limited to those Member States which previously accepted the jurisdiction of the Court in this respect. A Member State may eventually limit the possibility to ask preliminary rulings to its highest courts. With respect to the legality control of decisions taken by the EU under the third pillar, the Court only has jurisdiction in actions brought by Member States or the Commission.

As to the protection of fundamental rights, the Treaty of Amsterdam provides for the justiciability of Article 6 (the former Article F) TEU, be it restricted to (1) the action of the institutions (which is not a problem as such, since the actions of the Member States already fall under the national judicial control) and (2) to the jurisdiction the Court already has under the different pillars. The latter condition obviously restricts the fundamental human rights control of the Court in the third pillar and the title on visa, asylum and immigration policy and excludes any such power of the Court under the second pillar.

2.2.5. THE COURT OF AUDITORS

The Treaty of Amsterdam allows the Court of Auditors to bring a case before the Court of Justice against the other institutions, if the former feels its prerogatives should be protected (a similar *locus standi* as the European Parliament has). The Treaty also specifies that the Court of Auditors can control the records if necessary on the premises of any natural or legal person in receipt of payments from the Community budget. The Court of Auditors and the national audit bodies of the Member States also have to cooperate in a spirit of trust while maintaining their independence. The national bodies have to forward to the Court of Auditors any document or information necessary to carry out its task.

2.2.6. THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

The Treaty of Amsterdam introduced only minor changes in the structure of the Committee of the Regions. There shall be e.g. an incompatibility between belonging to the Committee and being a MEP. This will have to make clear that both represent the European citizens in a different capacity. The new Treaty also gives the European Parliament the possibility to consult the Economic and Social Committee or the Committee of the Regions, although there is no change to the status of the Committees, namely linked to the Council and the Commission. The Committees are moreover consulted in some of the new provisions, dealing with important social matters.

2.2.7. THE CRUCIAL INSTITUTIONAL REFORMS ARE MISSING

The insufficient character of the institutional provisions of the new Treaty led the European Council of Amsterdam to foresee a further revision of the EU Treaties. That's why a protocol of the future institutional reforms was introduced into the Treaty. This protocol on the institutions with the prospect

of enlargement of the European Union specifies that new institutional negotiations will take place depending on the progress of the next enlargements.

From a legal point of view, there have to be new institutional negotiations as soon as there are more than twenty Member States. This revision will be on the whole of the institutional questions. Negotiations might begin though from the first enlargement on. According to the said protocol every Member State will from the next enlargement of the Union on, only appoint one commissioner. The big Member States will thus loose their second commissioner. This reform is however conditioned. A reviewing of the votes or a double majority has to be introduced in the qualified majority voting in the Council. If that is not the case, the current number of commissioners remains unchanged.

From a political point of view, the "big" Member States will probably ask for an institutional negotiation before the next enlargement. Indeed, some of them already now consider the actual weighing of the votes to restrict their influence in the decision-making too far and this threatens to be all the more the case in a bigger Europe.

2.3. The European Union constitutionally ready for the future enlargements

2.3.1. THE SUBSIDIARITY PRINCIPLE

The Treaty of Maastricht introduced this principle into the EU Treaty (Article 3b TEC). Although everybody agreed that this is a very important principle, nobody was sure what it really meant. Specifications were therefore made in the conclusions of the Birmingham European Council of 16 October 1992 and – more important – in the conclusions in the European Council meeting in Edinburgh on 11 and 12 December 1992. In the latter conclusions one can find the overall approach to the application of the subsidiarity principle which have to guide the action of the EU institutions. Later on, the European Parliament, the Council and the Commission concluded on 25 October 1993 an Interinstitutional Agreement on the procedures for implementing the subsidiarity principle.

The Treaty of Amsterdam has clarified the legal status of the said agreement and the European Council conclusions by introducing a protocol on the application of the principles of subsidiarity and proportionality. This protocol repeats the main provisions of the conclusions of the 1992 European Council meeting in Edinburgh and of the 1993 Interinstitutional Agreement.

It has thus been agreed that Community action is only justified if the objectives of a proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community. Helpful criteria in this respect could be the transnational aspects of the action or the explicit requirements of the EC Treaty, such as e.g. the need to correct the distortion of competition.

Regarding the nature and the extent of the Community action, it is said that the measures should leave as much scope for national decision as possible. Care should moreover be taken to respect well established national arrangements and the organisation and working of Member States legal systems. Although one can find here a reflection of the needs of federal states, Austria, Belgium and Germany added a declaration to the Final Act stating that they take it for granted that action by the EC in accordance with the subsidiarity principle not only concerns the Member States but also the entities of the latter to the extent that they have their own law-making powers conferred on them under national constitutional law.

2.3.2 ENHANCED COOPERATION

Although there are different terms to refer to the same issue (differentiated European integration, concentric circles, multi-speed Europe, variable geometry, …) enhanced co-operation basically means that not all Member States advance in the European integration process at the same pace. The present European Union already offers options for enhanced European co-operation between fewer than the total number of Member States. Examples in the present EU Treaty are: the traditional transition periods to allow a new Member State to adopt its national legal system to the European one, the objective criteria to enter the third phase of the EMU and the Social protocol, where the United Kingdom chose not to join a strengthened social policy.

Alongside these forms of enhanced co-operation which are developed within the framework of the Treaty and thus with the help of the institutions of the European Union, there are also forms of enhanced co-operation outside of the EU Treaty. These forms are of a more intergovernmental nature and are permitted as long as they do not contravene or hinder any action by the Union or by the Community. The WEU (were the neutral EU Member States are not a member to), Eurocorps and the Schengen Agreement between those EU Member States that preferred to have a elaborated common policy on the free movement of persons are examples of this “external” type of enhanced co-operation.

The different forms of enhanced co-operation differ from one another in one important aspect: the fact that some Member States are not willing (Denmark and the UK for the EMU, the Social protocol, WEU and Schengen) or not able (transitional periods, Member States with a derogation under the EMU) to join the rest of the group.

The first situation – some Member States are not willing to join – could lead to a *Europe a la carte* if one would allow that kind of system at a larger scale: Member States that do not want to join a specific policy, simply don’t have to. They can thus choose on which European policies they want to cooperate with each other and on which policies they do not want to cooperate. This could ultimately lead to a destruction of the foundation of the European Union, as e.g. the solidarity between Member States.

The fact that the UK is not bound by the decisions taken on basis of the Social protocol e.g., means that the social protection in that country will not be at the same minimum level as in the other Member States, which could eventually lead to some form of social dumping. The decision of some companies on the continent to move to the UK is a sad proof of this logic. The EMU serves as another example. Although Denmark and the UK might fulfil the conditions set forward in the Maastricht Treaty to join the third phase of the EMU, they will not be obliged to enter the EURO-zone. This means that they will remain the master of their monetary policy, whereas other Member States are subject to the decisions of amongst others the European Central Bank. The former thus could have an inflation policy, which will bring them economic profit in the short run, that couldn’t be punished by whatever form of European co-operation.

The second situation – some Member States are not able to join – is completely different: some Member States that temporarily cannot follow the pace of integration have a specific time period to catch up or to fulfil the protective conditions to join the group. Transitional periods e.g. are by definition limited in time, the objective conditions of the third phase of the EMU are there to protect

the EURO-zone. Once a Member State fulfils the conditions of that third phase, it automatically enters the EURO-zone. This type of differentiation can thus not lead to a structural diversity in the European integration process, based on pure discretion.

The main problem in the present state of the Union is that it becomes more and more clear that not all Member States share the same view on European integration. When a unanimity vote in the Council is required, this might lead to a paralysis of the decision-making process. To avoid this problem (which will become even bigger after the accession of more Member States), one could suggest an extended use of the technique of enhanced co-operation. This time not at an ad hoc basis, but more structural. The danger of this suggestion is however crystal clear: it could lead in the long run to a scattered European Union. To avoid that scenario, any structural enhanced co-operation should be accompanied by the necessary guarantees for the *acquis communautaire,* so that a system of “pick and choose” can be avoided.

The enhanced co-operation was one of the most crucial complex aspects of these negotiations. It concerns a true Copernican revolution in the history of European integration. Until now the Community project had as its objective the realisation of common projects in a unified structure. Suddenly, in a few Years time, most of the founding Member States turned in the direction of a different concept. For a long time the IGC discussed the general principles and conditions of such a structural enhanced co-operation. It took the negotiations quite some time to come up with some real suggestions. The negotiations though, created little by little a way in between, by elaborating at the same time procedures, guidelines and conditions of entry.

Before going into the modalities of the enhanced co-operation as it was finally agreed upon in Amsterdam, we have to point out that the general principles of the enhanced co-operation are determined in the Treaty on European Union (Articles 43 to 45 TEU). Besides these general principles, there are specific articles for the first pillar (Article 11 TEC) and for the third pillar (Article 40 TEU). The rules in the third pillar are not applicable on the integration of the *Schengen acquis.* It is obvious that the modalities should differ according to the pillars. One could easily imagine differentiated initiatives in those sectors where the European Union did not realise a lot until now. It is more difficult to imagine this in sectors where a lot is realised, e.g. the internal market. Indeed, in the latter context, enhanced co-operation could lead to a questioning of past realisation. Note that the enhanced co-operation is not foreseen in the second pillar. One found that the possibility of constructive abstention there already offered sufficient possibilities for differentiation. The Court of Justice finally has full competence to judge on the use of the enhanced co-operation technique.

2.3.2.1. The authorisation clause

The Commission has the monopoly of initiative in the EC Treaty. This constitutes an important factor of coherence in the general framework of the enhanced co-operation. In the third pillar, every Member State can take the initiative for a form of enhanced co-operation. In both pillars, such an initiative should be approved by a qualified majority of the Council. This is an important point. The obligation of unanimity would have deprived every meaning of this mechanism.

There is however a possibility for hostile Member States to block the procedure. If a state declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity. The

application of this provision falls under the control of the Court of Justice, that can finally decide on the real importance of the invoked “reasons of national policy”.

2.3.2.2. The formal conditions

The conditions for enhanced co-operation are the most stringent in Community matters. The central concern here is to preserve the famous *acquis communautaire.* Enhanced co-operation must preserve the nature, coherence and unity of the European integration process and safeguard the *acquis communautaire.* This general condition obviously limits the possibility for enhanced co-operation in the Community pillar. The Member States did not want the enhanced co-operation to end up in an indirect questioning of the functioning of the internal market. This explains why several conditions are made more precise or added to this general one.

The enhanced co-operation can thus not concern areas which fall under the exclusive competence of the community, nor under the citizenship of the Union. It may further not affect Community policies, actions or programs, so that by taking an initiative, one could not question what has already been decided. Finally, a proper balance have to be struck between the preservation of the cohesion and coherence of the EU and the protection of the prerogatives of all Members States on the one hand and allowing some Member States to go ahead when they so wish on the other hand. The enhanced co-operation may thus not constitute a discrimination or a restriction of trade between Member States and not distort the conditions of competition between the latter.

2.3.2.3. The functioning of the institutions

The Commission and the European Parliament take their decisions in full composition. The Council will also consist of all Member States, but only the Member States concerned can take part in the vote. The decisions are taken according to the procedures foreseen in the Treaties for that specific subject-matter. This means that, depending on the subject-matter, the Council votes by a qualified majority or by unanimity of the Member States concerned. In the same way, the consultation, co-operation or codecision procedures with the European Parliament will be applicable.

2.3.2.4. The adherence of Member States who did not participate from the beginning

The conditions for adherence by Member States which were not associated with the enhanced co-operation from the start, was one of the most delicate negotiations at the IGC. Several Member States feared that in reality they would be excluded from a number of new processes. They wanted a maximum of guarantee on this point.

In the first pillar, reintegration, once requested by a Member State, depends on a decision of the Commission. Depending on the case, the latter decides on possible specific arrangements, as it may deem necessary. In the third pillar, the Council decides on the eventual adherence within four months on the request and on possible specific arrangements, as it may deem necessary. The decision shall be considered to be taken unless the Council acting by a qualified majority decides to hold it in abeyance; in this case, the council shall state the reasons for its decision and set a deadline for re-examining the request.

2.3.3. THE PROTECTION OF HUMAN RIGHTS

2.3.3.1. The intervention of the Court of Justice in the human rights protection

The Treaty of Amsterdam did not want to draft a catalogue of human rights, nor let the EC/EU adhere to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 of the Council of Europe (ECHR). A third option was chosen, which will make the Court of Justice directly competent to apply the provisions of the ECHR in the Community legal order. The Court already did so in the past, be it in a praetorian way. This official confirmation should lead the Court to do it more severely. This solution made an end to an old debate. It has the advantage of simplicity. It also contributes to the concern not to prolong procedures too much. But the danger remains that the interpretation of a provision of the ECHR by the court of Justice and by the European Court of Human Rights will differ.

The Treaty of Amsterdam also in a way extended the non-discrimination clause (Article 13 TEC). According to this new provision, the Council may – within the limits of the powers of the Community by virtue of the EC Treaty – take measures to combat discrimination based on sex, racial, or ethnic origin, religion or belief, disability, age or sexual orientation. This article, however, can not be considered to be a true extension of the protection of fundamental rights in this respect. It does therefore not substitute the non-discrimination provision of the ECHR, nor the relevant case law of the Court of Justice. Indeed, the new provision does not forbid any discrimination on these grounds, but only facilitates the Council to take an action in order to combat the said forms of discrimination. In the future, the prohibition to discriminate on one of the mentioned grounds still will have to come from the judges. Such a control by the Court of Justice will all the more be important since the second provision on human rights in the Treaty of Amsterdam seems mainly psychological.

2.3.3.2. The suspension of the rights of a Member State in case of violation of human rights

On basis of Article 7 TEU, the European Council can, by unanimity, determine the existence of a serious and persistent breach by a Member State of human rights. In this voting, the vote of the Member State concerned will not be taken into account. When the vote is affirmative, the Council may, by qualified majority, decide to suspend certain rights, which the European Treaties confer to this Member State.

This provision is introduced into the Treaty in the light of the future enlargements. It seems however to be pure decoration. Not only will it be very difficult to make it operational; moreover one cannot imagine that the Member State in the spotlight won't find an ally to paralyse the process. When the protection on this point seemed to be necessary, one had to assure this through a mechanism avoiding unanimity.

3. CONCLUSIONS: IS THE EU MORE DEMOCRATIC, MORE TRANSPARENT AND MORE EFFICIENT AFTER THE TREATY OF AMSTERDAM ?

3.1. A real progress of democracy

The main problem in assessing the democratic progress through the Treaty of Amsterdam is the definition itself of democracy. In general, democracy in the European Union is narrowly defined as the power of the European Parliament, mainly in its relation to the Council. In this respect, one can say that the Treaty of Amsterdam has improved the democratic character of the European Union, since

the role of the European Parliament is strengthened. Not that much in its relation to the Commission, but mainly in relation to the Council. The use of the codecision procedure – in which the European Parliament and the Council cooperate at almost equal footing – is strongly extended and the procedure itself is also made more democratic so that we can speak about a true bicameral system now.

But democracy is more than the role of the European Parliament. The role of the national parliaments is as important as long as the European Union is not a true federal system. The Treaty of Amsterdam strengthens the role of the national parliaments, without going too far over the limit. In a protocol annexed to the Treaty, it is agreed that the Commission will largely distribute its consultation documents (the green and white papers and the communications). Moreover, a six-week period has to elapse between a legislative proposal is available in all languages of the EU and the date when it is placed on the Council agenda for decision. These set of rule give the national parliaments ample opportunity to discuss the matter thoroughly with the responsible minister, who will represent the Member State in the Council and with their colleagues, MEPs, who deal with the matter in the European Parliament.

France also wanted to give the Conference of European Affairs Committees (COSAC) the role of a kind of controlling Chamber of the national parliaments in the European decision-making process. All other Member States were opposed to this type of intervention because it would have complicated the decision-making process tremendously. The COSAC finally got a limited role. It is said in the mentioned protocol that COSAC may examine any legislative proposal and may make any contribution it deems appropriate for the attention of the EU institutions. Since no binding consequences are given to these `rights`, they can be considered to be harmless to the decision-making process.

Democracy, however, is even more than the role of the parliaments in the European decision-making process. Citizens should also be able to interfere directly in the process. The right of petition was already mentioned in the Treaty of Maastricht. Another element is the transparency of the decision-making process, so that the citizen can control what is happening.

3.2. A fair progress of transparency

3.2.1. THE TRANSPARENCY OF THE LEGISLATIVE ACTIVITIES AND THE ACCESS OF THE PUBLIC TO OFFICIAL DOCUMENTS OF THE EUROPEAN INSTITUTIONS

For most of the European citizens it is absolutely not clear how the European institutions are functioning. Nobody is allowed to know how the discussions in e.g. the Council went and what arguments were used by whom. If moreover a national parliament wants to exercise an effective control over their ministers in the council, it should be possible to know what these ministers did in the Council. Once the Treaty of Amsterdam comes into force, it should be easier for EU citizens to get information on the content of the legislative activities of the institutions and the access of the public to official documents of the European legislative institutions should also be facilitated.

As to the transparency of the legislative activities of the Council, the Treaty of Amsterdam states that when the Council acts in its legislative capacity, the results of the vote and explanations of vote as well as statements in the minutes shall be made public. There remains however a problem. The Treaty does not itself define when the Council acts in its legislative capacity. It is up to the Council to

define by simple majority the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. We can only hope the council will not produce a too limited definition, otherwise the new provisions will loose a big deal of their significance.

As to the access to documents in the European institutions, the Treaty of Amsterdam states that any citizen of the European Union, and any natural or legal person residing or having registered office in a Member State, shall have a right of access to European Parliament, Council and commission documents (Article 255 TEC). Within two years time, the Council will determine according to the codecision procedure the general principles and the limits of this right. Every institution elaborates its own rules of procedure specific measures of execution.

According to a declaration every Member State can request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. The principle of transparency is thus limited in a differentiated way, since the citizens do not have that same right.

3.2.2. OTHER ASPECTS OF TRANSPARENCY

Transparency not only concerns the openness of the meeting of the legislative bodies or the access of the public to official documents. It also means that the citizen is able to understand the rules. A declaration on the quality of the drafting of Community legislation has to assure that this legislation is properly implemented by the competent national authorities and better understood by the public. In order to make legislation more accessible, a codification of the legislative texts is also necessary. The interinstitutional Agreement of 20 December 1994 sets a first step in this respect and the Treaty of Amsterdam stimulates the institutions in this respect.

It is in the same framework that the Treaty of Amsterdam simplifies and consolidates the Treaties. The Treaty of Amsterdam contains a list of EC and EU Treaty articles which are repealed or amended because they are (partly) senseless in the actual situation (e.g. because they were referring to transitional periods in the history of the European integration process, which already passed). The remaining articles and the new articles added by the Treaty of Amsterdam are then renumbered, so that there are no longer gaps in the numbering, nor subdivisions with letters (e.g. 130a to 130y).

All of these measures should make it possible for the citizen to better understand how the European Union is functioning or should at least encourage them to try to understand the functioning of the European Union, without any technical barriers preventing their efforts.

3.3. A very weak progress of efficiency

The efficiency of the decision-making in the European Union depends mainly on the composition and the functioning of its institutions.

The European Parliament can only work efficient if you allow their Committees to have enough autonomy and keep the plenary sessions workable. The decision not to let the number of MEPs exceed 700 is therefore a good decision which takes into account future evolutions. The lack of real

parliamentary control on the commissioners could of course diminish the feeling of responsibility in the minds of the latter and thus have negative effects on their efficiency.

In the Council, the main problem remains with the unanimity requirement, which will also in the future block the functioning of this institution. In case of a political problem, it should be possible to solve the matter on the level of the ministers of Foreign Affairs (the Council General Affairs) and not on the level of the Heads of State of government (the European Council), since the latter normally only meets twice a year. The actual functioning of the Council General Affairs however, does not lead to this kind of problem solving, which also diminishes the efficiency of this institution.

For the moment, the Commission is working rather efficiently, but that could of course change once there are more Member States. One therefore has to prepare this part of the enlargement process carefully in order not to paralyse the motor of the integration process. The Treaty of Amsterdam did not prepare the Commission for its new tasks, although the Commission promised to make an internal study on the strengthening of the institution before the next Commission starts working (January 2000).

One could thus conclude that the Treaty of Amsterdam did only partly realise a progress in guaranteeing the efficiency of the institutional system. It is of course true that it was not entirely up to the IGC to make the EU efficient, but that the institutions themselves in their daily functioning have to guarantee the required efficiency.

3.4. General conclusion

Overall, the Treaty of Amsterdam marks an important step in the European integration process. As far as the European Community is concerned, the Member States clearly took the option to introduce social and environmental corrections to the rather liberal European integration model of the fifties. The transfer from the third pillar to the first pillar of important subject matters with regard to the free movement of third country nationals shows that the Member States are willing to exercise in common their sovereignty in this respect. Only with regard to the second pillar, one has to conclude that time has not come yet to create a genuine European common foreign and security policy. Steps have been taken though to let also this policy function more efficiently in the future.

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FUNDAMENTALS IN THE DEVELOPMENT OF THE GEORGIAN LEGAL SYSTEM SINCE 1994**

1. Preface

The following contribution[1] follows on from the report published in WGO-Monatshefte für Osteuropäisches Recht (further: WGO-MfOR) No. 6/1994, which provides an overview of the development of Georgian legal system since October 1990 (overcoming the monopoly of Communist Party) until the second half of 1994[2]. Similar to the previous report, this report deals with only the „basic principles" of the development of Georgian legal system, particularly since the second half of 1994 until the second half of 1997. In fact, the legal acts, mentioned below, have been selected solely by the authors, and the presented contents of the laws will be only of a rough character. An overview of Georgian laws, adopted between April 1994 until June 1996 is given in the No. 4/1996 of WGO-MfOR.

2. The new Georgian Constitution of 1995

The new Georgian Constitution which was adopted on August 24, 1995[3], provides for the following basic principles:

- integrity and indivisibility of the State territory within the borders of 1991. In this respect the (former) Abkhaz Autonomous Republic and the (former) South Ossetian Region are mentioned, which are being de facto separated from Georgia for the time present;
- the people, as the supreme sovereign, who exercises his rights through the elected representatives, as well as through the direct plebiscite and „any other means of direct democracy";
- the principles of local self-government, distribution of powers, separation of church from the State, establishing the domain of international law over the domestic one and of binding and direct application of „commonly accepted human rights and freedoms".

Number of fundamental rights and freedoms (prohibition of deprivation of citizenship, freedom of press, the right of assembly, free movement, guarantee of property, etc.) as well as the necessary preconditions for the possibility of restricting fundamental rights and freedoms, are embodied in the

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** Translation from German language by *GEPLAC.*

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2 See *S. Lammich, D. Sulakvelidze,* Fundamentals in the post-communist Development of Georgian legal System (German), WGO-MfOR 1994, pp. 361.

3 Vedomosti Parlamenta Respublika Gruzija (further: VP RG) 1995 Nr. 31-33, Pos. 668. German translation with introduction by *S. Lammich and E. Tsiklauri-Lammich,* in: Constitutional and Administrative Law of Eastern European Countries – VSO (German), Section Georgia, Document 1.1, Berlin, 1995.

35 articles of the second Chapter of the Constitution. Under the Constitution the supervision over the protection of human rights is entitled to the Ombudsman (Public Defender of Georgia – Art. 43).

The supreme representative legislative body is the Parliament, elected for the period of four years through universal, direct and equal elections by secret ballot. It still consists of one chamber, though according to Art. 4 of the Constitution, "after establishing the necessary pre-conditions for creating the bodies of local self-government on the whole territory of Georgia" it will consist of two chambers - the Council of the Republic and the Senate.

The Head of the State, who is the leader of the executive power at the same time, is the President, elected for the period of five years[4]. It falls within the competence of the President to appoint the members of the Government (while the Parliament has the right to confirm their appointment), who are responsible for their activities before the President. The advisory body of the President in the field of national security is the "Council of National Security", as stipulated in Art. 99.

The judicial system consists of courts of ordinary jurisdiction and the Constitutional Court. The members of the latter are elected by the President, the Parliament and the Supreme Court on a pro rata basis. The main tasks of the Constitutional Court are: the supervision over the compatibility of laws and legal acts of the President with the Constitution, adopting the decisions on dispute-matters, arising in regard with the scope of competence of separate state bodies, adopting the decisions on the constitutionality of the political parties and social organisations, as well as the compliance of the international conventions and agreements with the Constitution. The establishment of special courts is explicitly prohibited. Establishment of special tribunals is permitted only in case of war and as the part of the existing judicial system.

The Constitution of 1995 explicitly acknowledges the principles of free market economy. In accordance with Art. 30, par. 2, the State assumes the responsibility "to promote the development of free entrepreneurship and competition". Monopolistic activities are strictly prohibited, except the cases stipulated by law. The Constitution also acknowledges the right of property, its assignment and inheritance. The expropriation of the property for public purposes is only permitted in cases explicitly regulated by the law and only with appropriate compensation. The Constitution declares the freedom of labour and strike as well.

3. Law on State Legislation

The basic principles of parliamentary elections, stipulated by the Constitution, are further detailed by the law "On Parliamentary Elections of Georgia" of September 1, 1995[5]. According to this law the Parliament consists of 150 members, which are elected from party rolls on the basis of a proportional voting system and of 85 members, elected in electoral districts on the basis of a majority voting system. Only Georgian citizens have the right to vote. An elector acquires the right to vote at the age of 18 whereas the right to stand – at the age of 25. Open voting, typical for "socialist elections" is explicitly prohibited. The members of Parliament are elected for the period of four years.

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[4] After the adoption of the Constitution of 1995, the first President, elected on November 15, 1995, is *E. Shevardnadze*, who, until that time, was the Head of the State of Georgia.

[5] VP RG 1995 No. 31-33, Pos. 671.

On the same day, on September 1, 1995, the regulation "On the Election of the President of the State"[6] was adopted. The President is elected for the period of five years. The right to vote in presidential elections have only Georgian citizens, having reached the age of 18 and the right to stand in these elections have Georgian citizens with an age not less than 35 years. The candidate for the post of the President has to be a permanent resident of Georgia for the past 15 years, including the moment of fixing the date of elections.

The first parliamentary and presidential elections in compliance with the above mentioned regulations were conducted on November 5, 1995.

The law "On the Constitutional Court" of January 31, 1996[7] regulates the procedure of the appointment of the members of the Constitutional Court and the requirements for their qualification, the issues of internal structure and the competence of the court, as well as the principles for its activities. Further procedural questions, such as who can appeal to the Constitutional Court, who is a party in the procedure, the rights of judges and of the parties in the proceedings at the Constitutional Court, the composition of each special sub-division of the court, etc., are regulated by law of March 21, 1996 "On Constitutional Jurisdiction"[8].

The law "On National Security Council" of January 24, 1996[9] stipulates the scope of competences of this body, as well as the basic principles of its mode of operation. It is an advisory body of the President in regard with the decisions, having strategic importance for foreign and domestic security of the country. Apart from the President, the Council consists of the State Minister of Georgia, the Ministers of Foreign Affairs, Defence, State Security and of Internal Affairs, the Secretary of the Council, assigned by the President, who directs the activities of the apparatus of the Council, as well as the other members, assigned by the President.

The law "On Legal Acts" of October 29, 1996[10] determines the types of legal acts, being in force in Georgia and their hierarchy, the procedure of their elaboration, adoption and publication, as well as the matters subject to their regulation.

Apart from the legal acts adopted by the Parliament (Constitution, organic law, law) that have the status of a law, also Presidential Decrees are assigned the same legal status as a law. Legal acts of the President (Ordinancies), the Orders of ministers or leaders of other bodies of the state executive power, Decrees of the National Bank Council, Orders of the President of the National Bank, Legal Acts of the Government Audit-office of Georgia are considered to be the subordinate legal acts to the laws. The above mentioned legal acts constitute the "Georgian legislation" as a whole. Respectively, the legal acts of restricted territorial application are in force in the Autonomous Republics of Abkhazia and Adjara. The law attributes the decisions of the representative bodies of local self-government and the Orders of the heads of the executive body to the legal acts of the local self-government.

The hierarchy of legal acts is as follows (Art. 19): Constitution; International Convention or Agreement; Organic Law or Presidential Decree, regarding the issues stipulated by Article 46 of the

6 VP RG 1995 No. 31-33, Pos. 673.

7 Parlamentis Utzhebani (further: PU) of 27.02.96, 8 pp.

8 PU of 24.4.96, 66 pp.

9 PU of 9.03.96, 14 pp.

10 PU of 19.03.96, 1 pp.

Constitution; Laws and other Presidential Decrees; Decisions of the Parliament of Georgia; Orders of the ministers and other heads of the executive bodies.

All legal acts come into force after their publication (an exemption for subordinate legal acts is permitted only in cases, stipulated by the law "On State Secrets" (at the moment, the relevant law, adopted on October 29, 1996 is in force).[11]

The law "On the Governmental Audit-Office" of April 15, 1997 stipulates the goals, organisation and the mode of activities of the latter. According to Art. 97 of the Constitution of 1995, which is dealt with in detail in this law, the Governmental Audit-Office is liable to exercise the control over the expenditure of financial resources of the State and other material values. It has the right to audit the activities of other State organs for financial and economy control. The Governmental Audit-Office is independent in its activities and is responsible only before the Parliament. The Governmental Audit-Office is appointed by the Parliament on the recommendation of the President, for a period of five years.

The law "On the Structure and Activities of Executive Power" of April 15, 1997 stipulates the organisation and the mode of activities of the bodies of State executive power. The head of the executive power is the President of the State, who exercises his functions directly or through "the organs of State executive power". As regarding the latter, the law differentiates between the governmental bodies, which are subordinated to the President and execute the direct governmental tasks and the subordinated State executive authorities, which may be under the direct subordination of the President or of a particular governmental body.

The law regulates the working-method and the status of the Government, as well as the types of ministries and central organisations (State departments), their internal structure, the scope of competence of the ministers and their deputies, as the leaders of the ministries, the status and the tasks of the State Secretary, the scope of competence of the State Minister, the status and the scope of competence of the "State Commissioner/Representative of the President" (the representative of the President in separate governmental units or for the fulfilment of specific tasks), etc.

The law defines the Government as an advisory body to the President (in compliance with the provisions of the Constitution). It comprises of the heads of the departmental ministries and the State Minister. The latter is in charge of the State Chancellery and the fulfilment of other tasks, laid upon him by the President. The sessions of the Government are headed by the President or, under his authorisation, by the State Minister. The particular branch minister directs the activities of his ministry and takes decisions in regard with the issues, falling within the scope of his competence. The minister is responsible before the President.

Among the other laws on the regulation of the activities of the supreme State bodies, adopted by the Parliament, elected in 1995, up to now, we would like to mention the following: "On Parliamentary Fractions" of December 21, 1995[12], "On the Temporary Investigative Commission of the Georgian Parliament" of April 17, 1996[13], "On the Committees of the Georgian Parliament" of December 1,

[11] PU of 21.11.96, 53 pp.
[12] PU of 27.03.96, 12 pp.
[13] PU of 08.05.96, 12 pp.

1995[14], and "On the Public Defender of Georgia (Ombudsman)“ of May 16, 1996[15]. The latter stipulates the scope of competences of this newly introduced body, the tasks of which goes in line with those of the ombudsman of civil rights of some of the western democratic countries. Finally, mention should be made to the law “On Referendum" of May 15, 1996[16], which regulates the order of conducting a referendum.

4. The Law on Administrative Organs of Justice

The law “On the Notaries“ was adopted on May 3, 1996[17] which stipulates the tasks, the basic principles of the organisation and the mode of operation of the notary, as well as the requirements for the candidates to the post of a notary. According to Art. 1 of the law, the notary is an institution under public law, which certifies the legal relations of natural and legal persons in compliance with the order, established by State. The notary is an independent authority and exercises the state power through the fulfilment of notary activities. Notaries are appointed on the basis of a competition. Apart from Georgian citizenship and law degree of a state university, the candidate for the post of a notary is required to pass the relevant examination as a post-graduate civil service trainee.

The adoption of a new law “On Judiciary“ is expected in the nearest future, and it will come approximately into force by the end of 1997 / at the beginning of 1998.

5. The Law on Public Service

On June 29, 1995 Georgian Parliament adopted the law “On Public Service”[18], which regulates the rights and obligations of persons, which are employed as 'public servants', the order of their appointment and dismissal, qualification requirements, as well as the basic principles for their promotion.

'Public service' is considered by this law to be “the performance of the functions on behalf of the State, which fall under the competence of the State administration according to the legislation of Georgia. The provisions of this law primarily refer to the 'officials' in public service, whose legal position can be compared to those of a public servant in Germany. The said law is also applicable to the technical and administrative employees by taking into consideration their 'specific circumstances'.

The law differentiates between the managerial officials, who are authorised to issue legal acts; functionary officials, who are obliged to fulfil organisational tasks; executive officials, who execute particular service obligations, precisely determined by the law. Only Georgian citizens may be engaged in State service. One of the main objectives of this law is to prevent the engagement of unqualified persons in State service through political and personal patronage. For that purpose the law stipulates the requirements for the qualification and the criteria for the promotion of the officials. The preamble of this law considers the composition of the State authorities, independent from

14 PU of 09.03.96, 3 pp.
15 PU of 07.06.96, 12 pp.
16 PU of 12.06.96, 10 pp.
17 PU of 31.05.96, 15 pp.
18 VP RG 1995 No. 23-26, Pos. 650.

external influence, as one of the most important pre-conditions for the normal functioning of State authorities. Even, in the case everyone unconditionally accepts the assessment of the importance of a composition of State authorities, which are independent from any personal and political relationship, embodied in the preamble of the law, the possibility of at least a partial fulfilment of this goal in the nearest future, might be estimated rather sceptically due to the present situation in Georgia.

6. Commercial Law

Together with public law, the adoption of laws in the field of economy, was another main direction of the legislative activities.

The law "On Lease"[19], adopted on May 24, 1994, regulates the lease of land (not with respect to agricultural lands), other natural resources, enterprises and their parts, premises and other material commodities. It is admissible to lease any material commodities (unless their lease is explicitly forbidden by law) independent from its property form. The legal institute of lease can be used for the purpose off conducting business activities or for any other reasons. The lease of agricultural land is regulated by the law "On the Lease of Agricultural Lands" of June 28, 1996[20] (see below).

The issues, connected with the establishment of the right of lien on movable things, as well as on immovable property and with regard to rights, are regulated by the law "On the Pledge" of June 21, 1994[21]. Consequently it is possible to give securities for obligations, deriving from loan agreements, i.e. bank credits, purchase contracts, lease of property, transportation and other contracts, through the right of lien, which is established either by a contract or by law.

The introduction of the real-estate register is tightly connected with the process of land privatisation. The details of its implementation and of the relevant entries is regulated by the law "On Registration of Real Estate" of November 14, 1996[22].

The law "On Entrepreneurs" of October 24, 1994[23] regulates issues concerning the statutes, regarding subjects involved in entrepreneurial activities. For the purpose of this law, entrepreneurial activity is considered to be "a legitimate and repeated activity carried out independently or jointly, with the purpose of gaining profit". In compliance with this law, the term "entrepreneurial activity" does not comprise scientific or creative activities of a natural person, his activities in the field of the health services, in the capacity of an attorney or notary and in principle with respect to agriculture and forestry. However it is possible to conduct agricultural or forestry activities under the legal form of an enterprise, if the owner registers the relevant enterprise. The registration is mandatory, if the number of permanent employees of the enterprise amounts to five and more persons, provided they are not the members of the family of the owner. The registration of enterprises is carried out by court together with the entry in the register for enterprises.

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19 VP RG 1995 No 18, Pos. 371.

20 VP RG 1994 No.19, Pos. 423.

21 VP RG 1994 No.19, Pos. 423.

22 PU of 11.12.96, 12 pp.

23 VP RG 1994 Nr.21-22, Pos. 455.

Enterprises may either be owned by one sole person or else be established as a "trading company" (partnership, limited partnership, limited liability company and joint-stock-company) or as a co-operative company. Governmental enterprises or municipal enterprises may also be conducted by other organisational-legal forms. The above mentioned law "On Entrepreneurs" is regulating also the procedure and the conditions for registration of enterprises, the relationship between the shareholders of a trading company, internal organisation of each legal form for the companies and the rights and obligations of each body of the enterprise.

The law "On Entrepreneurs" is applicable on both foreign and Georgian enterprises, operating in Georgia.

The rights of trade-unions (e.g. the right on strike) and their right to take part in the decision-making together with the company's management (e.g. in case of mass dismissal of employees) are regulated by the law "On Trade-Unions" of April 2, 1997 [24], which also deals with further issues in regard with the establishment and activities of trade-unions.

On June 30, 1995 the law "On Foreign Investments" [25], was adopted (which has been invalidated in the meantime). The purpose of the law, as described in the preamble, was: "to create favourable conditions for the attraction, investment and circulation of foreign capital, together with the law "On Enterprises" and other laws of the Republic of Georgia".

For the purpose of this law, the foreign investors were considered to be the foreign citizens, persons without citizenship and Georgian citizens, permanently residing abroad, as well as the foreign governmental bodies, international organisations and companies, enterprises, legal persons and other organisations, registered abroad. Foreign investments were considered to be any type of materiel and intellectual values, invested by a foreign investor with the purpose to profit or gaining a social effect. For the realisation of foreign investments of more that 100.000 USD, a license issued by the Foreign Investment Agency of the Government was required. Furthermore, the law regulated also the procedure for issuing the license, the reasons for refusing to issue the license and the right and obligations of a foreign investor, the legal protection of a foreign investment (e.g. the prohibition of nationalisation of foreign investments), the transfer of the income from foreign investments abroad, etc.

The above mentioned law "On Foreign Investments" was in force only until the adoption of the law "On Promotion and Guarantees for Investments" of November 12, 1996[26], which regulates not only the issues of promotion and guarantees for foreign investments, but matters earlier regulated by the law "On Foreign Investments", as well.

The general principles and procedure for issuing of concessions to foreign investors for the exploitation of natural resources and other economic activities, connected with this matter, are regulated by the law "On Concessions to Foreign Countries and Companies" [27], adopted on February 28, 1995.

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[24] PU of 26.04.97, 6 pp.

[25] VP RG 1995 No. 23-30, Pos. 654. To this law compare more detailed: *M. Ziskadze,* The legal regulation of the economic activities of foreigners in Georgia (German), Recht in Ost und West (further: ROW) 1997, 28 pp.

[26] PU of 11.12.96, 6 pp.

[27] PU of 31.05.96, 15 pp.

Of particular importance for the development of Georgian agriculture is the law "On Agriculture Land Ownership"[28], adopted on March 22, 1996, which regulates the purchase, sale, and inheritance of agricultural estate and of agricultural enterprises. In accordance with Art. 5, section 2, of this law, the transfer of such estate is only admissible to Georgian citizens. Agricultural estate may be transferred to foreigners and stateless persons only on the basis of lease; in this case, the principles for lease are stipulated by the law "On Lease of Agricultural Lands" of June 28, 1996 [29], which is applicable to both foreign and Georgian citizens.

The law "On the Activities of Commercial Banks" of February 23, 1996 [30] regulates the principles and the procedure of establishment of a commercial bank and issuing and cessation of a license, the rights and obligations of such a bank, the principles of internal organisation and the scope of competence of each organ of a bank, as well as the procedure for liquidation of a commercial bank.

The principles of prohibition of monopolies and establishing the free competition in the economic field, embodied in the Constitution of 1995, are regulated in detail by the law "On Monopolistic Activities and Competition" of June 25, 1996[31]. The law provides for the liability of the economic entities for the abuse of a monopolistic position, for unfair competition and "for other activities, which cause or may cause the restriction or elimination of competition on the market". The supervision over the application of restrictions for establishing monopolies and unfair competition, provided for by the Law, lies within the competence of the "State Monopoly Service of Georgia", which is established at the Ministry of Economics (respective, authorities are established in the Autonomous Republics of Abkhazia and Adjara).

Among the other laws, having essential importance for economic activities and the entire field of economy, which were adopted for the reporting period, the following should be mentioned:

- On Promissory Notes and Checks (both on April 25, 1995)[32],
- On the National Bank of the Republic of Georgia, June 23, 1995[33],
- On Utilities, March 7, 1995[34]
- On Bankruptcy Proceedings, June 25, 1996[35],
- On the Guarantee, June 28, 1996[36],

- On the Protection of Consumer Rights, March 20, 1996[37],
- On Customs Taxes, December 27, 1997[38].

[28] PU of 30.04.96, 16 pp.
[29] PU of 30.07.96, 49 pp.
[30] PU of 30.04.96, 16 pp.
[31] PU of 17.10.96, 19 pp.
[32] VP RG 1995 No. 23-26, Pos. 595,597.
[33] VP RG 1995 No. 27-30, Pos. 642.
[34] VP RG 1995 No. 23-26, Pos. 546.
[35] PU of 30.07.96, 13 pp.
[36] PU of 30.07.96.
[37] PU of 30.04.96.
[38] PU of 22.01.97, 36 pp.

In this context, the new Georgian Civil Code is also to be mentioned. The Code was adopted unanimously by the Parliament through the first reading in June 1996 and it is expected to be finally adopted through the second reading in 1997[39].

7. Environmental Protection Law

Several laws related to the protection of the environment had been also adopted during the period in question. It is to be mentioned that the current level of environmental protection measures is rather low due to Georgia's economic situation. The following laws are to be mentioned: "On the Protection of Land" of May 12, 1995[40], "On the Protection of the Environment from Harmful Organisms" October 12, 1994[41], "On the Import and Transit of Waste Products through the Territory of the Republic of Georgia" of February 8, 1995[42], "On the Taxation of Production of Substances Injurious to Health" of March 4, 1995 [43] and the law "On Environmental Protection" of December 10, 1996[44].

8. Health Care

The health care is one of the fields in Georgia, which do not function properly. The remaining governmental institutions in public health care sector are often uncapable to fulfil their tasks in this sector according to economic reasons. The private institutions in this sector are too expensive for the majority of the population. The following laws, adopted in the field during the reporting period should be mentioned first of all:

- The law "On Medical Taxes" of March 21, 1995[45], which provides for the material participation of the legal persons and the employed part of the population "in the fulfilment of state program in the field of health care" within the scope of the conception of the "reform in the field of health care". The medical tax is levied upon all the legal entities, registered in Georgia, independent from their property or legal-organisational form, as well as upon all natural persons, which are employed or self-employed. The basis for the taxation is the income of the legal and the natural person.
- The law "On Health Insurance" of April 18, 1997[46], which determines the scope of the State health insurance and the right of every person to become a party of a contract of private health insurance.

9. The new Codifications

The above mentioned new Georgian Civil Code, elaborated in close collaboration with German experts and German organisations, through their consultations and material support, is to be adopted

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39 See *B. Zoidze / R. Kandelhard,* "Historical Fundamentals of Civil Law Reform in Georgia (German), ROW 1997, 41 pp.

40 VP RG 1994 No. 18, Pos. 268.

41 VP RG 1994 No. 21-22, Pos. 450.

42 VP RG 1995 No. 23-26, Pos. 504.

43 VP RG 1995 Nr. 27-30, Pos. 579.

44 PU of 22.01.97, 2 pp.

45 VP RG No. 23-26, Pos. 564.

46 Sakvarthelos Respublika of 08.05.97.

in 1997. The German support, rendered during the elaboration of the new Civil Code, might explain the existence of similarities with the German Civil Code.

The work on the drafts of the Criminal Code and the Criminal Procedure Code are quite advanced too. The Drafts have been already published. Transfer to this new codification requires the introduction of numerous amendments to the material and procedural parts of the Criminal Code, which is to adapt the criminal legislation of 1961 to that of the new political and economical realities.

10. Conclusion

This overview on the fundamentals of the development of the Georgian legislative system reveals, that during the given period the legislative activities were mainly focused on two main points: on the elaboration of the necessary conditions for the transfer to market economy and the reorganisation of the governmental institutions in compliance with the provisions of the new Georgian Constitution of August 1995. Economy is the field in Georgia where, similar to other independent countries of the former USSR, the situation is rather worrying notwithstanding the apparent features of improvement. One of the reasons for the economic recession in Georgia was obviously the instability in public security and order. The remarkable improvements are to a big extent the results of the real impact of the State, and not of the legislative development.

Finally we would like to mention the measures for an increased qualification of the judges in connection with the court reform. Within the framework of examinations the professional and moral virtues of the judges are to be checked (e.g. their inclination to bribes, sometimes a way for the improvement of salaries). One of the measures will consist in considerably raising the salaries of judges. The establishment of a class of judges, independent from external influence due to their professional knowledge and financial standing, is regarded to be one of the essential pre-conditions for the formation of rule of law in Georgia.

NINO KHOPERIA*

THE PRINCIPLE OF PARTY DISPOSITION ACCORDING TO THE NEW GEORGIAN CIVIL SUBSTANTIVE AND PROCEDURAL LAW**

The principle of 'party disposition' is an expression derived from Latin (dispositivus), which describes the 'capacity to dispose' upon rights. Hence, the legal term defines the legal freedom of participants of civil legal relations to exercise their rights.

According to civil law legal subjects may exercise rights that are encompassed by the meaning of legal capacity (for example, to acquire or not different subjective rights, to choose the definite legal instruments for their acquisition, etc.). They also have the right to choose particular ways to exercise their rights (e.g. the assignment of property by its owner can be realised by means of gifts, sale, by rights of succession, lease or otherwise).

In the theory of civil law, 'party disposition' means the authorisation of legal subjects to exercise their rights at their own discretion. This general principle is the basis of private law and is related to the autonomy of will. In other words, the creation and development of civil legal relations depends on the will of the parties.

Civil law is based on several principles, such as the guarantee of property rights, freedom of contract, the inadmissibility of unauthorised interference in personal affairs, the enjoyment of civil rights without any restrictions, and the guarantee of restoration of infringed rights.

These should be the authorities' guidelines for applying law, both regarding particular civil cases and also in amending or reforming legislation. For instance, if, according to the principle of freedom of contract, the latter reflects the complete freedom of will of parties, then legislative bodies should not introduce any regulation that revokes this principle.

A violation of the principle of party disposition infringes also the principle of equality of the parties. For instance, the subjects of duties and responsibilities of civil law are authorised to conclude (or not to conclude) a contract. Contracts are executed on the basis of a mutual agreement of the parties that represents their will. Without such agreement transactions are impossible. This legal connection between the subjects of civil law is established in accordance with their legal equality. Hence, forcing a counterpart to enter into a transaction violates not only the freedom of agreement, but also the legal equality of parties. These considerations are reflected in the Civil Code. Thus according to the Article 85 of the Code a forced transaction is considered invalid. We may conclude that the civil regulations that guarantee 'party disposition' also guarantee the legal equality of the parties.

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** Translation from Georgian language by *GEPLAC.*

The substantial legal norms of 'party disposition' and the concept of equality of parties would have no practical effect if their protection were not guaranteed by legal procedures. 'Party disposition' has logically developed into the principle of free party disposition in the civil procedure.

As indicated above, any person is authorised to exercise or not exercise his rights, to abandon them, to request their respect by other persons or to consent to the violation of his rights.

The State should not be interested in whether a lessor receives his contracted amount from a lease or in temporarily transferring a dwelling for free use; nor whether an author receives remuneration for his publication or fulfils his work free of charge; nor whether a creditor is repaid by his debtor. Those who wish to exercise their rights should take care of it themselves – *vigilantibus non fit injuria*.

This principle is reflected in Article 3 of the new Civil Code according to which the protection of rights of all persons is guaranteed by court proceedings. Courts will consider cases only after receiving a request to protect the rights and the interests from the persons concerned.

The above-discussed legal relations might be summarised as follows:

1. It is the sole right of a person disposing of civil rights to decide whether to appeal to the court to protect his infringed rights.

2. The magnitude of a claim depends on the will of the plaintiff. The State is not interested whether the creditor receives the total amount of money from his debtor. Creditors have the right to renounce their claims on debtors. The court cannot exceed the amount claimed by the plaintiff.

   Soviet law violated these principles. Article 201 of the Civil Procedure Code of Georgia from 1964 stated that "after investigating the circumstances of the case, the court shall exceed the amount of the claim of the plaintiff if it is necessary to protect the legal rights and interests of State corporations, institutions, organisations, unions and other social organisations or citizens". For example, if the plaintiff requested one room, the court had the right to grant him two; or if the plaintiff requested reimbursement of losses of 200 roubles his request could be increased up to 300. The new legislation precisely stipulates that the court is not authorised to allocate other or more than claimed (Article 248, Civil Procedure Code).

3. If a person disposing of civil rights can exercise his rights without a court procedure he is also authorised to reject them during the court procedures. Accordingly a plaintiff may withdraw his claim; the defendant is authorised to acknowledge the claim and conclude an agreement.

4. A person disposing of civil rights has the right to decide whether to open proceedings or terminate them at any moment.

In conclusion, we have discussed the main features that characterise the principle of 'party disposition' described in the Article 3 of the Civil Procedure Code: "Parties open proceedings with a claim. They define the subject of litigation and decide whether to take legal action. Parties can settle a case by reaching an agreement. The plaintiff can withdraw his claim, or the defendant can acknowledge the claim."

On the base of the above, we can conclude that the autonomy of will, expressed by means of appropriate procedural provisions, occupies an important position in private legal relations. According to Georgia's new civil legislation it is very important to protect these principles.

ROLF KNIEPER*

ARBITRATION AND STATE JURISDICTION – A COMPARISION**

Theses for the Seminar with the Co-ordinators of the Inter-regional Law Advisory Project (Civil Law Reform in Transitional Countries) held in Bremen from June 29 to July 3, 1998

1. The existence and establishment of a judiciary, that is a State institution but at the same time independent from governmental influence, are necessary prerequisites for successful legal reform in transitional countries. Without such a judiciary the practical application and implementation of law is impossible. Enforcement authorities may also be considered to be part of the judiciary in this context. The functioning of the judiciary is one of the pre-conditions for a constitutional State, and meets the requirements of a competitive society where every legal and natural person has the right to take legal action against all other legal or natural persons, including State institutions, if his rights are violated.

2. The above quoted prerequisites and functions result in tensions and conflicts of objectives, which have to be taken into account in establishing the institutions and must be resolved somehow. Thus, the judiciary must be independent from other State authorities, but at the same time must participate in the State monopoly of power. The judiciary is a highly political institution, which at the same time has to be committed to the law and not to policy. It is part of the entire system of separation of powers in a State and has to control this system at the same time.

3. Various countries have chosen various ways of establishing independent judiciaries within the State system of power. The main problematic areas in this respect are:

   - budget management and material equipment of courts,
   - education of judges, their recruitment and appointment,
   - relationship of courts with the legislative and executive authorities, and finally the
   - role of prosecution.

   The models of the structure of the court system vary from giving relatively strong powers to the ministry of justice, and also to the Parliament, to having complete autonomy and self-administration of courts by associations of judges. These models may co-exist in combination with one another. Many transitional countries are also developing such laws, which will probably lead in this direction.

4. Alternative institutions of dispute-conciliation and trade-arbitration can only complement State judiciary but not replace it. When citizens and companies within a State preferably apply to the courts of arbitration in order to receive a decision on their disputes, it is normally an alarming symptom of the lack of confidence of the population in the quality, impartiality and/or the honesty of their courts.

5. In this context it has to be mentioned, that the former State courts of arbitration of the USSR can not be considered as courts of arbitration in this sense, because they were direct political

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instruments of planned economy and did not meet one of the most important requirements of commercial arbitration, their private-autonomous appointment. The closest equivalents to the commercial arbitration boards are probably the “Treteiskij”-courts of the old system.

6. One of the essential common criteria of alternative instances for the conciliation of disputes and for commercial courts of arbitration is their appointment on the basis of a private agreement of the parties concerned. One of the essential distinguishing criteria is that an alternative procedure for the conciliation of a dispute ends with a proposal for an amicable agreement of the parties, which has no prospects of enforcement and does not claim to be enforced, whereas the procedure of arbitration ends with a decision settling the dispute, which in principle the parties are able to enforce.

7. As enforcement necessarily emanates from the State monopoly of power, it requires the participation of a State institution. Private arbiters or private arbitration courts are by no means able to undertake the enforcement without participation of State courts. Some of the recently enacted laws, attempting the complete privatisation of arbitration, are to be revised with regard to this issue. It is strongly recommended to follow, in coherence with the international acknowledged basic principles, the proposals of the UNCITRAL Model Law on Commercial Arbitration and to implement a legal procedure for arbitrary judgements to receive State recognition and the declaration of enforceability. In these kinds of laws State courts have to be obliged to recognise and to declare the enforceability of arbitrary judgements and they only have the possibility to reject a respective order if clearly defined pre-conditions exist. Practice has developed five such pre-conditions, including the violation of public order or the refusal of due process of law at the proceedings. The court in charge of adopting such decisions should be of a higher order so as to avoid unnecessary appeals and contests. Despite this restriction, it is obvious that private arbitration cannot completely exist without state authority. This might be one of the reasons why the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” signed in New York on 10 June 1958 is one of the most successful international conventions of our time: this convention constitutes the key junction between private arbitrary judgements and their recognition and enforcement by the state. As a matter of fact non-arbitrary conciliation judgements do not require procedural rules, because they are not concerned with enforcement.

8. It is highly likely that non-governmental conciliation of disputes has a long-standing tradition in many transitional States too. This tradition mainly refers to the disputes in neighbourhood, family and rural area and to disputes regarding minor sums in dispute characterised by the readiness of the parties to accept and follow decisions made by an authority not having state power for reasons of traditions and context of life. These traditions should be revived, because they predictably guarantee competence, understanding and authority to the matter. In respect to financial disputes in a market economy this alternative is applicable only to a very limited degree.

9. Some doubts have been expressed with regard to alternative conciliation procedures and courts of arbitration - particularly the issue on the absence of the state control over the decision making process, as well as the concern that the stronger party may impose its will on the weaker one. Under the conditions of traditional democracy, state courts are considered to be guarantors for the protection of the socially weaker parties. These arguments should be taken seriously. They have been taken into account during the development of national laws on commercial arbitration. This refers to the requirement of written form and to substantial

restrictions with respect to the application of the discussed procedures, e.g. for customers or tenants.

10. Nevertheless, there are evident benefits in having an alternative dispute settlement which is complementary to state courts. This is especially significant in the field of international business, where one party in a dispute is usually wary of being subordinated to the judiciary of the other party's country. This might be because of language barriers, geographical distance or distrust about impartiality. In such and other cases the establishment of arbitration on a private-autonomous basis has been acknowledged. Most Southern American countries still maintain a conservative attitude in this respect.

11. Courts of arbitration may be established as ad hoc courts or as institutional courts. The instrument of ad hoc arbitration is complicated and requires excellent expertise at every stage. In any case, it is recommended to follow the model-rules suggested by UNCITRAL closely. Institutional arbitration exists both at national and international levels. Purely international organisations include the International Chamber of Commerce in Paris and the London Court of International Arbitration. Most other organisations that are open for international disputes have structures and functions that are national in character and therefore should not be considered to be genuinely international. A characteristic of all institutional arbitration courts is that they do not exercise arbitrary functions, but instead assist the proceedings which are conducted by courts that are established for every particular case on the basis of a joint decision of the parties concerned.

12. Every country must establish certain pre-conditions in order to be taken seriously as a mother country or as a partner in arbitration proceedings. First of all a national law on arbitration must be adopted and membership of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" must be attained. The basic element of the arbitration proceedings is its international character; therefore it is highly recommended to follow the UNCITRAL Model Law as it was done by many ideologically so different countries including Germany, Russia, Canada, Australia, etc.

13. Many countries have already tried and many "Newly Independent States" are still trying to establish international centres for arbitration. Most such attempts fail because the countries cannot meet the high factual, institutional and legal requirements. Moreover, there is no need to create a centre for arbitration in order to be selected as a place of international arbitration. As already mentioned, the proceedings and the internal structure of arbitration courts is subject to the agreement of the parties. For instance, under the rules of an international arbitration court, such as the International Chamber of Commerce in Paris, they can choose freely the place and language as well as the applicable procedural and substantive law. They are free in principle to choose any city in the Caucasus or in Middle Asia as a place for arbitration. In order to achieve this objective in practice these countries have to establish the above mentioned conditions and take part as actively as possible in the development of institutional arbitration courts. Finally it is necessary to warn against the selection of applicable laws on the basis of national pride. It might be that the law of another country is more suitable for the interests of a party than the law of their own country. This has to be analysed on a case by case basis.

IN MEMORIAM OF SERGO JORBENADZE

Batoni *Sergo Djorbenadze* died in Tbilisi/Georgia on Friday, April 3, 1998, just two weeks before his 72nd birthday. He finally succumbed to cancer, which he had fought long enough to see the dream of his scientific life come true: the enactment and beginning implementation of independent Georgian legislation.

The tormented 20th century had left its marks on him, but - as he often said – the last decade was the most challenging, demanding, torturous and rewarding period of his life: He saw the end of totalitarian rule and the independence of Georgia, but he saw also and suffered from the social and partly cultural disaster, the civil war and political turmoil. In all this he never lost his dignity, his integrity and his faith: he wanted to see a prosperous and peaceful society and country, governed by the rule of law. With this belief he supported and survived pain, the loss of most of his library and of his last book-manuscript and finally a cancer-operation in Bremen. He sat through days and nights, in unheated rooms in winter, his scarf only loosely decorated around him, and swallowed all emerging reform and model legislation, classic and modern literature on comparative law, discussed, drafted and redrafted: the laws on intellectual property, the laws "On cheques" and "On Letters of Credit", the law “On Entrepreneurs” and finally – the coronation – the new Georgian Civil Code. He was indeed the driving force behind and the soul of all these law. Only when most of the drafting was done, he was ready to go to international conferences in Leiden and in Bremen to expose the work and to further refine it. The battle of enactment hardly accomplished. He started to teach the new laws and to write commentaries and textbooks, which he had to leave uncompleted.

Batoni Sergo had a brilliant academic career and he was a wonderfully gentle man. After studies in Tbilisi and Moscow he held the chair of private law and the post of pro-rector at his Dzjavakhishvili University, he was member of the Georgian Academy of Science and received many honours. He loved his family, his university, his city, his country and was at the same time open to the world and kind to foreigners; he had a deep and unending interest in his scientific subject – the civil law -, but always looked beyond it. This complexity is well documented in his work; he has widely contributed to the law of property, of the family, of obligations, of tort, of intellectual property, but he has equally written major books on the Georgian history of law, on the University and on its founder, *Ivane Dzjavakhishvili*. It was – in one last moment of concentration – symbolised during funeral ceremonies in the university: the President of Georgia and jobless workers, the most distinguished members of the legislature, the executive and the judiciary and the scientific community, foreigners and Georgians, rich and poor, assembled to how their heads and share the sorrow with *Batoni Sergo’s* family.

Let us hope that *Sergo Djorbenadze’s* legacy will survive and not be spoiled by lack of understanding and petty jealousy!

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